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Does the Law Matter? Part II

# The New Hire

Learn how you can avoid pitfalls and prevent problems by navigating through key areas of employment law in Hong Kong and Singapore

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# A Guide For Startups and Small



## Businesses

Although employment law can appear complex and overwhelming for any startup or business which decides to take on employees, you can avoid pitfalls and prevent problems from arising by getting a few key areas right from the start.

Ready to hire? Read up on these 11 things to think about before you take on your first employee.

*Read on.*

# Keep Up With Employment Legislation in Your Jurisdiction



pension issues. What's more, these laws can and do often change. It is important to get to grips with these laws before you take on your first employee.

## 13 Employment-Related Laws in Hong Kong

- Employment Ordinance (Cap 57)
- Minimum Wage Ordinance (Cap 608)
- Mandatory Provident Fund Schemes Ordinance (Cap 485)
- Occupational Retirement Scheme Ordinance (Cap 426)
- Sex Discrimination Ordinance (Cap 480)
- Disability Discrimination Ordinance (Cap 487)
- Family Status Discrimination Ordinance (Cap 527)
- Race Discrimination Ordinance (Cap 602)
- Occupational Safety & Health Ordinance (Cap 201)
- Employees' Compensation Ordinance (Cap 509)
- Prevention of Bribery Ordinance (Cap 201)
- Personal Data (Privacy) Ordinance (Cap 486)
- Inland Revenue Ordinance (Cap 112)

## Entering into an Employment Contract



Most businesses employ staff at some stage. If your business employs people, or if you're thinking about employing people, you should protect your business by setting out exactly what you expect from your employee and how your employment relationship might come to an end.

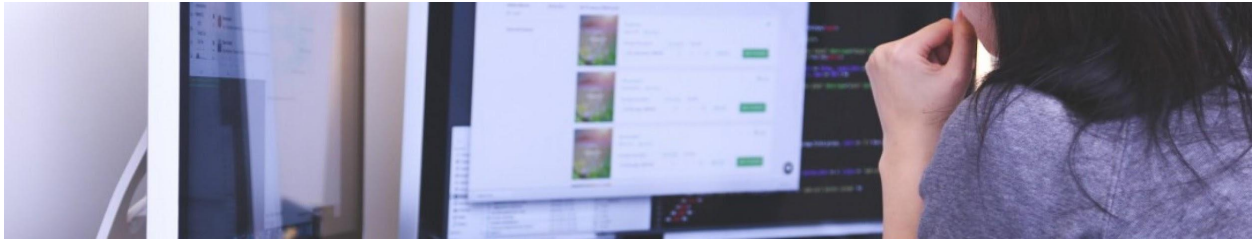
#### Important Clauses in an *Employment Contract*

- Any period of probation and notice to be given to abide by the law as well as to protect the company's interests
- Clauses that structure employee benefits to be an employer of choice
- How much notice is to be given to terminate the agreement and whether to issue annual leave
- How confidential and copyrighted information should be protected
- How to manage employee inventions
- Whether they can follow outside business interests and how to manage potential conflict of interests
- What restrictions you want to include? after termination, such as non-competition and non-solicitation clauses

**Zegal** has assisted numerous businesses in building *Employment Contracts*. [HYPERLINK "https://dragonlaw.io/register/?utm\\_source=ebook&utm\\_medium=offline&utm\\_campaign=thenewbirehk"](https://dragonlaw.io/register/?utm_source=ebook&utm_medium=offline&utm_campaign=thenewbirehk) Our [easy-to-use Document Builder](#) will take you step-by-step through the required clauses for a senior or junior member of staff.

Some matters to include in an [Employment Contract](#) seem fairly straightforward, such as the hours an employee will work, their holiday entitlement, and their pay. But will they receive overtime pay or a bonus? Do you want there to be a period of probation during which you can monitor the new employee's performance and, if necessary, dismiss them from the role? How can the employment relationship come to an end? Can the employee immediately work for a competitor? Do they have a duty to protect your confidential information?

