

Employment & Labour Law 2024

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CONTENTS

Argentina	Enrique M. Stile, Martín Emiliano Guala & Fernando Ezequiel Romano, <i>Marval, O'Farrell & Mairal</i>	1
Australia	Joydeep Hor, <i>People + Culture Strategies</i>	11
Austria	Robert Prchal & Alexander Rosen, <i>Prchal Rechtsanwalts GmbH</i>	24
Chile	Aníbal Zalaquett, Josefa Delgado & Domingo Eyzaguirre, <i>Della Maggiora Eyzaguirre Abogados Laborales</i>	36
China	Hongyuan Zhang, Chang Liu & Kai Cui, <i>Shihui Partners</i>	48
Denmark	Michael Møller Nielsen, Julie Flindt Rasmussen & Mina Faiz, <i>Lund Elmer Sandager Law Firm LLP</i>	52
Finland	Jani Syrjänen, <i>Borenius Attorneys Ltd</i>	66
France	Lionel Paraire & Anaëlle Donnette-Boissiere, <i>Galion Société d'Avocats</i>	73
Greece	Dr. Nikolaos Katiforis & Maria Aikaterini Papadopoulou, <i>Sioufas and Associates Law Firm</i>	86
Hong Kong	Felda Yeung, Ashima Sood & Tanya Parmanand, <i>Gall</i>	112
India	Sumit Ghoshal, Aprajita Rana & Archana Iyer, <i>AZB & Partners</i>	127
Italy	Francesco Rotondi & Marco Giangrande, <i>LabLaw Studio Legale Rotondi & Partners</i>	136
Japan	Takashi Ugajin, <i>Ugajin International Law Firm</i>	143
Mexico	Rafael Vallejo Gil & Ana Ruiz Morales, <i>Von Wobeser y Sierra</i>	149
Nigeria	Josephine Tite-Onnoghen, Gift Ejimofor & Jelilat Mustapha, <i>Ikeyi Shittu & Co.</i>	163
North Macedonia	Emilija Kelesoska Sholjakovska & Ema Dimitrieska, <i>Debarliev, Dameski & Kelesoska, Attorneys at Law (DDK)</i>	183
Switzerland	Vincent Carron & Michael Hess, <i>Schellenberg Wittmer Ltd</i>	192
Taiwan	Zong-Lin He, Szu-Shian (Osmond) Lu & Li-Pu Lee, <i>Formosan Brothers Attorneys-at-Law</i>	209
United Kingdom	Anna Birtwistle & Amy Wren, <i>Farrer & Co</i>	217
USA	Brian S. Cousin, <i>Fox Rothschild LLP</i>	230

Hong Kong

Felda Yeung, Ashima Sood & Tanya Parmanand
Gall

General employment and labour market and litigation trends

Following the COVID-19 pandemic, the focus has been on reinstating Hong Kong as a competitive place to work, with Government initiatives and various legislative amendments designed to attract top international talent to the region.

Hybrid, flexible and/or remote working arrangements continue to remain popular and/or preferred alternatives for employees. Whilst there is no specific legislation or regulation governing hybrid, flexible and/or remote work, many employers have continued to offer non-traditional work arrangements in order to remain competitive with regard to retention and attraction of top talent.

The recent emergence of the gig economy or platform economy, where workers perform short-term assignments, such as delivering food or goods to customers using self-owned vehicles, has further challenged the distinction between employees and independent contractors. In the case of *Cheung Ka Yan and ors v Kin Shun Information Technology (Hong Kong) Ltd & Ors* (unreported, LBTC 3170/2022, 29 May 2023), the Labour Tribunal decided in favour of six gig workers who worked as couriers for Zeek, a food and parcel delivery company. The workers claimed outstanding wages, payment *in lieu* of dismissal notice, and unpaid statutory holiday and annual leave pay. Applying the overall impression test, the Labour Tribunal considered a range of factors, including the control exercised by the company over the workers, provision of equipment in the form of an online platform (even though the claimants used their own vehicles and phones), lack of financial risk, lack of participation in the management, etc., and ruled that they were ‘employees’ and not ‘independent contractors’, and that Zeek was liable to pay the claimants their outstanding entitlements.

On 1 February 2024, the Government announced that the existing requirement to determine whether an employee is in “continuous employment” under the Employment Ordinance (Cap. 57) (“EO”) will be relaxed. The proposed arrangement is yet to come into effect and an amendment bill is expected to be introduced into the Legislative Council. Currently, an employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract, and such employee is entitled to a range of employment benefits such as statutory holiday pay, paid annual leave and sickness allowance under the EO. Under the new regime (when implemented), the requirement will be revised using the aggregate working hours of four weeks as the basis of calculation, and employees will be deemed to be under a continuous contract if they work for at least 68 hours within four consecutive weeks for the same employer. This will confer the rights and benefits under the EO on more employees, especially part-time and casual employees who meet the threshold.

The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) has recently come into force on 29 January 2024, establishing a more comprehensive and streamlined mechanism for reciprocal enforcement of Hong Kong judgments in Mainland China and *vice versa*, reducing the need for parties to re-litigate the same dispute in both jurisdictions and reducing the time, costs, and risks usually associated with enforcement. From an employment perspective, this will facilitate the enforcement of qualifying judgments in employment matters in both jurisdictions, and will also allow for the enforcement of judgments handed down by the Hong Kong Labour Tribunal in Mainland China, which was not possible under the current regime.

