RPC

Employment law changes in 2020 and what to expect in 2021

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2020 has brought about a significant number of changes to working life in Hong Kong. In light of the protests and COVID-19, there has been a widespread adoption of working from home ("WFH"). In addition, there has been new legislation enhancing the statutory rights of employees. In this article, we provide a review of these changes in 2020 and set out what we are to expect in 2021.

Year of 2020

Maternity leave and Paternity Leave

Effective on 11 December 2020, statutory maternity leave was extended from 10 weeks to 14 weeks for eligible female employees under a continuous contract of employment.

The formula for calculating statutory maternity leave pay ("SMLP") remains four-fifths of the employee's average daily wages, with the additional 4 weeks of SMLP subject to a cap of HK$80,000.

Employers may claim a reimbursement from the HKSAR Government for SMLP for the additional 4 weeks' SMLP.

The eligibility of maternity leave has also been extended as a result of the amendment to the statutory definition of "miscarriage". A female employee will now be entitled to 14 weeks of maternity leave if she has a miscarriage at or before 24 weeks of pregnancy (previously, 28 weeks). This change means that female employees who experience a miscarriage at or after 24 weeks of pregnancy will now be entitled to 14 weeks of maternity leave.

As a general reminder, an employer who fails to pay SMLP to an eligible female employee is liable to criminal prosecution.

In line with increased maternity leave, the period within which an expectant father may choose to take paternity leave now begins 4 weeks before the expected due date and ends 14 weeks (as opposed to the original 10 weeks) after the actual due date.

Suggested action for Employers

- Employers should review and update their Employment Contract and/or maternity and paternity leave policies to ensure they are up to date;
- Payroll should be instructed to make enhanced payments for eligible employees as well as be familiar with the process of seeking reimbursement from the Government.

At RPC, we regularly advise employers and employees on their statutory obligations and rights. We have extensive experience in review and revising (as necessary) Employment Contracts and policies, as well as provide training to Human Resources ("HR") and/or other relevant stakeholders on all aspects of employment law. For employees, we advise on bringing internal complaints in respect of underpayments of entitlements and, where an amicable resolution is not found, advise the employee in the commencement proceedings and/or prosecutions.

Expanded discrimination protection

Effective on 19 June 2020, a number of amendments to the Sex Discrimination Ordinance (Cap. 480) ("SDO"), Disability Discrimination Ordinance (Cap. 487) ("DDO"), Family Status Discrimination Ordinance (Cap. 527) ("FSDO") and Race Discrimination Ordinance (Cap. 602) ("RDO")) came into effect.

A summary of the key changes are as follows:

- The scope of unlawful sexual, racial and disability harassment has been expanded to include unlawful conduct by "workplace participants" ie those who work in the same workplace and is no longer limited to those with an employment relationship. Examples of "workplace participants" includes volunteers, interns, contract workers, commission agents;
- The DDO and RDO have been amended to prohibit disability and racial harassment by customers against service providers (and vice versa), including where such acts occur on Hong Kong registered aircraft or ships and while they are overseas;
- The SDO and DDO have been amended to prohibit sexual and disability harassment in respect of members and prospective members of clubs, committed by the club or the management committee (or its members) of the clubs;
- The scope of unlawful racial discrimination and racial harassment has been expanded to prohibit racial discrimination and racial harassment by imputation under the RDO. Imputation is where a person is subject to unlawful discrimination or harassment on the basis of an impression that he/she is of a particular race or belongs to a particular racial group;
- The scope of unlawful racial discrimination and racial harassment has also been expanded to prohibit direct racial discrimination and racial harassment of a person because of the race of his/her "associate" (previously, "near relative"). The definition of "associate" includes a spouse of the person, another person who is living with the person on a genuine domestic basis, a relative of the person, a carer of the person, and another person who is in a business, sporting or recreational relationship with the person; and
- Plaintiffs are no longer required to prove that the Defendant(s) **intended** to discriminate in a claim of of indirect discrimination. This means that a Plaintiff may be able to obtain an award for damages for any unintentional acts committed by the Defendant(s) as a result of indirect sex, family status or racial discrimination.

Employers should be reminded that they may be vicariously liable for the acts of discrimination or harassment committed by their employees and/or the workplace participants. This means that the Employer may still be liable for the unlawful act of his employees and/or workplace participants even though such act was committed without the Employer's knowledge or approval.

An Employer may be able to escape liability if it is able to show that it has taken reasonably practicable steps to prevent such unlawful behaviour.

