

Hong Kong
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1. Are there any laws that govern a layoff of employees? If so, what do the laws require?

Termination of employment in Hong Kong is governed by the Employment Ordinance (Cap.57) (“Ordinance”). With a few limited exceptions, the Ordinance applies to all employees engaged under a contract of employment in Hong Kong and their employers. It is not possible to contract out of the Ordinance and any term of an employment contract seeking to eliminate or reduce employees’ rights or benefits under the Ordinance is void.

The Ordinance provides a minimum level of protection to all employees covered by the Ordinance regardless of the number of hours worked. Employees engaged under a “continuous contract” of employment are entitled to additional benefits. An employee who has been employed for 18 or more hours per week for at least 4 weeks is taken to be employed under a “continuous contract”.

In the case of collective dismissals, there is no statutory obligation on employers to consult employees on either a collective or individual basis. Nor is there any governmental or regulatory authorization requirement. As detailed in the answers to the following questions, the Ordinance does however stipulate the procedures for terminating employment contracts, the termination payments to be made and, in the case of employees engaged under a continuous contract for at least 24 months, requires payment of severance in a redundancy situation. Employees engaged under a continuous contract for at least 5 years who are terminated otherwise than for redundancy may be entitled to a long service payment.

2. Are there any formal requirements for terminating an employee or groups of employees?

An employer can terminate a contract of employment by giving notice of the length required under the Ordinance. Alternatively, an employer can terminate a contract without notice by paying wages in lieu of notice.

In the case of continuous contracts of employment, the length of notice required for non- probationary employees is:

- (a) Where the contract provides for the length of notice on termination, the agreed period, subject to a minimum of 7 days;
- (b) Where there is no contractual notice period, at least one month’s notice.

Employees on probation can be terminated without notice during the first month of probation. Thereafter, they are entitled to notice of the length provided for in the employment contract. If the contract provides for less than 7 days’ notice or there is no contractual notice period, the minimum period is 7 days.

The notice period cannot include any maternity leave or annual leave.

Where an employer terminates a contract without notice, the employee must be paid the amount of wages that would have been due to the employee for the notice period.

The definition of wages includes all remuneration and earnings payable to an employee including travel allowances and non-discretionary commission and attendance allowances. Overtime pay is within the definition of wages if it is paid consistently or if its monthly average in the previous 12 months amounts to at least 20% of the employee's monthly wages for that period. End of year payments, bonuses of a gratuitous or discretionary nature and the value of certain benefits provided by the employer such as accommodation, education and medical care, are excluded from the definition of wages.

Employers are required to pay wages in lieu of notice, and all other termination payments other than severance payments, as soon as practicable, and no later than 7 days after the termination date.

3. Are there special legal requirements for a layoff caused by redundancy in the workforce?

The Ordinance requires an employer to make severance payments to employees who have been employed for 24 months or more under a continuous contract and have been dismissed **by reason of redundancy or laid-off**.

An employee will be regarded as having been dismissed **by reason of redundancy** if the dismissal is attributable wholly or mainly to the fact that:

- the employer has closed, or intends to close, the business for which the employee was employed;
- the employer has ceased, or intends to cease, carrying on business in the place where the employee was employed; or
- the requirements of the business for employees to carry out a particular kind of work, or for employees to carry out a particular kind of work in the place where the employee was employed, have ceased or diminished or are expected to cease or diminish.

In the absence of proof to the contrary, an employee is presumed to have been dismissed by reason of redundancy.

An employee is regarded as **laid off** if his employer has not provided him with work or wages for more than:

- (a) half of the normal working days in any 4 consecutive weeks; or
- (b) one-third of the normal working days in any 26 consecutive weeks.

Days of lock-out, rest days, statutory holidays and annual leave are not counted as normal working days in determining whether an employee has been laid off.

Calculation of Severance Payments

Employees paid monthly

The severance payment will be two-thirds of the lower of: (a) the employee's last full month's wages (or, at the election of the employee, his average monthly wage during the previous 12 months); and (b) HK\$22,500, for each year of service.

Employees paid on a daily or piece basis

The severance payment will be the lower of: (a) the wages for any 18 days chosen by the employee from his last 30 normal working days; and (b) two-thirds of HK\$22,500, for each year of service.

The amount payable in respect of an incomplete year of service is calculated on a *pro rata* basis.

Deductibility of Employer's Contributions

A severance payment can be reduced by the amount of:

- (a) gratuities based on length of service or occupational retirement scheme benefits (other than those attributable to contributions by the employee) paid to the employee; or
- (b) benefits under a mandatory provident fund scheme (other than those attributable to contributions by the employee) which are held for, or have been paid to, the employee.

To be deductible, the above gratuities and benefits must relate to the years of service for which the severance payment is payable.

Maximum Amount Payable

The Ordinance caps the amount payable by way of severance payment at HK\$390,000.

Associated Companies

Where an employee was previously employed by an associated company of his employer, the period of employment with the associated company can be counted as a period of employment with the employer provided that the two companies were associated at the time of the employee's move.

