

## LATEST UPDATES ON EMPLOYMENT-RELATED LEGISLATION



The article we published in the September 2018 issue of APERCU updated readers on the latest employment-related legislative amendments for 2018/19 and beyond. In the interim, some legislative amendments have been updated and changes have been proposed that would affect employers.

### 1. The Employment (Amendment) (No. 2) Ordinance 2018 became effective on 19 October 2018

If an employee has been unreasonably and unlawfully dismissed and the employee makes a claim for reinstatement or re-engagement, the Labour Tribunal (LT) may make an order for reinstatement or re-engagement without the need to secure the employer's agreement.

The definitions of unreasonable dismissal and unlawful dismissal are provided in **Table 1:**

**Table 1: Definitions of unreasonable dismissal and unlawful dismissal**

Unreasonable dismissal		Unlawful dismissal
Dismissal other than for the following valid reasons		Dismissal which is in contravention of the law
<ul style="list-style-type: none"><li>• The conduct of the employee</li><li>• The capability or qualifications of the employee for performing his or her work</li><li>• Redundancy or other genuine operational requirements of the business</li><li>• Statutory requirements (ie when it would be against the law to allow an employee to continue to work in his or her original position or to continue with the original terms in his or her employment contract)</li><li>• Other substantial reasons</li></ul>	AND	<ul style="list-style-type: none"><li>• During pregnancy or maternity leave</li><li>• During paid sick leave</li><li>• After work-related injury and before compensation is determined, settled and/or paid under the Employees' Compensation Ordinance</li><li>• By reason of the employee exercising trade union rights</li><li>• By reason of the employee giving evidence for the enforcement of relevant labour legislation</li></ul>

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If no order for reinstatement or re-engagement is made by the LT, the LT may make the below payable by the employer to the employee:

- An award of terminal payments as considered fair and appropriate by the LT.
- An award of compensation up to HK\$150,000.

If the employer does not eventually reinstate or re-engage the employee as required by the LT order, the employer will have to pay the employee a further sum amounting to three times the employee's average monthly salary.

This further sum is capped at HK\$72,500 and must be paid on top of the above-mentioned monetary remedies payable to the employee as ordered by the LT.

The employer commits a criminal offence if he or she wilfully and without reasonable excuse fails to pay the further sum under an order made by the court or LT. If convicted, the employer must pay a maximum fine of HK\$350,000 and faces up to three years of imprisonment.

## 2. Amendment to the statutory minimum wage rate with effect from 1 May 2019

If no order for reinstatement or re-engagement is made by the LT, the LT may make the below payable by the employer to the employee:

The Chief Executive in Council has accepted the recommendation of the Minimum Wage Commission to increase the statutory minimum wage (SMW) rate from the prevailing level of HK\$34.50 per hour to HK\$37.50 per hour. Subject to the approval of the Legislative Council, the revised SMW rate will take effect on 1 May 2019.

The SMW rates before and after the amendments are summarised in **Table 2**.

## 3. Proposal to extend statutory paternity leave

The Employment (Amendment) (No. 3) Ordinance 2018 in respect of extending statutory paternity leave from three days to five days became effective on 18 January 2019.

## 4. Proposal to extend statutory maternity leave

The government has proposed extending statutory maternity leave from the current 10 weeks to 14 weeks.

The government will fund the cost for this extra maternity leave pay by reimbursing employers. If an employee is entitled to maternity leave pay under the Employment Ordinance, the employer must first provide the employee with maternity leave pay for both the current 10 weeks' statutory maternity leave and the additional four weeks' statutory maternity leave. Afterwards, employers may apply for reimbursement from the government for the four weeks' statutory maternity leave pay.

The amount of reimbursement of the four weeks' statutory maternity leave pay is capped at HK\$36,822 per employee. The current cap is equivalent to an employee earning a monthly wage of HK\$50,000 (ie  $HK\$36,822 = HK\$50,000 \times 12 \times 28/365 \times 4/5$ ). This cap may be reviewed and adjusted from time to time.

The rate of statutory maternity leave pay would be maintained at four-fifths of the employee's average daily wages.

The government has extended maternity leave for all female government employees to 14 weeks with effect from 10 October 2018.

In addition, it is also proposed that the Employment Ordinance be amended to update the definition of miscarriage so that an employee who suffers a miscarriage at or after 24 weeks of pregnancy may be entitled to maternity leave.