# Are you Hiring an Independent



## Contractor or an Employee?

Certain entitlements, such as medical insurance, annual leave, and housing allowance, are provided to individuals who are classified as employees. These benefits account for a significant part of an employee's total remuneration package. To save costs, many businesses choose to hire workers with the status of "independent contractors," "consultants," or "freelancers" rather than "employees". Consultants, freelancers, or independent contractors are not entitled to these statutory benefits.

However, if a dispute arises, it makes no difference what title you have chosen to

**A company can face significant penalties and liabilities if it has failed to meet its obligations as an employer when it is later found that a consultant is in reality an employee.**

If you hire an independent contractor, consultant, or freelancer, you should enter into a [HYPERLINK "https://dragonlaw.io/hkg/hkg/onepager/consultancy-agreement/?utm\\_source=ebook&utm\\_medium=offline&utm\\_campaign=thenewhirehk"](https://dragonlaw.io/hkg/hkg/onepager/consultancy-agreement/?utm_source=ebook&utm_medium=offline&utm_campaign=thenewhirehk) *Consultancy Agreement* with this individual. This agreement is especially useful for small businesses or startups that will most likely outsource work or hire contractors or freelancers. The easy-to-use Dragon Law Document Builder can assist you to create your *Consultancy Agreement*.

give an individual in a contract. So, for example, just because you have provided a new hire with the title of "Consultant" or "Freelancer" rather than "Employee" does

not necessarily mean this individual is a consultant or a freelancer. In the eyes of the law, the individual may still be an employee.

#### **Distinguishing factors of an "Employee"**

- Control over work procedures, times, and method
- Ownership and provision of work tools and materials
- Whether the individual is properly regarded as part of the employer's organisation
- Responsibilities regarding insurance and tax
- Whether the individual is carrying on business on his own account with investment and management risk
- Other factors that the court considers relevant

The law looks into the substance of the relationship to determine whether that individual is a true consultant or, in reality, an employee. Unfortunately, there is no one single conclusive test to distinguish between an employee and a consultant, and the final interpretation will rest with the court in the case of a dispute. If the required tests are not met, the independent contractor, freelancer, or consultant will be considered legally to be an employee and will be eligible for all the statutory benefits afforded under the law. A company can face significant penalties and liabilities if it has failed to meet its obligations as an employer when it is later found that a consultant is in reality an employee. The company will also be required to pay back what is legitimately owed to the employee. Therefore it is imperative to know the difference and classify properly!



# Use a Confidentiality Agreement /



## Non-disclosure Agreement

Your main business asset may be a unique idea, a formula, a technique, a process, an invention, or a novel business model. Any of these may be the reason why your business will succeed. Protecting this confidential information should be a priority for your business.

Often, startups and small businesses overlook this risk by failing to enter into a [Confidentiality/Non-disclosure Agreement](#) with their employees or independent contractors. As a result, confidential information can be stolen and, in the most unfortunate case, end up in the hands of a competitor.

*A Confidentiality Agreement, or Non-disclosure Agreement, helps protect certain types of confidential information that is sensitive to your business but is necessary to be disclosed to employees or independent contractors. You will therefore have some peace of mind knowing that the information shared with these people cannot be repeated, used, or shared by them with third parties.*

The Confidentiality Agreement / [HYPERLINK](#)

["https://dragonlaw.io/hkg/hkg/onepager/confidentiality-agreement/index.html?utm\\_source=ebook&utm\\_medium=offline&utm\\_campaign=thenewhirehk"](https://dragonlaw.io/hkg/hkg/onepager/confidentiality-agreement/index.html?utm_source=ebook&utm_medium=offline&utm_campaign=thenewhirehk)Non-disclosure Agreement, or the confidentiality provision in an [HYPERLINK](#) ["https://dragonlaw.io/hkg/hkg/onepager/employment-contract-junior-&-senior/?utm\\_source=ebook&utm\\_medium=offline&utm\\_campaign=thenewhirehk"](https://dragonlaw.io/hkg/hkg/onepager/employment-contract-junior-&-senior/?utm_source=ebook&utm_medium=offline&utm_campaign=thenewhirehk)Employment Contract, should state the types of information your business considers to be confidential or proprietary information, such as: customer databases, supplier lists, inventions, software codes, and product specifications.