In general, given the global economic slowdown, there have been an increasing number of claims involving non-payment of wages and constructive dismissal by employees, as well as by employers seeking to enforce post-termination restrictions including non-solicitation, non-competition and as regards the use of confidential information.

Redundancies/reductions in force, business transfers and reorganisations

Under the Transfer of Business (Protection of Creditors) Ordinance (Cap. 49), the transfer of business refers to a transfer or sale of a business, but does not include, *inter alia*, the sale of stock-in-trade of a business in the ordinary course of its trade. Although business transfers are uncommon in Hong Kong, it should be noted that whenever any business is transferred (with or without goodwill), the buyer will be liable for all debts and obligations, including employee liabilities, of the business, unless a notice of transfer is given in accordance with the Ordinance.

During a business transfer or restructuring, there is no automatic transfer of employees. In order to effect a transfer of employment upon the sale of a business, a termination and re-hire process and the consent of the employee(s) is required.

It is uncommon for there to be employee representation in the event of a transfer, though trade union representatives are occasionally involved if the union is recognised by the employer. In terms of participation rights, employees generally do not have the right to management or board-level representation, unless otherwise provided for in the employment contract.

There is generally no requirement to consult employees or employee representatives in relation to a business sale or transfer, unless otherwise agreed between the parties. However, if a seller intends to transfer its employees to a buyer, it must terminate the relevant employees' employment in accordance with their existing contracts. The buyer must then make a new offer of employment to the employee. The employee must accept the offer in order to effect the transfer of the employee to the buyer.

In order to avoid triggering severance payment obligations, the buyer should make a written offer of employment not less than seven days before the expiry of the employee's notice period or not less than seven days before the date of termination of employment. The offer from the buyer should be on the same, or no less favourable terms as the terms of employment under the seller and there should also be continuity of employment during the transfer.

If the buyer wishes to change the terms of employment as under the seller, the buyer must obtain the employee's consent or face legal consequences for unreasonable and/or unilateral variation of the terms of employment.

Business protections and restrictive covenants

Employers often rely on restrictive covenants or Post Termination Restrictions ("PTRs") in their employment contracts to protect their legitimate business interests and to restrict

the activities of a former employee following the termination of his/her employment. Common examples of restricted activities include the restriction of an employee from joining competitors, poaching employees, soliciting clients or customers, or dealing with clients or suppliers.

Confidentiality clauses are also commonly used by employers to protect their trade secrets and confidential information. Although the duty of confidentiality is implied in all employment contracts, express provisions which define an employer's confidential information are usually embedded in employment contracts and generally continue to apply even after the employment relationship has ended. While employers cannot restrain an employee from using their general skills and knowledge, employers can attempt to restrict employees from misusing or disclosing any trade secrets or confidential information in order to protect a legitimate business interest.

PTRs that amount to restraint on trade are *prima facie* void and unenforceable. The courts will enforce PTRs only where it can be demonstrated that such restrictions are for the reasonable protection of the employer's legitimate interests and are no wider than reasonably necessary.

Whether or not a PTR is deemed enforceable will be highly sensitive to the individual facts of each case. There is no legislation that governs the enforceability of PTRs. Accordingly, precedents are a helpful benchmark of enforceability but are not determinative.

When drafting PTRs, employers should bear in mind that the onus is on the party seeking to rely on the PTR to show that it is reasonable and enforceable. PTRs should not be general in nature and should be clearly defined as to duration and geographic scope. They should also take into account the nature and role of the employee, the employee's seniority as well as the nature of the confidential information and knowledge retained by the former employee.

In the case of *BFAM Partners (Hong Kong) Limited v Gareth John Mills & Anor* [2021] HKCFI 2904, the court accepted that a six month non-compete period was appropriate and enforceable because the nature/role of the employee was concerned with trading strategies with six-month life cycles.

Courts in Hong Kong readily provide judicial relief to those seeking to enforce PTRs so long as it can be shown that the PTRs are reasonable in the interests of the contracting parties and reasonable in the interests of the public. For example, employers can seek to obtain a springboard injunction from the court in order to prevent an employee from obtaining a "head start" as a result of his/her misuse of the former employer's confidential information.

Discrimination and retaliation protection

There are four anti-discrimination ordinances in Hong Kong, namely, the Sex Discrimination Ordinance ("SDO") (Cap. 480), the Disability Discrimination Ordinance ("DDO") (Cap. 487), the Family Status Discrimination Ordinance (Cap. 527), and the Race Discrimination Ordinance ("RDO") (Cap.620) (collectively, "**Anti-discrimination Ordinances**"). Generally, it is unlawful to discriminate an individual on the grounds of (amongst others) sex, race, colour, breastfeeding, marital status, disability, family status, and/or pregnancy. These are commonly referred to as "protected characteristics".

Under the Anti-discrimination Ordinances, there are two types of discrimination: direct; or indirect discrimination. Direct discrimination occurs if/when an employer treats an individual with one of the protected characteristics less favourably than an individual who does not have such characteristics or attributes. For example, refusing to hire or promote an employee because the employee is pregnant.

