

2. Employment Law and Related Ordinances

2A Employment Ordinance

The following provisions of the Employment Ordinance are relevant in the management and execution of a HR function on a day-to-day basis. They are:

- ✦ Terms of Contract of Employment
- ✦ Wages
- ✦ Rest Days, Statutory Holidays and Leave
- ✦ Sickness Allowance
- ✦ Maternity Protection
- ✦ End of Year Payment
- ✦ Employment Termination
- ✦ Employment Protection

2A.1 Overview of Employment Ordinance

The Employment Ordinance covers almost all employees, irrespective of their hours of work but with a few exceptions such as family members who live in the same dwelling as the employer.

Employees covered by the Ordinance are entitled to basic protection under the Ordinance including payment of wages and the granting of statutory holidays, etc.

Employees who are employed under a continuous contract are further entitled to such benefits as rest days, paid annual leave, sickness allowance, severance payment and long service payment, etc. An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract.

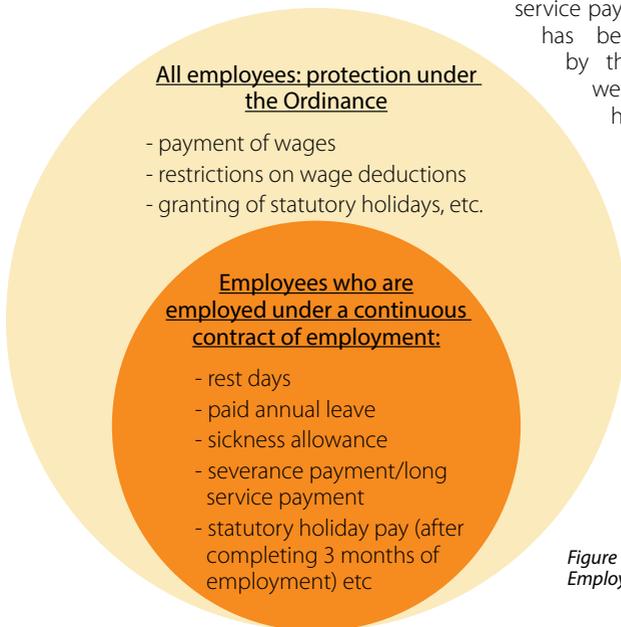


Figure 1: Employees' entitlements under the Employment Ordinance

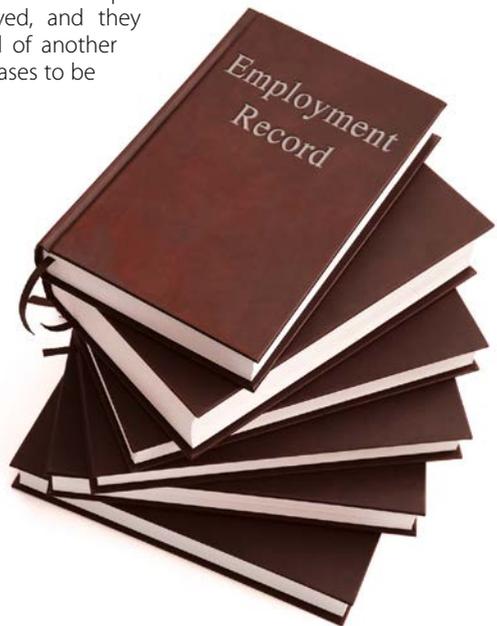
Chapter 1: Application of the Employment Ordinance of "A Concise Guide to the Employment Ordinance" provides more details about who are covered by the Employment Ordinance. <http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/01.pdf>

Every employer must at all times keep a record setting out the wage and employment history of each employee covering the period of his employment during the preceding 12 months.

The record should include the following information of the employee:

- ❖ name and identity card number;
- ❖ date of commencement of employment;
- ❖ job title;
- ❖ wages paid in respect of each wage period;
- ❖ wage period;
- ❖ total number of hours worked in each wage period (if applicable*);
- ❖ periods of annual leave, sick leave, maternity leave and holidays entitled and taken, together with details of payments made in respect of such periods;
- ❖ amount of end of year payment and the period to which it relates (if applicable);
- ❖ period of notice required for termination of contract;
- ❖ date of termination of employment (if applicable).