The agreement or confidentiality provision should also list the circumstances under which the confidential or proprietary information can be used and should prohibit any other use or disclosure of such information.

In the absence of a separate *Confidentiality Agreement* or *Non-disclosure Agreement*, it is common for an [Employment Contract](#) or [Consultancy Agreement](#) to include a confidentiality provision with respect to the confidential or sensitive information of your business.

# Plan for the End: Consider



## Post-termination Restrictions

Post-termination restrictions are contractual terms in the [Employment Contract](#) that restrict an employee's activities after they finish working for your company. Usually, the purpose of these restrictions is to prevent your employee from immediately taking up work with a direct competitor, dealing with your customers or suppliers, or poaching your staff.

Post-termination restrictions are common in Hong Kong, especially for senior employees or staff with valuable connections or relationships, or access to confidential information.

Although in general the law views such restrictions as contrary to public policy, certain restrictions are enforceable if they are reasonable and if you can show that they are necessary to protect the trade connections or the goodwill of your company, your trade secrets and other confidential information, or the stability of your company's workforce.

You should first consider whether such a post-termination restriction clause is necessary for your business and, if so, for which employees. Since the scope of the clause must be reasonable, it is useful to learn exactly what "reasonable" means in the context of the law. For example, what is the geographical limit of the clause? How long will the employee be restricted from taking up employment with a competitor or starting his own business in the same industry? There are many factors that the law will consider to determine whether your post-termination restriction clause is "reasonable".

# Understanding and Dealing with



## Discrimination in the Workplace

Discrimination happens when decisions are based on differences, whether intentional or otherwise, direct or indirect. It can be on a number of grounds. In Hong Kong, employment discrimination is illegal when an employer makes a decision impacting the terms and conditions of employment – hiring, promotion, demotion, termination – on the basis of a protected characteristic, which include:

- race
- gender
- marital status
- pregnancy
- disability
- family status or responsibilities

To ensure equal opportunities, the law requires you to hire based on an individual's knowledge, aptitude, and abilities.

Most people think that it is only minorities in one of the above-mentioned protected classes that are discriminated against at work. However, inclusion is not just restricted to minorities. In fact 58% of all complaints received by the Equal Opportunities Commission in Hong Kong in 2013-2014 were made by general

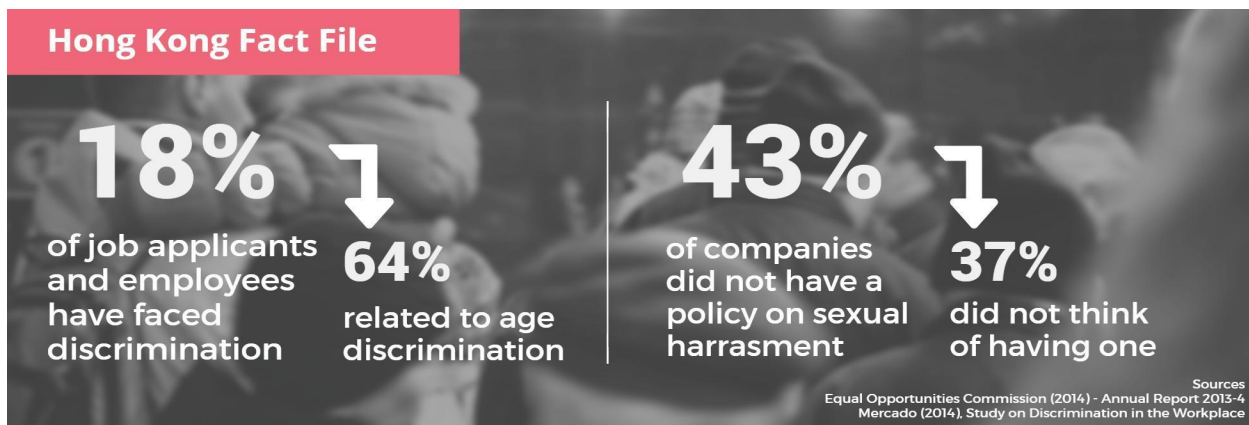
employees under the Disability Discrimination Ordinance about issues concerning sick leave and obligations to return to work.