In the case of *周露娜 v 中旅貨運物流中心有限公司* [2023] HKDC 1115, the District Court considered whether a pregnant employee had been discriminated against when her employer refused to renew her contract and pay her the yearly bonus that she received in previous years. The Court held that the Company's decision not to renew the contract was discriminatory. After considering the specific circumstances of the case, including the proximity in time between the claimant informing her employer of her pregnancy and the employer hiring a new employee to replace her instead of renewing her contract, the Court inferred that the employee's pregnancy was one of the reasons for the dismissal. In addition, the refusal to pay the employee her bonus was a consequence of her being dismissed, and the Court held that this was also discriminatory.

Indirect discrimination occurs when an unjustifiable requirement or condition is applied uniformly to all job applicants or employees, but where the application of that requirement would have a disproportionate effect on a particular group of persons because of a protected characteristic or attribute. For example, subjecting both men and women to the same physical assessment criteria.

Victimisation is another form of discrimination and occurs when an individual is treated less favourably than other individuals because that individual has, intends to, or is suspected of (i) making allegations of unlawful discrimination or harassment, (ii) giving evidence, or (iii) taking steps to make a complaint under one of the Anti-discrimination Ordinances.

The SDO, DDO and RDO also prohibit sexual, disability, breastfeeding and racial harassment. Sexual harassment includes any unwelcome sexual advance or request for sexual favours, or any unwelcome conduct of a sexual nature, in circumstances where a reasonable person would have anticipated that the other person would be offended, humiliated, or intimidated. It also includes the creation of a sexually hostile environment. Breastfeeding harassment includes any unwelcome conduct towards a breastfeeding woman or conduct that creates a hostile environment for such woman.

Disability harassment is unwelcome conduct towards an employee in relation to his/her disability or that of an associate. Similarly, racial harassment refers to unwelcome conduct or conduct that creates a hostile environment on account of a person's race, or on account of the race of that person's near relative.

The general test for harassment is whether a reasonable person would have anticipated that the person being harassed would feel offended, humiliated or intimidated.

Workplace harassment occurs when one "workplace participant" harasses another "workplace participant" of the same employer. A "workplace participant" can be an employer, employee, a contract worker, the principal, a commission agent, a partner in a firm, an intern or volunteer.

Employers can be held vicariously liable for any acts of discrimination and harassment committed by workplace participants in the course of employment. Liability will not arise if the employer is able to demonstrate that all reasonably practicable steps were taken to prevent the unlawful conduct from occurring.

The statutory protection against discrimination also extends to independent contractors.

Although discrimination under the Anti-discrimination Ordinances cannot be justified, there are some exceptions.

For instance, the SDO, DDO and RDO provide for exceptions where a particular gender, not having a disability, or being of a particular race are "genuine occupational qualifications" for the job. Under the DDO, it is also a defence for an employer to show that the alleged

act of discrimination is justified because the employee, due to his/her disability, is unable to carry out the “inherent requirements” of the job, or where reasonable adjustments made to accommodate the employee’s disability would cause “unjustifiable hardship” to the employer.

Employers can also rely on the affirmative action defence which is a defence to a claim of sex, marital status, pregnancy, disability, family status or race discrimination. Employers are required to take positive action targeting individuals that fall within the protected characteristic category by providing them with equal opportunities in employment.

The Anti-discrimination Ordinances enable individual employees who feel that they have been subject to discrimination to seek the assistance of the Equal Opportunities Commission (“EOC”). At any time, or if conciliation is not reached through the assistance of the EOC, individuals may bring a civil action directly in the District Court to seek remedies for any loss or damage they have suffered as a result of being discriminated against or being harassed, within 24 months from the time when the treatment complained of occurred. Possible remedies available to individuals in District Court proceedings include:

- a declaration that the respondent has engaged in discriminatory conduct under one of the Anti-discrimination Ordinances and an order that the respondent shall not repeat or continue such conduct;
- an order that the claimant be employed, reinstated or promoted;
- an order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the victim;
- an order that the respondent shall pay the claimant damages by way of compensation (including injury to feelings) for any loss or damage suffered as a result of the respondent’s discriminatory conduct;
- an order that the respondent shall pay the claimant punitive or exemplary damages; or
- an order declaring void in whole or in part any contract or agreement made in contravention of the Anti-discrimination Ordinances.

An award for compensation will usually be for financial loss being the amount required to put the claimant in the position he/she would have been in but for the discrimination. There is no statutory cap on compensatory awards for discrimination.

If the discrimination claims progress to litigation the general rule is that each party should bear its own costs unless the Court orders otherwise on the ground that: (i) the proceedings were brought maliciously or frivolously; or (ii) there are special circumstances which warrant an award of costs. However, in the recent case of *Lee Chick Choi v Choi v Hong Kong Golf Club* [2023] HKDC 515, the District Court departed from the usual practice and ordered the employee to bear the costs of the action on the basis that the proceedings were brought maliciously and frivolously against the employer.