The wage and employment records must be kept at the employer's place of business or at the place where the employee is employed, and they should also be kept for a period of another six months after the employee ceases to be employed.



2A.2 Terms of contract of employment

A contract of employment is an agreement on the employment conditions made between an employer and an employee. The agreement can be made orally or in writing and it includes both express and implied terms.

Before employment begins, an employer must inform each employee clearly the conditions of employment under which he is to be employed. There are core and non-core terms that could be included in the contract.

a. Core terms of an employment contract are:

- ✦ Contract period
- ✦ Wages
- ✦ Wage period
- ✦ Place of work
- ✦ Working hours (whether meal breaks are paid or not)
- ✦ Work days and rest days (whether rest days are paid or not)
- ✦ Personalized terms, e.g. position
- ✦ Probation period
- ✦ Notice period of termination of employment
- ✦ Leave and holiday entitlement
- ✦ End of year payment (if applicable)
- ✦ Eligibility for other discretionary payments (if applicable)

b. Non-core terms which are optional in an employment contract are:

- ✦ Medical benefits
- ✦ Insurance, e.g. life insurance
- ✦ Entitlement for allowances, e.g. education allowance, etc.

Chapter 2: Contract of Employment of "A Concise Guide to the Employment Ordinance" provides more details about the requirement under Employment Ordinance in relation to employment contract: <http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/02.pdf>

The Labour Department also published the following to give you more guidance on employment contract:

"Notes for preparing an employment contract"

<http://www.labour.gov.hk/eng/public/wcp/NoteSampleEC.pdf>

"Sample Employment Contract"

<http://www.labour.gov.hk/eng/public/wcp/ECsample.doc>

"Using Written Employment Contract (booklet)"

<http://www.labour.gov.hk/eng/public/wcp/WrittenContract.pdf>

2A.3 Wages

a. Definition of wages

Wages mean all remuneration, earnings, allowances, including:

- ❖ Travelling allowances
- ❖ Attendance allowances
- ❖ Commission
- ❖ Overtime pay if it is of a constant nature, or its monthly average over the past 12 months is at or over 20% of the average monthly wages of the employee during the same period
- ❖ Tips and service charges
- ❖ Special “one-off” payments, e.g. leave pay compensation, sign-on bonus
- ❖ Special cash bonus, share option

Wages do not include:

- ❖ the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer
- ❖ any contribution paid by the employer to any retirement scheme
- ❖ any bonus, allowance or commission which is of a gratuitous nature or which is payable only at the discretion of the employer
- ❖ any travelling allowance which is of a non-recurrent nature
- ❖ the value of any travelling concession
- ❖ any gratuity payable on completion or termination of a contract of employment

b. Deductions

Allowable circumstances for deduction from wages are:

- ❖ In the case of absence – deduction has to be proportionate to the absence period
- ❖ In the case of damage or loss of employer’s goods/property/equipment

Other allowable circumstances include deductions for:

- ❖ the recovery of advance or over-payment of wages
- ❖ the recovery of loan made by the employer to the employee
- ❖ retirement scheme/medical benefit scheme
- ❖ the value of food and accommodation supplied by the employer

Deductions, even though allowable by law, are subject to certain limits:

- ✦ the total of all deductions made in any one wage period should not exceed ½ of total wages payable, except for:
 - absence from work
 - outstanding maintenance payment owed by the employee pursuant to the Attachment of Income Order issued by the court.
- ✦ deductions for damage or loss of goods, equipment or property – the sum deducted shall not exceed the equivalent in value of the damage or loss, and shall not exceed \$300, total of such deductions shall not exceed ¼ of total wages payable
- ✦ deductions for the recovery of any advance or over-payment of wages – total of such deductions shall not exceed ¼ of total wages payable

According to the Employment Ordinance, an employer who:

- ✦ illegally deducts employees' wages will be liable to prosecution and, upon conviction, to a fine of HK\$100,000 and imprisonment for 1 year
- ✦ willfully and without reasonable excuse fails to pay wages when they become due will be liable to prosecution and, upon conviction, to a fine of HK\$350,000 and imprisonment for 3 years
- ✦ willfully and without reasonable excuse fails to pay interest on the outstanding amount of wages will be liable to prosecution and, upon conviction, to a fine of HK\$10,000

c. Payment of Wages

Wages shall

- ✦ become due on the expiry of the last day of the wage period. An employer:
 - should pay wages to an employee as soon as practicable but in any case no later than 7 days after the end of the wage period
 - is required to pay interest on the outstanding amount of wages to the employee if he fails to pay wages to the employee within 7 days when it becomes due
- ✦ be paid on a working day directly to an employee at
 - their place of employment or at any office; or
 - other place customarily used by the employer for the purpose of payment of wages; or
 - at any other place mutually agreed
- ✦ be paid, with the consent of an employee
 - by cheque, money order or postal order; or
 - into an account in his name with any bank; or
 - to his duly appointed agent

However, wages shall not be paid:

- ✦ in any place of amusement; or
- ✦ in any place where cash-sweeps, fixed odds betting or pari-mutuel betting is

- organized or conducted; or
- ✦ in any place where intoxicating liquor or any dangerous drug is sold; or
- ✦ in any shop or store for the retail sale of merchandise, except where the employee is employed in such place, shop or store

d. Average Daily Wage

Average Daily Wage is used as a base for calculating the various payments:

- ✦ annual leave pay and its payment in lieu
- ✦ statutory holiday pay
- ✦ sickness allowance
- ✦ maternity leave pay
- ✦ end of year payment
- ✦ wages in lieu of notice

Calculation of Average Daily Wage:

- ✦ This is calculated on the basis of the average daily wages earned by an employee in the 12-month period preceding the specified dates as stipulated by the Employment (Amendment) Ordinance 2007. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.
- ✦ Here are the steps:
 - Based on the type of leave, determine the specified date and the 12-month period for calculating the pay. For example, holiday pay for 1 July should make reference to the 12-month period commencing 1 July last year up to 30 June this year. Another example, holiday pay for 25 December should reference to the 12-month period commencing 1 December last year up to 30 November this year.
 - Identify periods and wages when the employee is paid less than full wages which are to be disregarded
 - Calculation as follows:

Average Daily Wage	=	Total Wages in the 12-month period*	—	Wages during the 12-month* period to be disregarded
		Total number of calendar day in the 12-month period*	—	Number of calendar days in the 12-month* period to be disregarded

* "month" refers to "calendar month"

For more details, refer to the guidebook *"A Concise Guide to the Employment (Amendment) Ordinance 2007"* published by Labour Department, available from their website <http://www.labour.gov.hk> > Publications > Labour Relations > Employment Ordinance. <http://www.labour.gov.hk/eng/public/wcp/GuideEAO2007.pdf>

2A.4 Rest days, statutory holidays and annual leave

Rest day, statutory holiday and annual leave are types of leave that an employee is entitled to during his/her employment.

a. Definition

i. Rest days

A rest day is defined as a continuous period of no less than 24 hours during which an employee is not required to work for his/her employer. Rest days shall be in addition to any statutory holiday, or alternative holiday or substituted holiday, to which an employee is entitled.

ii. Statutory Holidays

12 statutory holidays per year as follows:

- the first day of January
- Lunar New Year's Day or, if that day falls on a Sunday, then the fourth day of Lunar New Year
- the second day of Lunar New Year or, if that day falls on a Sunday, then the fourth day of Lunar New Year
- the third day of Lunar New Year or, if that day falls on a Sunday, then the fourth day of Lunar New Year
- Ching Ming Festival
- Labour Day, being the first day of May
- Tuen Ng Festival
- Hong Kong Special Administrative Region Establishment Day, being the first day of July
- the day following the Chinese Mid-Autumn Festival or, if that day falls on a Sunday, then the second day following that Festival
- National Day, being the first day of October
- Chung Yeung Festival
- Chinese Winter Solstice Festival or Christmas Day, at the option of the employer

Employers can opt for either the Chinese Winter Solstice Festival or the Christmas Day as a statutory holiday and employers must inform their employees of such decision.

iii. Annual leave

Annual leave are paid leave days employees entitled to after having been employed for every 12 months.

b. Eligibility

i. Rest days

Employees employed under a continuous contract, are entitled to not less than one rest day in every period of 7 days.

