



Hong Kong Employee Focus: Things to consider before handing in your notice

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Before you hand over your notice of resignation, it is important take a moment to plan ahead and think through the legal and practical considerations of your decision.

The first port of call is often to review and understand the suite of documents which make up the contractual terms of your employment. These documents typically include your contract of employment, employee handbook, deferred compensation agreements (which may relate to stock, shares, options or other compensatory awards) as well any confidentiality and post termination restrictive covenant agreements. A review of the documents may dictate how you should proceed and influence important next steps such as: how and when you resign, whether you can join a competitor, the amount of any terminal payments due to you and/or your employer.

Accepting a new role with a competitor

If you are looking to resign and join a competitor, you should carefully review the terms of your employment contract to see if it contains any post-termination restrictive covenants. These restraints may have the effect of preventing you from competing against your employer, soliciting and/or dealing with your employer's clients and poaching current and former members of staff. It is important to understand what these restrictions entail, how long they may last after termination and whether they would likely be enforced by the Courts.

If the post-termination restrictive covenants in your contractual documents are unreasonable and amount to a restraint of trade (for instance, if the period of restraint is manifestly excessive), even if they are recorded and agreed in writing, the restrictions may be deemed void and unenforceable, meaning you do not need to comply with them. On the other hand, if the post-termination restrictive covenants are reasonable and your employer has a legitimate business interest to protect, if you were to breach the post-termination restrictive covenants, you risk legal action being taken against you – which would be disruptive and costly.

It is always sensible to consider the enforceability of any post-termination restrictive covenants. If it is unlikely to be enforceable, you can proceed to join a competitor, solicit and/or poach clients and staff with greater confidence. If the post-termination restrictive covenants are likely to be enforceable then you should decide whether to abide by the restraints, or if that is not feasible, explore next steps with your solicitors, which may include negotiating with your employer and/or finding ways to mitigate against legal action/damages.

Assess the impact on deferred compensation

If you are entitled to receive deferred compensation such as stock, shares, options or other compensatory awards, you should carefully review the termination provisions before you resign.

Some institutions – particularly Investment Banks – will rely on leaver provisions in determining whether to pay out the deferred compensation after you have given your notice and/or after termination. Generally, these are divided between:

- “Good leaver” provisions, which set out circumstances where the employer deems that the employee has left on “good terms” and would remain entitled to compensation after notice is given/on termination, and
- “Bad leaver” provisions, which set out circumstances where the employer deems that the employee has left on “bad terms” and would forfeit their entitlement to compensation after notice is given/on termination.

It is usually sensible to get some advice on how your resignation affects your entitlements and clarify issues such as: what the applicable vesting periods are, when you should resign, what you are entitled to on termination, whether there are any forfeiture provisions, and whether the deferral is conditional on compliance with further post termination restrictive covenants (which may be more onerous than those found in your employment contract).

Payment/repayment obligations upon resignation

In modern contracts, employers often impose payment/repayment obligations on the employee if they resign within a specified period after they have joined. This is particularly prevalent in the world of finance where the employer has gone to great expense to recruit the employee.

Typical payment/repayment obligations, which can run into the millions, include sign-on bonuses, forgivable loans, training costs and liquidated damage – the terms of which should be clearly set out in your contractual documents.

Whether you will be required to make payment to your employer will very much depend on the circumstances of your departure, the terms of any contractual agreement, whether the payment/repayment is a penalty clause and/or whether the payment/repayment itself is a restraint of trade. You should always seek legal advice to establish if/when you need to pay/repay your employer on your departure.

How and when to resign?

The Employment Ordinance in Hong Kong provides that employees may resign at any time by either (i) giving and serving the requisite notice of termination or (ii) making a payment in lieu of notice to buy out the notice period and terminate the employment relationship immediately.

Technically, you have a statutory choice as to whether to serve notice orally or in writing, although it is usually more prudent to deliver the notice in the form and manner specified under your employment contract to avoid an unnecessary dispute over if/when notice was properly effected.

Separation Agreement

In certain circumstances, it may be appropriate to agree the terms of your departure with your employer in a separation agreement (also known as a termination agreement). A separation agreement is a contractually binding document which sets out the agreed terms of an employee’s cessation of employment. A separation agreement will usually include an enhanced termination payment for the employee, and in exchange, the employee would release and waive any potential claims they may have against their employer.

In Hong Kong, employers and employees have free rein to agree such terms so long as they do not violate or reduce any protection or right under the Employment Ordinance. As such, employer and employees often use a separation agreement to agree non-financial terms of departure, eg references, post-termination restrictive covenants and reciprocal non-derogatory obligations.

Garden Leave

Garden leave clauses are generally used by an employer to require the departing employee to remain at home, or at least not come to work, during the notice period. The thinking behind this is often to prevent the departing employee from having access to important client contacts and confidential information just before they leave.

Whilst garden leave is popular, particularly with professional services industries, your employer does not have a statutory right to direct you to go on garden leave. This may be a particularly important issue if, for instance, you work in a sector where sitting out the market will diminish your value. As such, you should always check if there is an express contractual term in your employment contract to place you in the garden.

Practical steps

Finally, there are a number of practical steps that you will also need to take when you leave your employer. Depending on the circumstances, you may need to carry these out immediately upon handing in your notice or on the date of termination.

It is important that you return company property and confidential information, including hard copy and soft copy work files prior to your departure. Property can include anything from work-product documents and notes to laptops and IT equipment. You should not send any work product to your personal email address either.

You should remove company programs and applications from all of your “bring-your-own-devices”, including your personal laptop and mobile phone. Once you have left, you should not be able to access company systems and the company should not be able to access your personal devices.

If you hold an employment visa, you will also need to notify the Immigration Department of your termination of employment. Other notifications (to MPF and IRD) must be made by your employer but it is your responsibility to inform the Immigration Department prior to the date of termination where notice has been given, or the day after termination where no notice is given.

Conclusion

The key takeaway here is that it is important for employees to fully understand the impact of their resignation before they hand in their notice of termination or accept a new offer from another employer. In order to cover all bases, employees should review the full suite of employment documents applicable to their employment relationship. Since these documents can be complex and interlinked, it may be tricky to understand every potential issue at play. If there is any doubt, we recommend that employees take independent legal advice.

We regularly advise employees on their termination rights and obligations. Please do not hesitate to contact Andrea Randall, a Partner and Head of the Employment Practice in Hong Kong for any employment law related queries you may have.

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