
3D. Employment Offers

3D.1 Legal considerations and common pitfalls

Before making an offer, you will have to consider the following:

- ✦ employability – is the person eligible for employment?
- ✦ is the offer made on the basis of equal opportunities?
- ✦ what should be included in the employment contract?

a. Employability

The employability of an employee should be checked before offering employment.

As a general rule, any person, other than those who have the right of abode or the right to land in Hong Kong (i.e. HKID card), must obtain an employment visa before coming to Hong Kong for the purpose of taking up employment. Other restrictions include the following:

i. The Employment of Children Regulations

Under the Employment of Children Regulations, it is stipulated that:

- Children aged under 15 are prohibited from working in all industrial undertakings.
- Children aged 13 and 14 may be employed in non-industrial establishments, subject to the condition that they attend full-time schooling if they have not yet completed Form III of secondary education and to other conditions which aim at protecting their safety, health and welfare.
- Children aged under 13 are prohibited from taking up employment. However, for the purposes of art and training, the Commissioner for Labour may grant special permission for children to be employed as entertainers, subject to certain stringent conditions as the Commissioner may specify.

The Employment of Children Regulations do not apply in relation to children who are registered apprentices under the Apprenticeship Ordinance.

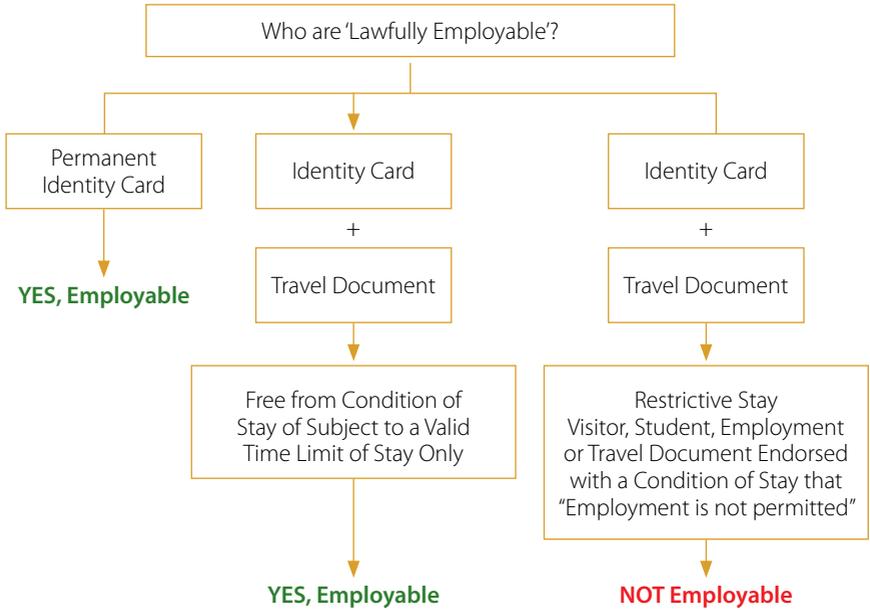
ii. Apprenticeship Scheme

Under the Apprenticeship Scheme, apprentices can enter into a contract of employment within the 45 designated trades.

iii. People without the right of abode or the right to land in Hong Kong

If the job applicant is not holding a Hong Kong permanent identity card, the law requires an employer to inspect the job applicant's valid travel document in order to ensure the job applicant is lawfully employable before entering into a contract of employment.

Persons permitted to remain on as visitor/student, with employment conditions or persons whose travel documents are stamped with a condition of stay of "Employment is not permitted", are not lawfully employable without first obtaining approval from the Director of Immigration.



Non-local fresh graduates who wish to apply to stay and work in the HKSAR are not required to secure an offer of employment upon application if they submit applications under the Immigration Arrangements for Non-local Graduates (IANG) to the Immigration Department within six months after the date of their graduation. Persons admitted under the IANG may be granted 12 months' stay on time limitation without any other conditions of stay provided that normal immigration requirements are met.

Participants of the Working Holiday Scheme are not permitted to engage in permanent employment and should not work for the same employer for more than six months (for participants from France and the Republic of Korea) or three months (for participants from Australia, Canada, Germany, Ireland, Japan and New Zealand) during their stay in Hong Kong.

For more information relating to immigration guidelines, you may refer to the Immigration Department website <http://www.immd.gov.hk> > Public Services > Hong Kong Visas > Immigration Guidelines for Entry to the Hong Kong Special Administrative Region of the People's Republic of China.

And for further information on who are legal workers, please visit the Immigration Department website <http://www.immd.gov.hk> > FAQs > Visit/Transit > FAQs > Q7. Who are lawfully employable > Don't Employ Illegal Workers <http://www.immd.gov.hk/en/faq/visit-transit/dont-employ-illegal.html>

Employers are liable to penalties of \$350,000 and three years' imprisonment if they employ people not lawfully employable.

b. Equal Opportunities

Equal Opportunity is about giving people a fair chance to prove what they are capable of. A selection decision should be based upon an individual's merit, but not their sex, marital/family status, whether or not they are disabled/pregnant.