Employees making discrimination claims against their employers will therefore need to carefully consider the substance of their claim before commencing an action, as the Courts will take into consideration the conduct of the applicant and the merits of the claim in making an order for costs in discrimination proceedings.

There has been increasing attention in the media as regards equal pay. Equal pay refers to female employees being entitled to the same level of pay as their male counterparts for the same kind of work. While there are no specific provisions in any of the Anti-discrimination Ordinances mandating that employers must offer equal pay, it is unlawful under the SDO for an employer to treat a woman less favourably than a man. A female employee can claim equal pay if she is receiving less pay than a male employee performing equal work for the same employer and there is no explanation for the difference in pay other than sex. Equal work is work that is of broadly similar nature and if there are any differences in tasks

performed, such differences are indiscernible and not significant. Employers can assess whether two roles/titles are equal by comparing the job description and demands on the workers through a job evaluation process.

When lodging a complaint, the female employee can use one or more male employees as her comparators. A comparator would be: (i) an individual of different gender working for the same employer; (ii) performing equal work or work of equal value; and (iii) receiving more pay than the complainant.

Given the complexity and sensitivity surrounding equal pay, many companies have adopted equal pay self-audit processes in order to identify and address any pay inequalities between males and females within their organisation.

When handling discrimination claims, or where there is a settlement between the parties, employers should ensure confidentiality at every stage of the process. Given the sensitive nature of these claims, it is not uncommon for employers to require a claimant to sign a non-disclosure agreement with a non-disparagement condition in order to protect the reputation of the employer.

Employers should also be aware of the Labour Department's Practical Guidelines for Employers on Eliminating Age Discrimination in Employment. There is currently no legislation which prohibits discrimination on the grounds of age. However, the guidelines set forth best practices that employers and employment agencies are encouraged to follow on a voluntary basis to ensure equal employment opportunities for all persons irrespective of their age, for example, developing a set of consistent selection criteria, not specifying an age range in job advertisements (unless it is a genuine occupational requirement), offering benefits commensurate with duties and experience, etc.

Protection against dismissal

Under Hong Kong employment law, governed primarily by the EO, both the employer and the employee have the statutory right to terminate an employment contract by giving the other party due notice or payment *in lieu* of notice. Accordingly, it is normally relatively straightforward for employers to terminate an employment contract in this way and make the relevant termination payments, including severance or long service payment if the employee qualifies based on years of service.

If an employer terminates a contract of employment without serving the requisite notice or payment *in lieu* of notice, or where a summary dismissal is not justified, the termination will be deemed a wrongful repudiation of the contract, entitling the employee to make a claim of wrongful dismissal and to receive termination entitlements and potentially damages. However, damages are usually limited to what the employee would have received by way of net remuneration had the requisite notice been given.

In *Lam Siu Wai v Equal Opportunities Commission* [2021] HKCFI 3092, the Court also confirmed that a contractual right to terminate can be exercised unreasonably or capriciously so long as the right is exercised in accordance with the specific terms of the contract unless such terms are inconsistent with the provisions of the EO.

The EO provides that an employer may dismiss an employee for any of the following reasons:

- the conduct of the employee;
- the capability or qualifications of the employee for performing his/her work;
- redundancy or other genuine operational requirements of the business;
- statutory requirements; or
- other substantial reasons.

This apparent requirement for the employer to have a specific reason for termination often leads to employees thinking they will have a substantial claim against their employers. In practice, however, the remedies are limited and therefore such claims tend to be rare. An employee who has been employed under a continuous contract for a period of not less than 24 months who is wrongfully dismissed without a valid reason can make a claim in the Labour Tribunal for unreasonable dismissal. However, the usual remedy is simply to receive the normal termination payments which the employer has usually already paid at the time of termination.

The distinction between independent contractors and employees in the context of termination or dismissal can sometimes become blurred. For example, if a “contractor” arrangement is terminated (or not renewed on expiry of a fixed term), a disgruntled individual who was previously content to be considered as an independent contractor may seek to claim statutory protections or termination payments by claiming that technically they are in fact an employee. Similarly, this situation can arise if individuals feel that their remuneration is affected or that other benefits are being reduced, which would not be permissible if they were considered employees.

The difficulty is that there is no set statutory mechanism or test to distinguish definitively between employment and independent contractor status. Accordingly, the Courts in Hong Kong are faced with making decisions in this complex area. Merely labelling a relationship as one or the other, or stating that the “worker” accepts and agrees that the relationship is that of an independent contractor, for example, is not in itself determinative. The approach of the Courts now is to look at all the features of the relationship to develop an “overall impression” in making such decisions.

The EO does provide some further protections to employees. Dismissal of an employee under any of the following circumstances is prohibited and unlawful:

- The employee is pregnant and has served notice of pregnancy.
- The employee is on paid sick leave.
- The employee is away on jury duty.
- The employee is a member of and participates in the trade union activities.
- The employee has a claim pending under the Employees’ Compensation Ordinance (Cap. 282) (“**ECO**”).
- The employee is giving evidence or information in any proceedings or inquiries relating to the EO and/or the Factories and Industrial Undertakings Ordinance (“**FIUO**”).
- The employee has suffered injury at work and has neither entered into an agreement with the employer concerning compensation nor been issued a certificate of assessment.