Suggested action for Employers

- Implement an anti-discrimination and harassment policy;
- Investigate complaints of discrimination and/or harassment;
- Take disciplinary action in a consistent manner in respect of breaches of the anti-discrimination and harassment policy;
- Require all employees and workplace participants to attend anti-discrimination and harassment course(s);
- Ensure that HR is equipped with the relevant knowledge and training to deal with complaints in a timely, confidential, sensitive and professional manner.

At RPC, we regularly advise on and draft workplace policies including tailormade anti-discrimination and harassment policies. We also provide training and/or act as external legal advisors to employers in investigating complaints and advise on any subsequent action(s). For employees, we advise on commencing or defending complaints of discrimination and harassment both in internal investigations in the workplace and, externally at the Equal Opportunities Commission ("EOC") and in the Courts.

Discrimination against breastfeeding women

The legislative provisions prohibiting discrimination against breastfeeding women will come into force on 19 June 2021. A woman is "breastfeeding" if she: (a) is engaged in the act of breastfeeding a child; (b) is engaged in the act of expressing breast milk (ie pumping); or (c) is feeding a child with her breast milk.

Unlawful discriminatory conduct includes direct discrimination, indirect discrimination, victimisation, subjection to or aiding discriminatory practices.

The EOC has given the following examples of discrimination against breastfeeding women:

- Where a breastfeeding woman who returns from maternity leave requests to use an unused room in the office for pumping during her lunch break, but the employer rejects the request on the basis that the room can only be used for purposes other than pumping, this will amount to direct discrimination;
- Where an employer imposes a requirement on all employees that if they wish to take additional breaks during working hours, they must still ensure their number of billable working hours per day is the same as all other employees. This requirement may significantly disadvantage an employee who is breastfeeding and requires lactation breaks and thus may amount to indirect discrimination unless the employer could justify the requirement;
- Where an employer imposes a policy requiring all employees to work eight consecutive hours per day without breaks. Again, this requirement may significantly disadvantage an employee who is breastfeeding and requires lactation breaks and thus may amount to indirect discrimination unless the employer could justify the requirement.

Whilst there are no legislative provisions in regards to lactation breaks, nursing rooms in the workplace etc the EOC has issued two sets of Guidance Notes[1] setting out recommended practices and suggestions on good governance.

Suggested action for Employers

- Implement an anti-discrimination policy with respect to breastfeeding women. As suggested above, the employer should investigate complaints of discrimination and take disciplinary action in a consistent manner in respect of breaches of the anti-discrimination policy;
- All employees and workplace participants should be given training in respect of this new prohibition;
- Employers should also consider whether to designate a spare office as a nursing room and a uniform policy in respect of lactation breaks.

At RPC, we advise on all aspects of workplace discrimination, including discrimination against breastfeeding women. We also provide training and/or act as external legal advisors to employers in internal investigations and/or any subsequent action(s). For employees, we advise on commencing or defending complaints of breastfeeding discrimination in internal investigations in the workplace and, externally at the EOC and in the Courts.

Guidance from the Privacy Commissioner for Personal Data ("PCPD") on WFH Arrangements

On 30 November 2020, the PCPD issued three Guidance Notes[2] in respect of data security and personal data privacy applicable to those who are WFH. Whilst these Guidance Notes do not have any statutory force, they are helpful as they contain practical recommendations to employers and employees particularly in regards to complying with the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO").

In summary, the Guidance Notes recommends that:

- Employers should (i) have clear policies on handling data when WFH arrangements are in place; (ii) take steps to ensure data security when data and documents are transferred to employees WFH; (iii) provide training and support to employees; and (iv) ensure data is stored in a secured manner in electronic devices provided to employees;
- Employees should (i) adhere to company policies on data handling; (ii) use corporate electronic devices for work (if provided); (iii) use secure Wi-Fi connections; (iv) avoid working in public locations such as cafes where the security of the data could be compromised; and (v) ensure the security of data in paper documents taken out of the workplace; and
- When using videoconferencing software, users should have in place strong passwords on user accounts and multi-factor authentication and prior to proceeding, verify all participants' identities in virtual meetings.

Given the ever-changing technological advancements and the widespread adoption of WFH arrangements, both employers and employees should take greater care in the protection and security of personal data. We expect that data protection is likely to be at the forefront of legislative work in 2021.

Suggested action for Employers

- Implement a Data Security and Transfer policy;
- Ensure all employees and workplace participants who either regularly WFH or have access to personal data receive training in respect of data security;
- Employers should also provide employees with the use of secure storage devices to lock away any electronic and/or hard copy confidential documents.