With consent of the employee, an employer may substitute some other rest day:

- within the same month before the original rest day, or
- within 30 days after the original rest day

ii. Statutory holiday

All employees, irrespective of length of service, are entitled to the 12 listed statutory holidays. An employee who has worked under a continuous contract for not less than three months immediately preceding a statutory holiday is entitled to the statutory holiday with pay.

Statutory holiday falling on a rest day should be taken on the day following the rest day.

iii. Annual leave

Under the statutory provision, an employee's entitlement increases progressively from 7 days to a maximum of 14 days according to their length of service. Some employers may grant more leave days to their employees than the statutory provision, depending on company's policy or employees' position in the company, etc. These additional leave days, if not otherwise specified, will be treated in the same manner as the statutory leave.

Employees with less than 3 months' employment in a leave year are not entitled to any annual leave.

Annual leave entitlement accrued has to be taken in the following 12 months. Annual leave should be granted for an unbroken period (core leave) unless the employee so requests, employer may grant the leave in the following manner:

Leave entitlement is 10 days or less	Maximum 3 days can be granted separately, the balance to be granted consecutively
Leave entitlement is more than 10 days	At least 7 days should be granted consecutively

To facilitate administration, some employers adopted the "Common Leave Year" approach for all their employees. Under such circumstance, if an employee has not been employed for 12 months in the common leave year, such employer should calculate the employee's leave entitlement on a pro-rata basis (rounded up to nearest integer).

c. Rate of pay and payment in lieu

A glance at the rate of pay and payment in lieu under various holiday/leave scenarios:

	Rate of pay	Payment in lieu
Rest day	not required by law, can be determined by employer	not allowed
Statutory holiday (applicable only to those who have having been employed under a continuous contract for not less than 3 months immediately preceding a statutory holiday)	sum equivalent to the average daily wages earned by the employee in the 12-month period preceding the statutory holiday (or first day if more than 1 consecutive day)	not allowed
Statutory Annual leave (leave in accordance with the provision under Employment Ordinance)	sum equivalent to the average daily wages earned by the employee in the 12-month period preceding the annual leave day (or first day if more than 1 consecutive day)	payment in lieu of statutory leave only applies to the portion which is in excess of 10 days (except for termination of employment)
Contractual Annual leave (leave in excess of the provision under Employment Ordinance, if any)	sum equivalent to the average daily wages earned by the employee in the 12-month period preceding the annual leave day or first day if more than 1 consecutive day; if not otherwise stated	payment in lieu is allowed

d. Working on rest days/statutory holidays

i. Working on a rest day

An employer must not compel an employee to work on a rest day except in the event of a breakdown of machinery or plant or in any other unforeseen emergency.

For any rest day on which the employee is required to work, the employer should substitute some other rest day within 30 days after the original rest day. The employer should notify the employee of the arrangement within 48 hours after the employee is required to work.

ii. Working on a statutory holiday

If an employer requires the employee to work on a statutory holiday, the employer should make the following arrangement:

- arrange an alternative holiday 60 days before the statutory holiday and give the employee at least 48 hours' prior notice before the alternative holiday.

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- arrange an alternative holiday within 60 days after the statutory holiday and give the employee at least 48 hours' prior notice before the statutory holiday.
 - if the employer and employee agree, any day within 30 days of the statutory or alternative holiday may be taken by the employee as a substituted holiday.

Employers are advised to keep clear records of the alternative or substituted holidays taken by an employee.