An employer who wrongfully dismisses an employee under any of the restricted categories above will be guilty of an offence and subject to a fine. The employee would also be entitled to make a claim for unlawful dismissal and, if successful, obtain an award of compensation from the Labour Tribunal of up to HK\$150,000 and seek an order for compulsory reinstatement or re-engagement.

The EO sets out two broad legal considerations when terminating an employee (unless the employee belongs to a restricted category as above):

Termination by notice

This is also known as termination without cause. Under such termination, the employer is not required to provide cause for dismissal.

- Under the EO, either the employee or the employer can terminate a contract by providing a written or oral notice to the other party, or by making a payment *in lieu* of notice.

- The contract will generally state the notice period (of at least seven days) and any additional requirements to be fulfilled by the parties.
- In absence of an agreed period of notice in the contract, either party may terminate the contract by giving at least one month's notice.
- Probationary periods – there is no requirement to provide any notice period for the first month of any probationary period and it can be as little as seven days thereafter. Accordingly, both the employer and employee can legally terminate the relationship quickly during the probationary phase if their paths are not aligned.

Termination for cause

This is also known as summary dismissal. In specific (and generally serious) circumstances, an employer is entitled to terminate immediately, without notice or payment *in lieu*, if the employee has:

- intentionally disobeyed an otherwise lawful and reasonable order;
- conducted themselves in a manner that has stopped them from fulfilling their duty of due diligence, care and competence;
- not performed their duties of fidelity and good faith; and/or
- engaged in fraudulent or otherwise dishonest activities.

It should be noted that the employer bears the burden of proof in this case as summary dismissal without just cause may result in grounds for wrongful dismissal of the employee.

Termination by mutual agreement

Employers and employees are also entitled to terminate the employment by mutual agreement. Provided the parties agree, no notice is required, although such arrangements typically involve a payment to the employee in excess of any statutory entitlements in return for the employee agreeing to release the company from any claims.

The arrangement is normally confirmed in a written document, variously referred to as a settlement, separation, compromise or mutual termination agreement. Such agreements can be helpful to achieve an amicable and smooth exit with certainty for both parties.

Employees have certain statutory rights upon termination. In cases where the employment contract provides additional entitlements upon termination, employers should take due care to factor in such contractual obligations.

Depending on the circumstances, statutory entitlements may include the following:

- All outstanding wages up to the last day of employment (*pro rata*), including payment in respect of accrued but untaken annual leave (*pro rata*).
- Payment *in lieu* of notice, if notice or full notice is not given.
- Monies relating to bonus (*pro rata*) and any other end of the year payments (if applicable).
- Any payment in relation to retirement scheme benefits.
- Statutory severance and long service payment:
 - i. Statutory severance is due to an employee who has been continuously employed for at least 24 months and is dismissed by way of redundancy.
 - ii. Statutory long service payment is due to an employee employed continuously for at least five years where the termination by the employer is for a reason other than summary dismissal.
 - iii. An employee is not entitled to both statutory severance and statutory long service payment.
 - iv. Both these statutory payments are currently capped at HK\$390,000.

Statutory employment protection rights

The EO is the main piece of legislation that provides for the protection of the wages of employees, and that regulates general conditions of employment. The EO prescribes minimum statutory benefits and protections for employees if they are under a “continuous contract” (i.e. the employee has worked a minimum of 18 hours every week for a period of four or more weeks) including rest days, paid annual leave, sickness allowance and parental leave pay.

For examples of statutory employment protection, see the “Protection against dismissal” section above.

Restrictions on working time

Employees under a continuous contract are entitled to a rest day for a period of at least 24 hours in every period of seven days. Under the EO, rest days must be granted in addition to any statutory holiday, or alternative or substituted holiday to which an employee is entitled under the EO. The EO is silent as to whether the rest day is to be paid or unpaid, but in the absence of any specific agreement in the employment contract, in practice it is generally accepted that a rest day will be treated as paid and covered by monthly wages.

Annual leave

Employees who have been employed under a continuous contract for not less than 12 months are entitled to paid annual leave. The number of days of annual leave to which an employee is statutorily entitled will depend on the employee’s length of service, starting with seven days following the first year of service and increasing to 14 days after nine years of service. Statutory annual leave cannot be forfeited.

Employers are free to provide contractual leave entitlements in excess on the minimum statutory requirements; however, employers should distinguish clearly between statutory annual leave and contractual annual leave to avoid the risk that an employee’s annual leave is, collectively, treated as statutory in nature, i.e. it cannot be forfeited.

Any rest day or statutory holiday falling within a period of annual leave will be counted as annual leave and another rest day or holiday must be substituted *in lieu* of those days.

If any employee falls sick after the commencement of a period of annual leave, the sickness period will be counted as annual leave. A period of sickness which commences prior to the annual leave period will not be counted as annual leave and the annual leave will only commence once the sickness period is over.

Holiday pay

Employees who have been employed for a period of three months immediately preceding a statutory holiday are entitled to holiday pay under section 40 of the EO. Holiday pay should be paid to the employee no later than the day on which the employee is next paid their wages after the statutory holiday. The daily rate of holiday pay is a sum equivalent to the average daily wages earned by an employee in the 12-month or shorter period preceding the period(s) of statutory holiday(s).

