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## **Employment Spotlight: Managing Annual Leave in Hong Kong During COVID-19**

The COVID-19 pandemic has thrown up many challenges for businesses. Severe and sustained travel restrictions, as well as other uncertainties, have resulted in many employees not taking time off and thus having significant accrued but untaken annual leave entitlements. This creates potential risk for companies. Productivity may be affected if employees all take extended or frequent breaks to use up rolled over leave when the situation eases. Similarly, risk management capability may be undermined if a large number of employees decide to take their leave at specific or peak times. So employers need to consider how to avoid risk and “log-jams” without breaching employee rights. In particular, if necessary, can they require employees to take or to forfeit annual leave?

In Hong Kong, there are two categories of annual leave:

### **(i) Statutory Annual Leave**

Statutory annual leave is prescribed by the provisions of the Employment Ordinance (“EO”). After the first year of employment an employee is entitled to seven days of statutory annual leave in the year following its accrual. This entitlement increases with years of service to fourteen days.

### **(ii) Contractual Annual Leave**

Many employers provide annual leave in excess of the statutory minimum which is generally known as contractual annual leave and is regulated based on the specific terms of the employment contract (including the company annual leave policy, if any). However, if the employment contract does not distinguish between contractual and statutory annual leave, the contractual annual leave is likely to be treated in line with the requirements in the EO.

## **Can Employers Require Employees to take Annual Leave?**

In relation to statutory annual leave, an employer may, by giving a written notice of at least 14 days (or less, if agreed with the employee) direct an employee to take annual leave. However, the employer cannot make such a direction in the year in which the statutory annual leave accrues. Accordingly, this right may be helpful for managing and clearing leave accrued in 2020, but will not apply to 2021 leave until next year.

In relation to contractual annual leave, the ability of an employer to require an employee to take this leave is determined by the contractual terms. An employer can rely on any specific terms regarding when and how the annual leave should be taken. In the absence of clear terms, however, companies should avoid a unilateral direction to take leave. That said, if there is no clear distinction between the statutory and contractual annual leave and the EO applies, employers could still use the 14 days' notice route.

## **Can Unused Annual Leave Be Forfeited?**

Statutory annual leave cannot be forfeited. Untaken statutory annual leave must be rolled over to the following year or, in certain limited circumstances, may be paid out, but this is an expensive option.

In the case of contractual annual leave (where clearly distinguished), however, the employer is free to follow the relevant provisions of the contract. This may include, for example, a capped or no carry forward policy in respect of contractual annual leave and the right to forfeit untaken contractual annual leave in specific circumstances.

## **Strategies and Approaches**

Annual leave is an important and prized entitlement of employees. As such, employers need to tackle the issue of "backlogs" with both rigour and sensitivity when considering what strategies are available to them.

Firstly, employers should be clear about the situation for their staff: review employment contracts and annual leave policies to be clear about how much leave employees have and whether specific rights and conditions apply to contractual annual leave; and update and check HR records to calculate accurate entitlements. This is vital for devising the best approach and maintaining the trust of employees.

Clear communication with employees and consistency of approach is also key to avoid mis-trust and disputes. One of the underlying purposes of annual leave and a primary reason for having minimum thresholds of statutory annual leave is to promote and maintain employees' physical and mental wellbeing, as well as to allow time with family and on external pursuits. There is also a clear rationale for taking periodic breaks during the course of the year.

These are core messages which can be included in any communications to staff regarding taking or clearing "backlogs" of annual leave. An employer can still encourage staff to take annual leave, even if it ultimately cannot direct employees to do so (depending on the type and applicable terms). In addition, for contractual annual leave which may be forfeited if not taken, periodic reminders from the company will likely incentivise them to do so and to plan ahead.

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