2A.5 Sick leave and sickness allowance

a. Eligibility

Sick leave is one of the basic rights of an employee. If they suffer from genuine sickness and is supported by an appropriate medical certificate, sick leave has to be granted.

b. Paid sickness day

Criteria for paid sickness day:

- ✦ Employee is employed under a continuous contract; and
- ✦ Sick leave taken is not less than 4 consecutive days (except for any day off taken by a female employee for her pregnancy check-ups, post confinement medical treatment or miscarriage); and
- ✦ Sick leave is supported by an appropriate medical certificate issued by either a registered medical practitioner or a registered Chinese medicine practitioner or a registered dentist. The medical certificate should state the number of days and the nature of the sickness/injury that the employee is unfit for work; and
- ✦ the employee has accumulated sufficient number of paid sickness days.

The daily rate of sickness allowance is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the sickness day or the first sickness day if more than 1 consecutive day.

c. Accumulation of sickness days

Paid sickness days can be accumulated:

- ✦ at the rate of two paid sickness days for each completed month of the employee's employment during the first 12 months and 4 paid sickness days for each completed month of employment thereafter.
- ✦ up to a maximum of total 120 days:
 - up to 36 days in Category 1
 - up to 84 days in Category 2

When sickness days taken exceeds the number of paid sickness days remaining in Category 1, the excess paid sickness days shall be deducted from the total number of paid sickness days in Category 2 accumulated by the employee.

d. Record of Sickness Days

An employer should keep the following records:

1. the date of commencement and termination of employment of each employee;
2. all paid sickness days accumulated by each employee, including the number of paid sickness days accumulated in Category 1 and 2;
3. paid sickness days taken by each employee and deducted from the total number of paid sickness days in either categories; and
4. sickness allowance paid and the sickness days in respect of which the sickness allowance was paid.

The record should be signed by the employee within 7 days of his return to work from paid sick leave, and the employee has the right to inspect the record.

For detailed information on sick leave and sickness allowance, please refer to *Chapter 5: Sickness Allowance of "A Concise Guide to the Employment Ordinance"* published by Labour Department <http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/05.pdf>

You may refer to the *"Guide on Human Resource Management Practices Relating to Sick Leave"* published by the Labour Department for more useful guidelines on human resource management practices relating to sick leave:

<http://www.labour.gov.hk/eng/public/wcp/SickLeave.pdf>

2A.6 Maternity protection

a. Eligibility for Maternity Leave

A female employee employed under a continuous contract immediately before the commencement of her maternity leave and having given notice of pregnancy and her intention to take maternity leave to the employer is entitled to the following periods of leave:

- ✦ a continuous period of 10 weeks' maternity leave;
- ✦ if confinement occurs later than the expected date of confinement, a further period equal to the number of days from the day after the expected date of confinement to the actual date of confinement;
- ✦ the employee may enjoy an additional period of leave for not more than 4 weeks on the grounds of illness or disability due to the pregnancy or confinement.

With agreement of her employer, pregnant employees may decide to commence her maternity leave from 2 to 4 weeks before the expected date of confinement. If there is no agreement or if the employee does not decide on the date, the maternity leave will commence 4 weeks before the expected date of confinement.

Maternity leave commences on the date of confinement if it occurs before the scheduled maternity leave. In this case, within 7 days of her confinement the employee should give to her employer notice of the date of confinement.

A sample of *"Maternity Leave Record prescribed form"* is available from the Labour Department website <http://www.labour.gov.hk> > Publications > Labour Relations > Maternity Protection: <http://www.labour.gov.hk/eng/public/wcp/MaternityLeaveRecord.pdf>

b. Payment for maternity leave

An employee is eligible for maternity leave pay for a period of 10 weeks if:

- ❖ She has been employed under a continuous contract for not less than 40 weeks immediately before the commencement of scheduled maternity leave;
- ❖ She has given notice of pregnancy and her intention to take maternity leave to her employer after the pregnancy has been confirmed;
- ❖ She has produced a medical certificate specifying the expected date of confinement if so required by her employer.
- ❖ The daily rate of maternity leave pay is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the first day of the maternity leave. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period. In calculating the average daily wages, an employer has to exclude (i) the periods for which an employee is not paid her wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods.
- ❖ Maternity leave pay should be paid on the normal pay day of the employee.