At RPC, we advise both employers and employees on all aspects of personal data and confidentiality obligations owed. On the non-contentious side, we draft policies and provide training on the internal procedures. Where things do go wrong, we advise on what to do in an actual/suspected breach, what remedial action to take (for eg deletion, delivery up and recovery of the personal data/confidential documents) and where necessary, commence/defend injunctive relief action and/or breach of contract proceedings.

What to expect (and what we've seen so far) in 2021

Abolition of the MPF Offsetting Mechanism

It is a mandatory legal obligation for employers to contribute to their employees' mandatory provident funds ("MPF"). Currently, on termination, employers can offset any statutory severance payments or statutory long service payments it makes against the accrued benefits derived from the employer's contribution to the MPF account.

In December 2020, the HKSAR Government announced that it will postpone introducing the amendment bill for the abolition of the MPF offsetting mechanism. We expect this issue to be debated again in October 2021, at the beginning of the next legislative session.

Proposal to increase Statutory Holidays

All employees in Hong Kong are entitled to 12 statutory holidays under the Employment Ordinance (Cap. 57). There are 17 general holidays (some of which are also statutory holidays) under the General Holidays Ordinance (Cap. 149). An organisation that is not a bank, educational establishment, public office or government department is not obliged to grant general holidays. In order to resolve the controversy in the past decade as to the alignment of the 12 statutory holidays with the 17 general holidays, the HKSAR Government proposed that statutory holidays be increased by one day every two years until there is complete alignment.

Again, this proposal has been postponed until a later date, but we expect to see some clarification in October 2021.

Proposal to amend the PDPO

In January 2020, the Constitutional and Mainland Affairs Bureau, together with the PCPD published a paper[3] outlining proposals to reform the PDPO with the following six recommendations:

- establishing a mandatory mechanism for data breach notification;
- strengthening the obligations on personal data retention;
- increasing the enforcement powers of the Privac Commissioner;
- introducing direct regulation of data processors;
- amending and expanding the PDPO's definition of "personal data"; and
- strengthening the regulation of improper disclosure of personal data of other data subjects.

Given the ever-increasing cybersecurity threats faced as a result of WFH, implementation of the above recommendations is welcome and also, long overdue. It is now more important than ever that employers are aware of their obligations, in particular the introduction of mandatory notification requirements. At a minimum, personal data retention policies need to be reviewed and updated. Employers should pay attention to cybersecurity and consider holistically, their own internal processes and controls on data usage, retention and security.

Minimum Wage to stay at HK$37.50

On 2 February 2021, the HKSAR Government announced that the statutory minimum wage will remain at HK$37.50 per hour until 30 April 2023. In arriving to this recommendation, the Minimum Wage Commission considered the elevated unemployment rate, the high degree of uncertainty faced by the Hong Kong economy and the need to strike a balance between the objectives of forestalling excessively low wages and minimising the loss of low-paid jobs. The next review of the statutory minimum wage will take place in October 2022.

Compulsory COVID-19 Testing

As part of the HKSAR Government's measures against the spread of COVID-19, it is likely that there will be more instances of compulsory testing notices being issued. If a compulsory testing notice is issued to a workplace, the employer should be prepared to respond to the situation with alternative working protocols and WFH arrangements. Employers should maintain records of employees who work in the office and their dates/times of entering the office to ensure they are tested in compliance with the compulsory testing notice. It goes without saying that employers should maintain close communications with all employees to ensure minimal business disruptions during this period.

Takeaway

The year of 2020 has thrown up many employment issues for businesses. Employers are reminded to stay on top of legislative changes and regularly review their policies and procedures to ensure they are up to date. Similarly, employees and workplace participants should be given regular training on workplace conduct and HR (and/or other relevant stakeholders) should receive specialist training to deal with complaints should they occur. When in doubt, employers and employees should seek independent legal advice before taking, or deciding not to take, any action.

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

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1. "Equality for Breastfeeding Women: Guidance for the Employment and Related Sectors"; " Equality for Breastfeeding Women: Guidance relating to the Provision of Goods, Facilities and Services, Education, Disposal or Management of Premises, Clubs, and the Government", November 2020.
2. "Protecting Personal Data under Work-from-home Arrangements: Guidance for Organisations"; "Protecting Personal Data under Work-from-home Arrangements: Guidance for Employees"; "Protecting Personal Data under Work-from-home Arrangements: Guidance on the Use of Video Conferencing Software", November 2020.
3. LC Paper No. CB(2)512/19-20(03) entitled "Legislative Council Panel on Constitutional Affairs: Review of the Personal Data (Privacy) Ordinance", 20 January 2020.

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