

Common Questions on Retrenchment

1. What amounts to redundancy under the Employment Ordinance ("EO")?

An employee will be taken to be terminated by reason of redundancy if the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or in the place where the employee was so employed. Redundancy also includes situations where the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish.

If an employee's remuneration depends on the amount work provided by the employer, then the employee will be taken to be laid off if the total number of days on which no work is provided or no wages is paid exceeds half of the total number of the normal working days in any four consecutive weeks or one-third of the total number of normal working days in any 26 consecutive weeks.

2. How to terminate a contract of employment?

Subject to certain restrictions (which are discussed below), an employer normally can terminate the employment by giving the employee the requisite notice of termination or payment of wages in lieu of notice. An employer should serve the required notice under the contract. In the absence of an agreed notice period, the length of notice required to terminate a contract should be not less than 1 month (save for employees who are under probation).

Note also if there is any contractual policy or procedures on redundancy, an employer will have to comply with the procedures before termination failing which it may give rise to a wrongful termination claim.

3. What are the statutory restrictions on termination?

It is unlawful to terminate (a) a pregnant employee, (b) a sick employee on a day on which statutory sickness allowance under the EO is payable, (c) an employee who has suffered incapacity entitling him to compensation under the Employees' Compensation Ordinance before certain certificates are issued by the Labour Department and (d) for any unlawful discriminatory reasons (e.g. termination on the ground of sex, marital status, pregnancy, disability, race or family status). Redundancy is not an exception.

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4. How do I deal with sick, injured and/or pregnant employees?

Be patient. An employer should wait until the statutory restrictions mentioned in (3) cease to apply before proceeding with the termination. Alternatively, an employer can attempt to negotiate a mutual separation with the employee where the parties agree that the employment ceases by mutual agreement instead of termination by the employer. An employer will need to provide legal consideration (i.e. something on top of the employee's statutory and contractual entitlements on cessation of employment) in order to entice the employee to agree to the mutual separation and for the agreement to be enforceable.

5. What should I pay attention to in selecting the employees to terminate?

An employer must ensure that the basis for selecting which employee to terminate has nothing to do with any of the protected attributes under the anti-discrimination ordinances (i.e. sex, marital status, pregnancy, disability, race or family status). For example, selecting only employees who take sick leave may give rise to disability discrimination.

6. Do I need to mention the reason for termination in the termination letter?

While redundancy is a valid reason for termination under the EO, an employer is not required to inform the employee or set out the reason for the termination in the termination letter. An employer may consider stating that the employment is terminated by reason of redundancy to assist the affected employees in seeking for replacement employment.

7. What are the payments payable on termination and when should they be paid?

Termination payments include outstanding wages, payment of wages in lieu of notice, payment for accrued but untaken annual leave, pro-rata end of year payment, severance payment or long service payment and any other payments under the contract. If a contractual obligation is more generous than the statutory entitlements, then the employer must comply with the contractual obligations. All termination payments (save for severance payment, if any) should be paid within 7 days of termination. Severance payment should be paid within 2 months of receipt of claim from the employee. That said, typically an employer will pay statutory severance pay together with other termination payments. Late payment of wages is a criminal offence.

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8. Are all employees entitled to statutory severance pay on termination?

No. Only employees who have been employed under a continuous contract for not less than 24 months are entitled to statutory severance pay if they are terminated by reason of redundancy or laid off. An employer may also use the employer's contribution element to the MPF or retirement scheme or gratuities (if any) based on the length of service to offset the amount of statutory severance payments payable to the employee under the EO.

9. Do I need to consult the staff union before the redundancy exercise?

There is no statutory obligation for an employer to consult the staff union before the redundancy exercise. However, the employer will need to comply with any contractual obligation to consult.

10. Do I need to notify any government departments?

There is no statutory obligation for an employer to consult or notify the Labour Department before or after the redundancy exercise. An employer however will need to notify the Inland Revenue Department of the termination. Where an employee intends to leave Hong Kong for a period of more than one month after the termination, an employer is required to withhold any payments of money to the employee for a period of one month from the date on which the notification was given to the Inland Revenue Department, or until a "letter of release" is received from the department, whichever is earlier. The employer should also notify the Immigration Department if the employee requires a work visa to work in Hong Kong.

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