Time for Payment of Severance Payment

In order to claim a severance payment, an employee is required to give his employer written notice of the claim no later than 3 months after the dismissal or lay off

takes effect. Such notice can only be served after the 3 month deadline with the approval of the Commissioner for Labour. The employer is required to make the severance payment to the employee within 2 months after receipt of notice of the employee's claim. At the time payment is made, the employer must also provide the employee with a written statement showing how the amount has been calculated.

Offers to Renew/Re-engage Employees

An employee is not entitled to a severance payment if his employer (or its associated company) made a written offer to renew the employee's contract or to re-engage him under a new contract, and the employee unreasonably refused the offer. The offer to renew or re-engage must be made at least 7 days before the termination date and the renewal of the contract or re-engagement must become effective on or before the termination date.

4. Are there employment laws that laid-off employees can use to challenge their inclusion in the layoff?

The principal grounds on which an employee can challenge the termination of his employment under the Ordinance are unreasonable dismissal, unreasonable variation of terms of employment contract and unlawful dismissal. For such a claim to be successful, the employee must have been dismissed other than for a "valid reason". The definition of "valid reason" is set out in Section 32K of the Ordinance and includes dismissal of an employee by reason of redundancy or other genuine operational requirements of the business. Hence dismissals by reason of redundancy or the genuine operational requirements of the business should not of themselves give rise to the above claims.

An employee may however be able to challenge his or her inclusion in the layoff under the following anti-discrimination laws: the Sex Discrimination Ordinance, the Race Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance. These Ordinances prohibit both direct and indirect discrimination on the basis of sex, marital status, pregnancy, race, disability and family status (i.e. a person's responsibility for the care of immediate family members).

Protected Employees

There are also statutory prohibitions on dismissing employees in specified circumstances. Employers are prohibited from dismissing:

- (a) a pregnant employee engaged under a continuous contract of employment who has given her employer notice of her pregnancy (Section 15(1) of the Ordinance);
- (b) an employee who is on sick leave and entitled to receive sickness allowance (Section 33(4B) of the Ordinance);
- (c) an employee by reason of his exercising his rights in respect of trade union membership and activities (Section 21B(2)(b) of the Ordinance);

- (d) an employee by reason of his giving evidence in proceedings, or information in an inquiry, in connection with the enforcement of the Employment Ordinance (s.72B of the Ordinance) or the Factories and Industrial Undertakings Ordinance (Section 6 of the Factories and Industrial Undertakings Ordinance (Cap. 59); and
- (e) an employee who is entitled under the Employees Compensation Ordinance (Cap.282) to compensation for incapacity suffered before the employer and employee enter an agreement for the employee's compensation or before a certificate of assessment is issued (Section 48 of the Employees Compensation Ordinance).

5. What sanctions or penalties may be imposed against employers for violating any of the requirements mentioned in Nos. 1-4 above?

An employer who does not pay termination payments (other than severance payments) when due may be prosecuted, and if convicted, may be liable to a fine of HK\$350,000 and to 3 years' imprisonment. An employer who fails to pay a severance payment is liable on conviction to a fine of HK\$50,000.

An employer who dismisses an employee in breach of the prohibitions referred to in the answer to Question 4 above, may be prosecuted and subject to a fine, on conviction, of HK\$100,000. The employer may also be liable to pay compensation to the employee.

Where an employer is found to have breached Hong Kong's anti-discrimination laws, the remedies which the court may award include injunctions, reinstatement, and compensatory as well as punitive or exemplary damages. If proceedings are brought in the district court, there is no limit on the amount of damages which the court may award. In employment cases, compensatory damages are based principally on loss of earnings and injury to feelings caused by the discrimination. Awards for injury to feelings in discrimination cases can be substantial and have typically been in the range of HK\$15,000 to HK100,000.

6. What are the one or two most common mistakes that employers make that lead to liability for a layoff?

One of the common issues in relation to lay offs is whether annual leave can be used to off set the required notice period of termination in order to shorten the notice period. The answer is no, an employer must ensure that employees are given notice of termination of the length required by the Ordinance.

7. What other employment issues are likely to arise from a layoff in your jurisdiction that you have not addressed in your answers to the previous questions?

Continuity of Employment on Transfer of Business

On the transfer of a business, the transfer does not break the continuity of the period of employment of employees who are kept on by the transferee and their periods

of employment with the transferor count as periods of employment with the transferee (Paragraph 5 of the First Schedule of the Ordinance). The transferee may therefore seek to negotiate adjustments to the purchase price so that the transferor bears contingent liabilities for severance or long service payments accrued in respect of periods prior to the transfer.

Long service payment

An employer is liable to pay a long service payment to an employee engaged under a continuous contract for at least 5 years in the following circumstances:

- (a) the employee is dismissed and the dismissal is not by reason of redundancy or a summary dismissal due to serious misconduct and the employer is therefore not required to pay a severance payment;
- (b) an employee's fixed term contract of employment has expired and not been renewed;
- (c) the employee terminates his contract having been certified by a medical practitioner as permanently unfit for his type of work;
- (d) on the resignation of an employee aged 65; or
- (e) the death of an employee.