To treat a person less favourably than another person in comparable circumstances on the ground of their sex, marital/family status, disability or pregnancy is considered direct discrimination. Indirect discrimination includes not imposing same requirement/condition on all people, unjustifiable requirement for the job, etc. An employer has to be cautious about these discrimination issues when making the selection decision.

Refer to previous section 2E. Equal Opportunities Legislations for more details.

c. The employment contract

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.

Whenever there is any change in the conditions of service, whether these have merely been proposed to an employee or are actually in force, the employer shall inform him in an intelligible manner. If such change to conditions of service is in writing or upon the written request from the employee, a copy of the written amendment must be provided to the employee.

Refer to previous section 2A.2 Terms of contract for more information.

3D.2 **Terms of employment – permanent employee/part time employee/temporary employee/contractor/self-employed person**

The Employment Ordinance (EO) applies to employers and their employees engaged under a contract of employment. The EO does not differentiate between “temporary”, “part-time”, “substituted”, “permanent” and “full-time” employees regardless how they are termed by the employer. All employees covered by the EO, irrespective of their designated job titles or working hours, are entitled to statutory rights and protection such as wage payment, restriction on deductions from wages and granting of statutory holidays, etc.

To avoid misunderstanding or dispute and to safeguard their rights and benefits, the relevant persons should understand clearly their mode of cooperation according to their intention and clarify their identities, whether they are engaged as an employee or a contractor/self-employed person, before entering into a contract.

In differentiating an “employee” from a “contractor or self-employed person”, all relevant factors of the case should be taken into account. There is no one single conclusive test to distinguish these two identities. Moreover, there is no hard and fast rule as to how important a particular factor should be. The common important factors include:

- ✦ control over work procedures, working time and method
- ✦ ownership and provision of work equipment, tools and materials

-
- ✦ whether the person is carrying on business on his own account with investment and management responsibilities
 - ✦ whether the person is properly regarded as part of the employer's organisation
 - ✦ whether the person is free to hire helpers to assist in the work
 - ✦ bearing of financial risk over business (e.g. any prospect of profit or risk of loss)
 - ✦ responsibilities in insurance and tax
 - ✦ traditional structure and practices of the trade or profession concerned
 - ✦ other factors that the court considers as relevant

3D.3 Orientation

a. What is it? and what are the benefits?

It is the introduction of new employees to their jobs, their colleagues and the organization.

- ✦ Orientation can help achieve significant cost savings by cultivating corporate culture and values to new employees and fostering positive staff attitudes, job satisfaction and a sense of commitment at the start of the employment relationship. Establish clear standards that help reduce disputes and limit liability
- ✦ Promote consistent management
- ✦ Inform new employees of the company's policies
- ✦ Demonstrate a commitment to equal treatment of personnel
- ✦ Provide protection from claims of discrimination and sexual harassment

b. How is orientation to be conducted? By who and when?

i. Formal company-wide orientation

- is essential to provide information about the organization's business, objectives, structure, corporate culture and values, policies, staff benefits and office operations
- is often scheduled on a monthly or quarterly basis, depends on the recruitment/onboarding status of the organization, to accommodate a group of new employees
- include presentations by members of senior management and functional/department heads, public relations materials such as corporate videos, and sharing sessions by recently joined employees about their experiences working in the organization

ii. Informal orientation

- can be a more relaxed and personalized introduction to the colleagues, the job and the organization upon the new employee joining the organization
- use mentors or sponsors who act as advisors and role models for the new employees

iii. Job-specific orientation

- typically begins as soon as the new employee starts a new job and generally takes the form of one-on-one training with a co-worker or supervisor

iv. Follow-up

- essential part of a well-planned orientation program
- in a form of interview/meeting with the employee's supervisor and a representative of the HR department to ensure that any unanswered questions and misunderstandings are clarified.

Information provided in all types of orientation will help new employees rapidly become a productive member of the organization.

3D.4 Employee handbook/manual

An employee handbook/manual is a communication tool between employer and employees. It sets forth the company's expectations for their employees, and describes what the employees can expect from the company, which usually covers:

- ✦ Core principles and values of the company
- ✦ Corporate governance
- ✦ Code of conduct
- ✦ Typhoon & rainstorm arrangement
- ✦ Employee communication
- ✦ Employee wellness, health, safety and environment
- ✦ HR policies & guidelines (eg. work hours, use of employee facilities, etc)
- ✦ Salaries and benefits
- ✦ Dress code
- ✦ Performance management

It is important that the employee handbook/manual is updated and kept current especially laws as well as company benefits might change. However, regular update of employee handbook/manual could be costly. Also, if it forms part of the terms and conditions of employment, it might become a legal document at court when an employee dispute arises.