When calculating holiday pay, employers are reminded to exclude periods in which the employee is not paid his wages such as rest days, statutory holidays, annual leave, sick leave, paternity leave, maternity leave, etc. and the sum paid to the employee for such periods. Under section 40A of the EO, employers are prohibited from making any payment to their employees *in lieu* of a statutory holiday. Failure to pay holiday pay can warrant the employer liable to prosecution and upon conviction to a fine of HK\$50,000.

Maternity leave

A female employee is entitled to 14 weeks' paid maternity leave if she has been employed under a continuous contract for no less than 40 weeks immediately preceding the date of confinement or scheduled maternity leave. If the employee has been employed for less than 40 weeks before the commencement of her maternity leave, then absent to any agreement with her employer, she will be entitled to 14 weeks' maternity leave without pay provided that the employee has given notice of her pregnancy and her intention to take maternity after her pregnancy confinement.

In the case of a miscarriage on or after 24 weeks, the employee will still be entitled to paid maternity leave provided she has been in continuous employment for 40 weeks.

Maternity leave pay is payable at a rate of four-fifths of an employee's daily average of wages earned by the female employee during either (i) the 12 months immediately before the date of commencement of maternity leave, or (ii) the shorter period before the date of commencement of maternity leave. When calculating the average daily wages, the employer must exclude any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee. However, the maternity leave pay for weeks 11 to 14 is subject to a cap of HK\$80,000. After the payment of 14 weeks' maternity leave pay, employers can apply for reimbursement of the cost of the additional four weeks of statutory maternity leave pay through the Reimbursement of Maternity Leave Pay Scheme. Additionally, any day on which such an employee is absent from work by reason of such miscarriage will be counted as a sickness day.

Paternity leave

A male employee under a continuous contract is entitled to five days of paternity leave if he is the child's biological father, and has notified his employer of his intention to take paternity leave. To request paternity leave, the employer must notify the employer of his intention to take paternity leave and set out the dates on which he intends to take leave at least three months before the expected date of delivery; or, if he has not notified the employer as set out above, the employee must notify his employer of each intended date of leave five days before such date. If required, the employer may require the employee to provide a written statement declaring that the employee is the child's father, along with details of the name of the child's mother and the expected/actual date of delivery.

Paternity leave pay is payable at a rate of four-fifths of an employee's daily average of wages earned by the male employee during either (i) the 12 months immediately before the date of commencement of paternity leave, or (ii) the shorter period before the date of commencement of paternity leave. When calculating the average daily wages, the employer must exclude any paternity leave, rest day, sickness day, holiday or annual leave taken by the employee. If the child is born dead or dies after birth, the employee can be entitled to paternity leave pay provided that the employee can produce a medical certificate certifying the delivery of the child and, if needed, a written statement.

Adoption leave

There is no statutory adoption leave in Hong Kong. However, employers can make specific provisions to include adoption leave within their company policies and/or make the decision to extend statutory/contractual parental leave entitlements to employees who are adoptive parents. This also applies to emergency dependant leave and/or family leave.

Special protections for workers against detriment/dismissal

It is unlawful for an employer to dismiss an employee under the following circumstances:

- i. In accordance with the EO: after notice of pregnancy has been given; where the employee is/has engaged in lawful trade union activities; during a period of statutory sickness leave; and where the employee is/has given evidence or information to authorised persons relating to the employee's employment.
- ii. In accordance with the FIUO: where an employee is/has given evidence or information to authorised persons in connection with the enforcement of any of the provisions of the FIUO.
- ii. In accordance with the ECO: before the employee's compensation formalities have been complied with.

Once an employee has served her notice of pregnancy to her employer, under section 15(1) (a) of the EO, her employer is prevented from terminating her contract of employment unless the employee's conduct warrants a summary dismissal. If breached, an employer will be guilty of an offence and be liable on conviction to a fine of HK\$100,000 under section 15(4) of the EO.

An employer is banned from terminating an employee's employment due to the employee giving evidence in proceedings or an enquiry for the enforcement of the EO or in any proceedings or enquiry relating to safety at work. If an employer does terminate an employee on the account of "whistleblowing" in these circumstances, the employer shall be guilty of an offence and be liable upon conviction to a fine of HK\$100,000. A court or magistrate may also award an employee compensation. Such an award will be payable by an employer.

Worker consultation, trade unions and industrial action

Worker consultation

Employers are not required by statute to conduct workers' consultations for changes in business operations or employment practices including terminations, changes in employment terms or mergers and acquisitions. There is also no statutory recognition of collective bargaining agreements in Hong Kong, meaning that principles of contract as to the incorporation of any collective bargaining agreements will prevail. In other words, even if a trade union enters into an agreement with an employer, the employee would only benefit from the terms of the agreement if the terms are incorporated into the individual employee's contract of employment, which is in practice, fairly uncommon.

The Labour Relations Division of the Labour Department is responsible for overseeing labour relations in the private sector. The Workplace Consultation Promotion Division was set up in 1998 to promote the EO, as well as to encourage voluntary negotiation between employers and employees.

