



Globalizing in Hong Kong

Insights

11.26.13

With dynamic soaring towers, elaborate bright lights, and heart warming traditional customs, Hong Kong's enigmatic economic and business climate serves as a financial capital for all industries, companies, and firms. Indeed, Hong Kong is a pivotal financial center of Greater Asia! As a former British colony, Hong Kong truly embodies the best of the East and the best of the West.

The Employment Ordinance (EO)

Prior to the transfer of sovereignty of Hong Kong to China in 1997, the decisions of English Courts were binding on Hong Kong courts. However, since July 1, 1997, the decisions of English courts only serve as persuasive authority. Hence, companies with a global workforce in Hong Kong should ensure compliance with current Hong Kong employment laws, rules and regulations.

Today, the primary sources governing employment law in Hong Kong are the Employment Ordinance (EO) and the common law. The EO provides mandatory employment rights, obligations, and protections for employees and employers, which apply to the formation of an employment contract, wages, benefits, leaves of absence, termination of employment, termination, entitlements upon termination, employment records and other related employer and employee matters. Be mindful that any employment contract attempting to contract outside the scope of the EO will be deemed null and void.

Employment Relationship Under the EO

Employment contracts are not required to be in writing. However, the EO mandates that certain terms of employment be agreed upon before the commencement of employment. These terms include: (1) wages, (2) the wage period, (3) the end of the year payment (if any), and (4) the length of notice required for the parties to dismiss and/or terminate the employment contract (which is typically between seven [7] to thirty [30] days).

For best business practice, it is ideal for employers to iron out the terms of employment in writing as a preventative measure to avoid unnecessary litigation. This is recommended for both fixed-term employment as well as continuous employment for an undetermined period of time. Additionally, for best business practice, employment contracts should be in both English and Chinese to ensure all parties of the employment contract are fully aware of the terms and conditions of employment.

Independent Contractors Under the EO

The EO provides rights, protections, and rules and regulations for employees, but does not provide the same for independent contractors. Many foreign companies in Hong Kong prefer to retain workers on an independent contractor basis versus employee basis to avoid compliance with the EO. However, employers must be mindful that Hong Kong courts scrutinize independent contractor agreements and other similar arrangements very carefully and are not afraid to deem such relationships a “sham” or mere “label.” In determining the validity of an independent contractor relationship, Hong Kong courts take into consideration numerous factors, including (1) whether the company and worker are mutually obliged to act in some manner, (2) the degree of control exercised by the company over the worker, (3) the extent the worker can realistically be regarded as operating his or her own business on his or her own terms, and (4) the extent the worker can work for another company. For best business practice, companies should consult with a lawyer to ensure proper classification of independent contractors in accordance with Hong Kong employment laws.

Dismissal of Employment

The principal of ‘at will employment’ is non-existent in Hong Kong. Employment relationships can be summarily dismissed by:

- Mutual agreement
- Notice given by either party per the notice period agreed upon
- Either party making a payment in lieu of giving notice
- Dismissal by employee for serious breach of a fundamental term of employment (e.g. lack of payment of wages for one month or more, reasonable fear of physical danger, ill treatment by employer, medically and permanently unfit for duty, etc.)
- Dismissal by employer for serious breach of a fundamental term of employment (e.g. willful disobedience of a lawful and reasonable order, misconduct, fraud or dishonesty, habitually neglect of duties and responsibilities, etc.)
- Expiration of employment period (fixed term employment)
- By operation of law or other legally recognized reason

Termination of Employment

Since the concept of ‘at-will’ employment does not exist, for all practical purposes in doing business in Hong Kong, the EO requires an employer to have a valid reason for terminating an employee. Importantly, a valid reason is mandated and required for employees who have been employed continuously for at least two years (but not more than five years). Generally speaking, examples of valid reasons for termination include:

- Serious misconduct by employee
- Proven and persistent performance issue(s) of employee
- Employee’s capability or qualifications were false or have been diminished

- Employee is in a position of redundancy (which requires severance
- payment under the EO pursuant to a statutory calculation based on years
- of service)
- Continuance of employment violates existing or new law

Upon a valid termination, employers must provide all compensation owed to the employee including (1) wages through the termination date, (2) accrued unused annual leave, (3) end of year bonus (if applicable), and (4) payment in lieu of notice (if applicable).

If an employer does not have a valid reason for terminating the employment, Hong Kong courts presume that the termination was improperly taken and in violation of the EO (other relevant regulation or ordinance, or public policy). Accordingly, the court or Labour Tribunal may make an order for reinstatement of the employee with a statutory annual compensation, or simply make an award of compensation as a penalty against the employer. Such penalties serve as a disincentive for employers to terminate employees without a valid reason and can be a handsome amount.

Recordkeeping

For at least six months after the cessation of employment, employers must maintain proper documentation of former employees. For best business practice, such documentation should include (at the very least) the following:

- Name
- Hong Kong identity card number
- Commencement date of employment
- Job title and position
- Cessation date of employment
- Wage period
- Wages paid with respect to each wage period
- Total hours worked in relation to each wage period
- Amount of end year payment (if any) and the time period relating to each payment
- Period of annual leave, sick leave, maternity leave, and holidays to which employee was entitled, whether such leave was taken, and the compensation payments made in relation to them
- Length of notice required to terminate the employment contract

Further, employers must file forms with the Hong Kong Inland Revenue Department for every employee working in Hong Kong regarding (1) commencement of employment, (2) cessation of employment, and (3) compensation paid to employee (annually). Please be mindful that additional

forms and notifications may be necessary in certain specific employment situation (e.g. compensation paid to company or person[s] other than the employee on an individual basis).

Restrictive Covenants

In Hong Kong's fast-paced working culture, post-separation obligations (e.g. non-compete agreements, non-solicitation agreements regarding the solicitation of clients and employees) are common for both junior staff and executives. However, Hong Kong courts are extremely reluctant to enforce such agreements for public policy reasons, and rarely uphold these agreements as legally binding. To demonstrate enforceability, an employer must be able to establish sufficient proprietary interest in the subject matter of the agreed upon restraint. However, even if an employer satisfies this criteria, the agreed upon restriction must still be reasonable after taking into consideration public interest, and also must be reasonable in scope, duration, and geographic limitations.

Hence, ensuring compliance with the EO is essential for your company's success in Hong Kong's competitive market and is even more critical in maintaining a profitable presence.