The Labour Department has published a *“Maternity Protection guidebook”* setting out in simple terms the main provisions of the Employment Ordinance on the part of maternity protection: <http://www.labour.gov.hk/eng/public/wcp/MaternityProtection.pdf>

Chapter 6: Maternity Protection of “A Concise Guide to the Employment Ordinance” provides more details about maternity leave, payment for maternity leave maternity protection and prohibition of assignment of heavy, hazardous or harmful work to pregnant employees: <http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/06.pdf>

c. Latest development on paternity leave

More and more employers have now adopted family-friendly practices to enhance employee engagement. Some of these employers will grant paternity leave to male employees around the time of the birth of their children so that the male employees may attend to their spouse/partner or the new born.

In April 2012, the Civil Service Bureau of the Hong Kong SAR Government introduced an initiative granting male civil servants (under a continuous employment contract for at least 40 weeks) eligibility to apply for paternity leave of 5 working days on full pay upon the birth of each child.

Refer to the Labour Department website <http://www.labour.gov.hk> > Publications > Labour Relations > Good People Management (Publications & Audio-visual Materials) > Family-friendly Employment Practices for an outline of the benefits of introducing paternity leave. http://www.labour.gov.hk/eng/public/wcp/paternity_leave.pdf

The table below shows how leave days should be taken if one overlaps with another:

	Statutory Holidays (SH)	Annual Leave (AL)	Rest Days (RD)	Maternity Leave (ML)	Sick Leave with Sickness Allowance (SL)	Temporary Incapacity (TI)
Statutory Holidays (SH)		AL Alternative SH	RD Alternative SH on the following day	No Alternative Holiday	SH with pay No Alternative Holiday	TI No Alternative Holiday
Annual Leave (AL)	AL Alternative SH		AL Alternative RD	ML Alternative AL	AL No Alternative Holiday if AL commences before SL	AL No Alternative TI
					SL before AL	
Rest Days (RD)	RD Alternative SH on the following day	AL Alternative RD		ML No Alternative RD	RD No Alternative RD	TI with compensation No Alternative RD
Maternity Leave (ML)	No Alternative Holiday/Leave	ML Alternative AL	ML No Alternative RD		ML or SL with Pay	ML or TI with Pay
Sick Leave with Sickness Allowance (SL)	SH with pay No Alternative Holiday	SL Alternative AL if SL commences before AL	SL No Alternative RD	ML or SL with Pay		TI No Alternative Holiday
		AL No Alternative Holiday if AL commences before SL				
Temporary Incapacity (TI)	TI with compensation No Alternative RD	TI Alternative AL	TI No Alternative RD	ML or TI with Pay	TI No Alternative Holiday	

2A.7 End of year payment

End of year payment is defined as payment by a company to its employees which is not statutory. End of year payment is a sum equivalent to the average monthly wages based on a 12-month average unless otherwise stated.

a. Eligibility

Employees who have been employed by a company on a continuous basis are eligible unless otherwise specifically stated in the employment contract.

b. Payment

Payment of end of year payment customarily falls either at the end of the calendar year or during the month of Chinese lunar new year.

Calculation of end of year payment is normally on a pro rata basis and should include the probation period.

For more details about End of Year Payment, refer to the *Chapter 7: End of Year Payment of "A Concise Guide to the Employment Ordinance"*:

<http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/07.pdf>

2A.8 Termination of contract of employment

A contract of employment may be terminated by either the employer or the employee by giving the other party due notice or wages in lieu of notice.

a. Termination of contract of employment by notice or payment in lieu

- ❖ the law specifies a minimum length for notice and payment in lieu of notice under various situations
- ❖ a combination of notice period and payment in lieu is allowable
- ❖ shortening/waiving of notice period is allowable by mutual agreement

b. Termination of employment without notice or payment in lieu

An employer may terminate an employee's employment contract summarily if the employee:

- ❖ willfully disobey a lawful and reasonable order
- ❖ misconduct - such conduct being inconsistent with the due and faithful discharge of their duties
- ❖ is guilty of fraud or dishonesty
- ❖ is habitually neglectful in their duties

5 "valid reasons" for dismissal or variation of the terms of the employment contract:

- ❖ poor conduct of the employee
- ❖ the capability or qualifications of the employee for performing the job, e.g. a mismatch in performance delivery or a mismatch in the academic/professional qualifications claimed
- ❖ redundancy or other genuine operational requirements
- ❖ contravention of the law if employment continues, e.g. expiration of work visa
- ❖ other substantial reasons e.g. an employee has been certified by a registered medical practitioner as unfit to be continued employed in the original capacity

On the other hand, an employee may terminate the employment contract without notice or payment in lieu of notice if the employee:

- ❖ reasonably fears physical danger by violence or disease
- ❖ is subjected to ill-treatment by the employer
- ❖ has been employed for not less than 5 years and is certified by registered medical practitioner or a registered Chinese medicine practitioner as being permanently unfit for the type of work the employee being engaged

c. Statutory restrictions on termination of employment contract

An employer shall not dismiss an employee without valid reasons.

An employer dismissing an employee under the following circumstances is liable to prosecution and, upon conviction, to a fine of \$100,000:

Maternity	An employer shall not dismiss a female employee who has been confirmed pregnant and has served a notice of pregnancy.
Paid Sick Leave	An employer shall not dismiss an employee whilst the employee is on paid sick leave.
Giving evidence or information to the authorities	An employer shall not dismiss an employee by reason of his giving of evidence or information in any proceedings or inquiry in connection with the enforcement of the Employment Ordinance, work accidents or breach of work safety legislation.
Trade Union Activities	An employer shall not dismiss an employee for trade union membership and activities.
Injury at Work	An employer shall not dismiss an injured employee before having entered into an agreement with the employee for employee's compensation or before the issue of a certificate of assessment.

d. Termination payments

Payments in relation to termination usually include:

- ✦ Wages
- ✦ Payment in lieu of notice
- ✦ Annual leave payment (accumulated and pro-rata leaves)
- ✦ Pro-rata end of year payment (if applicable)
- ✦ Severance or long service payment (where appropriate)

e. Severance payment and long service payment

The Employment Ordinance provides that an employee is eligible to severance payment/long service payment subject to specified conditions:

- ✦ Severance Payment:
 - not less than 24 months under a continuous contract; and
 - the employee is dismissed by reason of redundancy, or employment contract of a fixed term expires without being renewed by reason of redundancy or the employee is laid off
- ✦ Long Service Payment:
 - not less than 5 years under a continuous contract; and
 - any of the following conditions:
 - the employee is dismissed but he is not summarily dismissed due to his serious misconduct or his dismissal is not by reason of redundancy; or
 - employment contract of a fixed terms expires without being renewed; or
 - the employee dies; or
 - the employee resigns on ground of ill health; or
 - the employee, aged 65 or above, resigns on ground of old age.

To be eligible for severance payment under redundancy or lay-off, the employee must have been employed under a continuous contract for 24 months or more.

Severance payment should be paid to employees not later than 2 months from the receipt of such notice. And failure to pay without reasonable excuse is liable to prosecution and, upon conviction, to a fine of \$50,000.

Long service payment should be paid to employees within 7 days after the date of termination of employment contract. And failure to pay without reasonable excuse is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for 3 years.

While on the subject, we shall elaborate on the meaning and entitlement to severance payment due to redundancy or lay-off and long service payment.

i. Meaning of redundancy

An employee is considered redundant if:

- the employer closes or intends to close the business
- the employer relocates the business operations
- when the business requirements for employees to carry out a particular type of work no longer exists

ii. Meaning of lay-off

An employee is considered laid-off if they are not provided with work or are not paid for:

- More than half of the total number of normal working days in any 4 consecutive weeks
- More than one-third of the total number of working days in any 26 consecutive weeks

iii. Meaning of long service

Any employee who has been employed, under a continuous contract with the same employer for not less than 5 years.