Trade unions

As mentioned above, there is no collective bargaining law in Hong Kong and trade union recognition by employers is fairly uncommon. Trade union membership in Hong Kong is also low compared to many other jurisdictions, but there are in any event protections in the Basic Law and legislation governing trade unions which need to be adhered to.

Article 27 of the Basic Law provides that Hong Kong residents have freedom of association, and the freedom to form and join trade unions.

Under the EO, employees have the right to: (1) associate with other persons for the purpose of forming or applying for the registration of a trade union; (2) the right to be a member/officer of a trade union; and (3) the right, at any appropriate time, to take part in the activities of the trade union.

The EO also provides protection against anti-union discrimination where employers are prohibited from: (1) preventing/deterring an employee from exercising any of the above rights; (2) dismissing, penalising or discriminating against an employee for exercising the above rights; and (3) making it a condition in an offer of employment that an employee must not exercise the above rights.

The Trade Unions Ordinance (“TUO”) (Cap. 332) sets out the rights and duties of trade union members. The TUO together with the Trade Union Registration Regulations (Cap. 332A) make provisions for the registration and regulation of trade unions. A registered trade union is required to draw up and register a set of rules with the Registrar of Trade Unions. Upon registration, the trade union and its members are provided with various immunities such as immunity from civil action in respect of trade disputes between employers/employees or in relation to disputes concerning terms of employment, or in relation to other aspects of running the trade union.

An employer who prevents or deters an employee from exercising his/her trade union rights may be liable for an offence, carrying a fine and potential imprisonment.

Industrial action

Article 27 of the Basic Law also guarantees freedom of association and freedom to strike, including the freedom of assembly, procession and of demonstration.

A strike may consist of employees simply refusing to attend work or it can take the form of a public procession, a public meeting, an unlawful assembly, or a riot. If the strike takes on any of these public forms, trade union members must observe their obligations under the Public Order Ordinance (Cap. 245) including, for example, the provision of notice to the Commissioner of Police prior to the strike.

The Commissioner of Police has the authority to prohibit or restrict the freedom of assembly or a strike if considered reasonably necessary in the name of national security, public safety, public order and/or protection of rights and freedoms of others.

Going on strike and/or other industrial action involves the unilateral cessation or withdrawal of the employee’s labour, and will therefore usually amount to a breach of contract on the part of the employee. If the breach is not expressly provided for in the contract of employment, Courts will look beyond the express provisions and consider whether the unilateral disruption to the employer’s business is in breach of the employee’s implied obligation of fidelity or good faith. In *Secretary of State v ASLEF* [1972] ICR 19, the Court of Appeal held that there was an implied term in all employment contracts that employees would not carry out their contracts with the intention and result of frustrating their employer’s business.

Employee privacy

The collection and use of personal data, including personal data collected and held by employers is governed by the Personal Data (Privacy) Ordinance (Cap. 486) (“PDPO”). Employers who are “data users” (i.e. a person who, either alone or jointly with other persons, controls the collection, holding, processing or use of personal data) must comply with the PDPO Data Protection Principles in relation to the collection, holding, accuracy, use and security, and data subject access and correction in relation to the personal data of their prospective, current and/or former employees.

Personal data means any data “relating directly or indirectly to a living individual, from which it is possible and practical to ascertain the identity of the individual from the said data, in a form in which access to or processing of the data is practicable”.

As employers are liable to protect the data of their prospective, current and former employees, and all practicable steps should be taken to ensure the proper handling and security of personal data including the implementation of adequate security measures.

The monitoring or surveillance in the workplace of employee's emails, internet use, and telephone calls is generally not prohibited, however, in doing so employers must comply with the PDPO if personal data is collected.

The Privacy Commissioner for Personal Data ("PCPD") has issued Privacy Guidelines for Monitoring and Personal Data Privacy at Work. These guidelines apply to employee monitoring activities where the personal data of employees is collected in recorded form using telephone, email, internet and/or video (including CCTV) monitoring. The PCPD has also recently on 30 June 2023 issued a Guidance on Data Breach Handling and Data Breach Notifications to assist companies on how to effectively handle data breach incidents.

In deciding whether to engage in employee monitoring, employers are encouraged to undertake a systematic assessment process referred to as the 3As – Assessment, Alternatives and Accountability. It involves an assessment of the risks and benefits of employee monitoring against the employer's overall business objectives, less intrusive alternatives, and ensuring accountability as regards the handling of personal data obtained from employee monitoring.

In designing monitoring policies and data management procedures, employers are encouraged to follow the 3Cs – Clarity, Communication and Control. It encourages employers to set out clearly and communicate to employees the purpose(s) of employee monitoring, and to put in place proper safeguards for the control and protection of employee data.

Employers who have outsourced their recruiting functions (including background checks) to an external third party remain responsible for taking all practicable steps to ensure that the third party has taken adequate measures to ensure the security of personal data. Where a third party is acting as an agent of the employer or on the employer's behalf, the employer will be liable for any wrongful acts carried out by the third party.

