

Redundancy in Hong Kong – Payments and notification obligations

23 July 2021



In the last of this series, we consider the standard payments owed to an employee on termination as well as employers' notification obligations to government entities in Hong Kong on the cessation of employment.

It is important for employers to be familiar with their legal obligations when terminating an employee. Failure to make terminal payments and/or notify certain government entities in Hong Kong can have serious consequences. Aside from any civil claims an employee could have, both the company and its directors (or responsible officers) may also incur personal criminal liabilities.

When in doubt, employers and employees should seek independent legal advice to ensure they understand their legal entitlements and obligations on termination.

Terminal payments

Pursuant to the Employment Ordinance (Cap. 57), an employee who is made redundant may be entitled to statutory severance pay and other terminal payments.

In cases where the employee intends to leave Hong Kong for a period of one month or more following termination, the employer must temporarily withhold all terminal payments due to the employee (including salary, commission, bonus and expenses). Such withholding is for a period of one month from the filing of the notification to the Inland Revenue Department ("IRD"), or until the IRD has issued a "Letter of Release".

Statutory severance pay

Provided that an employee has been employed under a continuous contract for a minimum period of two years and has not resigned or been summarily dismissed prior to termination, the employee will generally be entitled to statutory severance pay.

Statutory severance pay is the statutory minimum payment that must be made to an employee and is calculated as two-thirds of the employee's monthly wage or two-thirds of HK\$22,500, whichever is less, for each year of service. The statutory severance payment is subject to a cap of HK\$390,000.

The Employment Ordinance requires that an employee should request statutory severance pay by notice to the employer within three months of the date of termination. The employer must then make the payment within two months of the notice. An employer who fails to comply with this requirement without reasonable excuse will be guilty of a criminal offence and will be liable upon conviction to a fine of HK\$50,000. In practice, however, most employers will make payment within seven days of termination along with other terminal payments.

Employers may also offset their Mandatory Provident Fund ("MPF") contributions against the amount of statutory severance payments payable to an employee. In order to do so, the employer will need to make an application to the trustee to withdraw MPF derived from the employer's contributions. If the amount of MPF derived from the employer's contributions is not enough to cover the amount of severance pay due, the employee is entitled to recover the shortfall from the employer.

Other terminal payments

Other terminal payments, which are provided for under the Employment Ordinance, which might be payable on termination, include:

- payment in lieu of notice, if the employee is not required to work during a notice period before termination
- wages earned by the employee from the last pay period up to the date of termination, including salary, overtime, commissions, allowances and expenses (such as for travel, housing, food, etc)
- any accrued annual leave entitlement, including pro rata annual leave entitlement if the employee leaves before the end of the leave year
- any statutory end of year bonus (which is not of a discretionary nature), including pro rata end of year bonus entitlement if the employee leaves before the end of the bonus year
- any unpaid maternity/paternity leave pay which is due.

If applicable, these terminal payments must be paid as soon as practicable and within seven days of the date of termination. If the employer fails to comply, they will be guilty of a criminal offence and will be liable upon conviction to a fine of HK\$350,000 and imprisonment for three years.

Contractual entitlements

In addition to the terminal payments due under the Employment Ordinance, the employment agreement may also provide for further payments which may be more generous than the employee's statutory entitlements.

These may include a contractual severance payment, which may be a more generous payment than the statutory entitlements, as well as other deferred compensation. For example, the employee may be entitled to lump sum payments representing the value of unvested share and stock options. Termination due to redundancy may trigger immediate or accelerated payment.

Notifications

Finally, employers must notify the following government entities of the intended cessation of employment:

- **MPF:** the employer must notify the MPF scheme trustee about the employee's termination within 10 days of the last day of the calendar month in which the employee was terminated
- **IRD:** where notice of termination is given, the employer is required to notify the IRD one-month prior to termination of employment. Where no notice is given, the employer should notify the IRD of the termination as soon as practicable. Notification needs to be in writing through the filing of Form I.R.56F, or Form I.R.56G where an employee intends to leave Hong Kong following termination
- **Immigration:** where an employee holds an employment visa, an employer must notify the Immigration Department of the employee's termination. If notice of termination is given, the employee must notify the Immigration Department prior to the date of termination. Where no notice of termination is given, the employee must notify the Immigration Department by no later than the day following termination. Notification needs to be in writing, and a copy of any termination notice issued by either employer or employee must be sent to the Immigration Department within seven days of being issued.

Conclusion

It is important to take stock of both the statutory and contractual entitlements which may be due to an employee in the event of a redundancy. Employers must also carefully consider their notification obligations following the termination of an employee, since these obligations have strict timetables and are important to get right.

We hope that this series on the law and practice regarding redundancy in Hong Kong has been informative. We have extensive experience advising employers and employees on their rights and obligations on redundancy.

Please do not hesitate to contact our Partner and Head of the Employment Practice in Hong Kong, Andrea Randall (andrea.randall@rpc.com.hk /+852 2216 7208), for any employment law related queries you may have.

All material contained in this article are provided for general information purposes only and should not be construed as legal, accounting, financial or tax advice or opinion to any person or specific case. RPC accepts no responsibility for any loss or damage arising directly or indirectly from action taken, or not taken, which may arise from reliance on information contained in this article. You are urged to seek legal advice concerning your own situation and any specific legal question that you may have.

AUTHOR



Andrea Randall

Partner

t: +852 2216 7208

m: +852 9305 3608

andrea.randall@rpc.com.hk



Sakshi Buttoo

Registered Foreign Lawyer

t: +852 2216 7211

m: +852 6977 2312

sakshi.buttoo@rpc.com.hk