The Labour Department will report the outcome of the review to the Labour Advisory Board and seek its views on the proposal within the year 2018. The LegCo Panel on Manpower will also be consulted in this respect.

## 5. Updates on the proposed abolishment of the Mandatory Provident Fund (MPF) offsetting arrangement

The government has been in active discussion with both the business sector and the labour sector since the Chief

Table 2

Details	Amendment to statutory minimum wage rate in 2019	
	Prevailing level of statutory minimum wage before amendment since 1 May 2017	Will come into force from 1 May 2019 (subject to the approval the Legislative Council)
Minimum Hourly Wage Rate	HK\$34.50 per hour	HK\$37.50 per hour
Monetary cap on keeping records of hours worked by employees	HK\$14,100 per month	HK\$15,300 per month

Executive's 2017 Policy Address in order to explore viable options for the abolishment of the MPF offsetting arrangement. After discussing and considering the views of various parties, it is advised that the government's support for employers would be further enhanced. The proposed enhanced arrangements are as follows:

- a. The period of the two-tier government subsidy will be extended from 12 years to 25 years (details of the enhanced proposed two-tier government subsidy system are set out in **Table 3**).
- b. The financial commitment in the entire government subsidy scheme will increase significantly from HK\$17.2 billion to HK\$29.3 billion, a 70% increase on the government's preliminary proposal in March 2018.

There will be no change to the following proposed arrangements:

- Severance payments (SPs) and long service payments (LSPs) will continue to be
- calculated at two-thirds of an employee's salary for the final month, multiplied by the reckonable years of service and capped at HK\$390,000.
- Employers to set up designated savings accounts (DSA) to which monthly contributions will be made as a reserve for SPs and LSPs.

- The government will provide a second layer of subsidy if a business's contributions to the DSA fail to cover the SPs or LSPs.

## 6. Proposed amendments to anti-discrimination ordinances

The government will introduce the Proposed Discrimination Legislation Bill by the end of 2018 following its review of the four anti-discrimination ordinances: the Sex Discrimination Ordinance; the Disability Discrimination Ordinance; the Family Status Discrimination Ordinance; and the Race Discrimination Ordinance. A number of the proposed amendments are employment-related. They are summarised as follows:

- a. Protection from direct and indirect discrimination, perceived harassment and imputation that a person is of a particular racial group.
- b. Prohibiting harassment on the basis of sex, disability, race (including imputed race and association with a race) in a shared workplace, in joint-tenanted and sub-tenanted premises, on aircraft, on ships and in clubs. This will apply not only to employers, employees, contract workers and co-workers but also to service providers, customers, joint tenants, sub-tenants and club managers.

**Table 3: Details of the enhanced proposed two-tier government subsidy**

Number of years after abolition	Tier 1 of government subsidy (% of employer's SPs and LSPs)	Tier 2 of government subsidy (% of employer's SPs and LSPs after netting off Tier 1 subsidy and accrued balance of DSA)	Maximum government subsidy (tier 1 plus tier 2)
1-3	50%	25% (50% x 50%)	75%
4	45%	24.75% (55% x 45%)	69.75%
5	40%	27% (60% x 45%)	67%
6	35%	29.25% (65% x 45%)	64.25%
7	30%	28% (70% x 40%)	58%
8	25%	30% (75% x 40%)	55%
9	20%	32% (80% x 40%)	52%
10	15%	29.75% (85% x 35%)	44.75%
11	10%	31.5% (90% x 35%)	41.5%
12	5%	33.25% (95% x 35%)	38.25%
13-15	0%	30%	30%
16-18	0%	25%	25%
19-21	0%	20%	20%
22-23	0%	15%	15%
24-25	0%	10%	10%
26	0%	0%	0%

### Notes

- a. Employers are allowed to offset the pre-effective date SPs and LSPs with MPF contributions they have made both before and after the effective date of the abolition of the MPF offsetting arrangement.
- b. The abolition of the offsetting arrangement also applies to occupational retirement schemes under the Occupational Retirement Schemes Ordinance.

- c. Prohibiting direct and indirect discrimination against a woman on the ground of breastfeeding.

Employers are encouraged to obtain a good understanding of these proposed amendments. They should be prepared to develop and implement broader anti-discrimination/anti-harassment policies and compliance training programmes to

provide a more harmonious work environment for employees.

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