Pre-employment screening is not prohibited in Hong Kong, however, in doing so employers should observe the relevant Anti-discrimination Ordinances, PDPO principles and the Code of Practice on Human Resource Management issued by the PCPD. Under the PDPO, only personal data that is necessary for the purposes for which it is to be used should be collected. In addition, potential employees should be informed about the purposes for which their personal data is to be collected and used; and personal data collected from potential employees should be adequate but not excessive, and should be relevant to the purpose of identifying whether a candidate is suitable for the job.

Employers are not prohibited from asking a job applicant whether they have a criminal record; however, employees are generally under no duty to disclose any prior convictions.

An employer may make an offer of employment conditional upon the fulfilment of a medical or drug examination. Testing can be performed before and during the course of employment, provided that the individual has consented to undergo such testing and for the results to be released to the employer. Employers must be careful not to collect excessive health data, which should be limited to the minimum information required to support the medical practitioner's opinion that the employee is fit for employment. There is no rule on whether an employer can refuse to hire an applicant who does not submit to a medical examination or drug testing.

Other recent developments in the field of employment and labour law

Jurisdictional issues

In *Acumen Hong Kong Limited v Kwan Pak Kei Lawton* [2023] HKCFI 2038, the Court of First Instance (“CFI”) struck out an employee’s counterclaim (in respect of payments *in lieu* of notice) as an abuse of process on the basis that it fell squarely within the Labour Tribunal’s exclusive jurisdiction. This is despite the fact that: (i) the employee had also commenced proceedings in the Labour Tribunal where the claim was identical to the counterclaim in the CFI; and (ii) the Labour Tribunal had ordered that claim to be transferred to the CFI which was a subject matter of a different set of CFI proceedings.

Similarly, in the case of *Hong Kong Vending System Company Limited v Lui Kin Ming and Another* [2023] HKDC 1175, the claims by an employer against one of the defendant employees for breach of non-compete restrictions were ordered to be struck out as an abuse of process on the basis that the claim was only monetary in nature and it fell within the exclusive jurisdiction of the Labour Tribunal.

Changes in immigration policies

As mentioned above, there have been a number of changes to Hong Kong immigration policies to attract more capital and global talent into Hong Kong. Some of the key changes are set out below:

- From 25 October 2023, Hong Kong has relaxed its visa policies by: (i) allowing Vietnamese talents to be eligible to work in Hong Kong under various talent admission schemes; (ii) establishing multiple-entry business and travel visas for Vietnamese nationals (provided they meet the prescribed criteria); and (iii) allowing Laotian and Nepalese nationals to work, receive training and study at universities funded by the University Grants Committee.
- From 26 October 2023, foreign employees of Hong Kong registered companies are eligible to apply for multiple-entry visas to Mainland China. The visas will be processed expeditiously and will be valid for two years or more.
- From 1 November 2023, the list of eligible universities under the Top Talent Pass Scheme (which allows high-income talents and graduates from the world’s top universities to explore work opportunities in Hong Kong) has been expanded from 176 to 184 institutions by adding eight institutions from Mainland China and overseas so as to further expand the network for attracting global talents.
- With effect from 1 March 2024, the Government has introduced the New Capital Investment Entrant Scheme (“**New CIES**”) to attract more capital and talent into Hong Kong. Under the New CIES, eligible investors who make investments of HK\$30 million or above in ‘Permissible Investment Assets’ would be able to apply for entry and residence in Hong Kong. The New CIES seeks to attract private wealth clients and high-net-worth individuals and their dependants. For employers, this would mean an increase in talent acquisition opportunities in the Hong Kong market.

Newly added statutory holiday

According to the Employment (Amendment) Ordinance 2021, the number of statutory holidays will progressively increase from 12 to 17 days by 2030.

Starting from 2024, the first weekday after Christmas Day (which falls on 26 December 2024 this year) has been added as a statutory holiday.



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Felda Yeung joined Gall as a trainee solicitor in 2011 and was promoted to the firm's first home-grown Partner in August 2022.

Felda has experience in commercial and civil litigation, with a focus on arbitration, contractual disputes, and fraud investigations. Recent arbitration-related work includes enforcing foreign arbitration awards in Hong Kong and defending applications to set aside arbitration awards. Recent litigation work includes assisting in large-scale cross-border actions worth in excess of HK\$1 billion at both the Court of Appeal and Court of Final Appeal stage and obtaining various injunctions and urgent interim relief both in support of Hong Kong proceedings and in aid of foreign proceedings.

Felda also co-leads Gall's employment practice where she acts for both employers and employees on contentious employment law matters.

Felda is a member of the Chartered Institute of Arbitrators. She was also a member of the Hong Kong International Arbitration Centre's HK45 Committee, a group for all young arbitration practitioners in Asia and beyond for two consecutive terms. In December 2022, Felda was invited to join the British Chamber of Commerce's Future Leaders Committee which focuses on addressing the needs of Hong Kong's young professionals through social and educational activities. In early 2023, she was selected as a mentor for the Women in Law Hong Kong's prestigious mentoring programme.



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Ashima Sood joined Gall in September 2014. She has wide-ranging experience in commercial litigation, arbitration, and dispute resolution, focusing on issues involving breach of contract, employment disputes, joint venture and shareholders' disputes, commercial fraud, asset tracing and Mareva injunctions, insolvency and bankruptcy matters, enforcement of judgments, as well as tort and negligence claims.

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