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## Employment Spotlight: What Should an Employee Expect to See in a Standard Separation Agreement?

It is increasingly common for employers and employees in Hong Kong to agree cessation terms. In such cases, an employee may be asked to enter into a separation agreement.

There are no statutory provisions which govern what should and should not be included in a separation agreement. Parties are generally free to agree terms of termination so long as those terms do not purport to contract out of the parties' statutory rights.

It should be remembered that although separation agreements are a particular type of contract, the ordinary rules of contract remain applicable. That is to say, there must be an offer, acceptance of that offer and consideration (i.e. something of benefit). Further, a separation agreement procured by a misrepresentation by either party may be rescinded under ordinary contractual principles.

Typically, an employee should expect to see the following terms in a standard separation agreement:-

**1. Reason for Termination:** It is important for the employee to check the reason given for the cessation of his/her employment as it may have an effect of his/her statutory entitlements. For instance, if an employee is being made redundant, subject to the particulars of that redundancy, the employee should expect to see a corresponding severance payment.

**2. Last Day of Work and Cessation Date:** The last day of work refers to the employee's last day in the office. This may be a different day to the cessation date, which is the last day of the employee's employment. The difference may be due to the employee being placed on garden leave or some other leave. However, the distinction is important because, generally speaking, the employee's statutory and contractual entitlements continue to accumulate following the last date of work and will usually only stop accumulating on the last day of the employee's employment.

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**3. Compensation and Employee Benefits:** Depending on the employee's particular circumstances, typical terminal payments/benefits could include:-

- a. The employee's salary up to and including the cessation date;
- b. Where applicable, any payment in lieu of notice;
- c. Payment of any accrued but untaken annual leave;
- d. Payment of any commission/bonuses due;
- e. Sickness allowance or maternity/paternity allowance due;
- f. All contractual payments due on termination (such as any deferred compensation or guaranteed payments);
- g. Any Long Service Payment or Severance Payment due (noting that an employer may, in certain circumstances, offset its Mandatory Provident Fund ("MPF") contributions against any Long Service Payment or Severance Payment);
- h. The payment of any statutory benefits such as MPF and contractual entitlement (typically this will include insurance, medical benefit, allowances and insurance)

**4. Ex-gratia Termination Payment:** Often, the employer will offer to make an ex-gratia payment, i.e. a voluntary payment without recognising any liability or legal obligation. The purpose of the ex-gratia payment is to provide some financial assistance to the employee and mitigate against the loss caused by the cessation of employment. The ex-gratia payment may be repayable if the employee violates the terms of the separation agreement.

**5. Post Termination Restrictions:** Subject to the requirements of the remaining business, post termination [as above] restrictions may be imposed, waived or re-affirmed by the separation agreement. For further commentary on the enforceability or otherwise of any post termination restrictions, please visit our website.

**6. Non-Disparagement:** Employers and employees often agree that during the currency of the employment and following its cessation, neither party may bad-mouth or say anything negative about the other. This obligation may be particularly important where one or both of the parties trades on their reputation.

**7. Confidentiality of Agreement:** In the vast majority of cases, the employer will require the employee to keep the fact of and terms of the separation agreement confidential. Typically, employees are restricted from disclosing the terms of the separation agreement to anyone, except to immediate family, accountants, legal advisers, relevant governmental bodies and/or unless ordered by the Courts.

**8. Full and Final Settlement and Release:** It is perhaps the most important term of the separation agreement as far as the employer is concerned. The employee will be asked to accept and confirm that the arrangements set out in the separation agreement are in full and final settlement of all claims and entitlements in relation to the employment. Upon confirmation, the employee will release and discharge the employer (and any other named party) from all claims, demands, causes of action, liabilities and obligations the employee may have in connection with or arising out of his/her employment.

There is always a certain value to achieving a clean break and finality. As such, employers and employees may be

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well advised to explore whether an agreed exit can be achieved, even if to simply discount that possibility.

For further information in relation to separation agreement and other employment law related matters, please do not hesitate to contact Andrea Randall ([andrearandall@gallhk.com](mailto:andrearandall@gallhk.com) / +852 3405 7688) or Nick Dealy ([ndealy@gallhk.com](mailto:ndealy@gallhk.com) / +852 3405 7656).

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