Long service payments are calculated in the same way as severance payments, are subject to the same maximum amount and are payable within 7 days from the date of termination of the contract. Long service payments are not payable in a redundancy situation, thus if an employee is entitled to severance on being made redundant, he will not additionally be entitled to a long service payment. As is the case for severance payments, an employee will not be entitled to a long service payment if he unreasonably refused an offer by his employer (or its associated company) to renew the employee's contract or to re-engage him under a new contract where the offer was made at least 7 days before the termination date and the renewal of the contract or re-engagement would take effect on or before the termination date.

Change of Ownership on Transfer of Business

Where there is a change of ownership of a business, an employee will not be entitled to any severance payment or any remedies for unreasonable or unlawful dismissal or unreasonable variation of the terms of the employment contract, if he unreasonably refuses an offer from the new owner of the business to renew the employee's existing contract or to re-engage him under a new contract on the same or no less favourable terms. The offer to renew or re-engage must be made no later than 7 days before the anticipated termination date and the renewal or re-engagement must take effect before the termination date. (Sections 31J and 32D of the Ordinance). **These provisions however apply only on a transfer of business and will not apply on an acquisition of shares in a company.** Thus where there is to be a transfer of a business and the transferee is to take on all or any of the sellers' employees, offers for renewing or re-engaging the employees must be made in strict compliance with the requirements of Sections 31J and 32D of the Ordinance.

Establishing Valid Reasons for Employees to be Dismissed

Where any employees are to be dismissed on a transfer of business or generally, it is important to establish that they have been dismissed for a valid reason. Section 32K of the Ordinance sets out the 5 valid reasons for dismissal or the variation of the terms of an employment contract:

- the conduct of the employee;
- the employee's capability or qualifications for performing the work he is employed to do;
- redundancy or other genuine occupational requirements of the business;
- statutory provisions making it unlawful for the employee to continue to be employed by the employer or to continue employment under the terms of his current contract; or
- any other substantial reason.

As a practical matter, employers should document the reasons for dismissal in case they are subsequently challenged. They should also ensure that the criteria on which they select staff for redundancy are fair and do not contravene any of the anti-discrimination laws.

Unreasonable Dismissal, Unlawful Dismissal and Unreasonable Variation of Contract Terms

An employee can challenge the termination of his employment and obtain remedies on the following grounds:

- (a) **Unreasonable dismissal:** where an employee engaged under a continuous contract for at least 24 months is dismissed other than for a valid reason as defined under Section 32K of the Ordinance (see above); or
- (b) **Unreasonable variation of the terms of an employment contract:** where the terms of a continuous contract under which an employee is employed are varied by his employer without the employee's consent, in the absence of an express term in the contract permitting the variation, and other than for a valid reason within the meaning of Section 32K; or
- (c) **Unlawful dismissal:** where an employee is dismissed other than for a valid reason and in breach of any of certain statutory prohibitions on dismissal of employees in specified circumstances (see the categories of protected employees in the answer to Question 4 above).

Remedies Available

(a) **Reinstatement or Re-engagement Orders**

A reinstatement or re-engagement order can be made where unreasonable dismissal, unreasonable variation of contract terms or unlawful dismissal is established. However both the employee and employer must agree to the order. A reinstatement order requires the employer to treat the employee as if he had not been dismissed or as if the terms of the contract had not been varied. A re-engagement order requires the employer, his successor on a change of ownership, or an associated company to employ the employee on terms comparable to his original terms of employment or in other suitable employment

(b) **Terminal Payments Awards**

This is a discretionary remedy which may be awarded if no reinstatement or re-engagement order is made. The provisions as to the calculation of terminal payments are complicated. Very simply, terminal payments include: (a) the employee's statutory entitlements under the Ordinance; (b) a *pro rata* amount of the long service payment to which the employee would have been entitled had he been employed for 5 years; and (c) any other payments due under the contract.

Terminal payments awards can be made for unreasonable dismissal, unreasonable variation of contract terms or unlawful dismissal.

(c) **Compensation Awards**

Compensation awards may only be made in cases of unlawful dismissal where no order for reinstatement or re-engagement is made. It is a discretionary remedy and is subject to a maximum of HK\$150,000.

Situations in which the Remedies are not Available

The above remedies are not available in the following circumstances:

- (a) on the transfer of a business where the employee unreasonably refuses an offer to renew the employee's contract or re-engage him under a new contract in the circumstances set out in Section 32D of the Ordinance (see "Change of Ownership on Transfer of Business" above);
- (b) on the expiry of a fixed term contract where the employee unreasonably refuses the employer's offer to renew his contract of employment or re-engage him under a new contract on no less favourable terms where a written offer was made no less than 7 days before the expiry of the contract and the renewal or re-engagement would be effective on or before the expiry date; and
- (c) where the employee is summarily dismissed for serious misconduct under Section 9 of the Ordinance.

Summary Dismissal

An employer is entitled to terminate an employee without notice or wages in lieu of notice if, in relation to his employment, the employee:

- (a) willfully disobeys a lawful and reasonable order;
- (b) misconducts himself;
- (c) is guilty of fraud or dishonesty; or
- (d) is habitually neglectful of his duties.