The following formula applies to the calculation of both severance payment and long service payment:

Monthly rated employee	(last month wages X 2/3) *	×	reckonable years of service [^]
Daily or piece rated employee	any 18 days' wages chosen by the employee out of his last 30 normal working days *	×	reckonable years of service [^]

[^] Service of an incomplete year should be calculated on a pro rata basis.

* The sum should not exceed 2/3 of \$22,500 (i.e. \$15,000). An employee may also elect to use his average wages in the last 12 months for the calculation.

You may refer to *Chapter 10: Severance Payment and Long Service Payment of "A Concise Guide to the Employment Ordinance"*.

<http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/10.pdf> for meaning of redundancy/lay-off, amount and payment of severance/long service payment.

2A.9 Employment protection

a. Sickness

An employer shall not dismiss an employee whilst the employee is on paid sick leave, except in cases of summary dismissal due to the employee's serious misconduct.

b. Maternity

An employer is prohibited from dismissing a pregnant employee from the date on which she is confirmed pregnant by a medical certificate to the date on which she is due to return to work upon the expiry of her maternity leave if she has been employed under a continuous contract and she has served a notice of pregnancy to her employer. The Employment Ordinance also protects pregnant employees from being assigned with heavy, hazardous or harmful work.

c. Employee sustained an injury giving rise to temporary or permanent incapacity

An employer shall not terminate, or give notice to terminate, the contract of service of an employee:

- ✦ where the employee sustained an injury giving rise to temporary incapacity not exceeding 3 days before the period of temporary incapacity has expired and the compensation has been paid
- ✦ where the employee sustained an injury giving rise to temporary incapacity exceeding 3 days or permanent incapacity:
 - before the Commissioner for Labour has issued the Certificate of Compensation Assessment; or
 - before the employer agrees with the injured employee as to the compensation payable under the Ordinance; or
 - before an Employees' Compensation Assessment Board has issued the Certificate of Assessment or the Certificate of Review of Assessment, whichever occurs first.



d. Unreasonable variation of the terms of employment contract, unreasonable and unlawful dismissal

An employee may claim for remedies against an employer under the following situations:

Situation	Condition	Remedies
Unreasonable Dismissal	<ol style="list-style-type: none"> 1. the employee has been employed under a continuous contract for a period of not less than 24 months; and 2. the employee is dismissed other than for a valid reason as specified in the Employment Ordinance 	<ul style="list-style-type: none"> • An order for reinstatement or re-engagement; or • An award of terminal payments
Unreasonable and Unlawful Dismissal	<ol style="list-style-type: none"> 1. the employee is dismissed other than for a valid reason as specified in the Employment Ordinance; and 2. the dismissal is in contravention of the law 	<ul style="list-style-type: none"> • An order for reinstatement or re-engagement; or • An award of terminal payments and/or award of compensation not exceeding \$150,000
Unreasonable Variation of the Terms of the Employment Contract	<ol style="list-style-type: none"> 1. the employee has been employed under a continuous contract; 2. the terms of the employment contract are varied without the employee's consent; 3. the employment contract does not contain an express term which allows such a variation; and 4. the terms of the employment contract are varied other than for a valid reason as specified in the Ordinance 	<ul style="list-style-type: none"> • An order for reinstatement or re-engagement; or • An award of terminal payments

e. Right of an employee in participating in trade unions

Every employee shall have the following rights to:

- ❖ be a member or an officer of a trade union
- ❖ take part in the activities of the trade union at any appropriate time*, if the employee is a member or an officer of a trade union
- ❖ associate with other persons for the purpose of forming or applying for the registration of a trade union

* appropriate time means outside working hours or during working hours by arrangement and with the consent of the employer

An employer shall not:

- ❖ prevent or deter an employee from exercising any of the above rights;
- ❖ dismiss, penalise or discriminate against an employee for exercising the above rights;
- ❖ make it a condition of employment that an employee must not exercise the above rights.