### Examples of direct discrimination

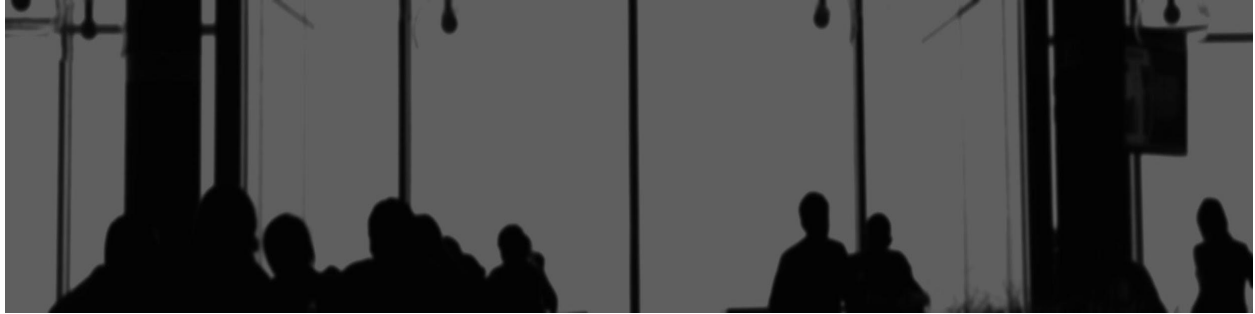
- Refusing to hire an applicant because the applicant has diabetes
- Not promoting an employee because the employee is pregnant

### Examples of indirect discrimination

An employer treats women and men in the same way by imposing a height requirement (e.g., job applicants must be at least 190cm tall). The requirement disadvantages women (which is sex discrimination) as a smaller proportion of women than men would be able to satisfy this requirement.



# Provide an Employment Policy Handbook



Many entrepreneurs have said that managing employees is by far the most challenging task when running their own business.

Although not required by law, employee handbooks serve as effective, efficient, and essential tools to communicate information to employees, regardless of the size of your company.

Startups and small businesses are not concerned with creating robust employment policies when the number of staff employed by them is small. However as your company grows, an *Employment Policy Handbook* can help you manage your employees by:

- ensuring that employees are aware of the company's mission, culture, and goals;
- defining acceptable conduct in the workplace; and
- setting out standardised procedures for dealing with employee-related matters as they arise.

Employers may prefer an easy communication channel - verbal communication. However, think about this: if every employee in your company approaches you and asks the same question, this becomes time-consuming. In addition you cannot be expected to give the same explanation all the time, and there may be inconsistencies in your answers.

### What's in an Employment Policy Handbook

- Company's mission and philosophy
- Working hours
- Holidays
- Leave entitlements
- Compensation and benefits
- Adverse weather arrangements
- Safety policies
- Evaluation procedures
- Disciplinary procedures
- Equal opportunities and procedures to report complaints
- Notice periods
- Use of the internet at work
- How to deal with confidential information
- Data security policies
- Expenses repayment procedure

Disagreements and misunderstandings can be avoided if policies and procedures exist. An *Employment Policy Handbook* can offer proof that a company has clearly communicated its policies to its employees. In some cases, the fact that an employer has put in place a policy to guide workplace conduct that is in line with statutory requirements can assist the employer in defending any legal actions against it. For example, policies setting out workplace health and safety requirements or a complaint procedure relating to anti-discrimination or sexual harassment will assist an employer to establish that it has taken reasonable steps to comply with local laws.

**Zegal** can assist you in building your own [Employment Policy Handbook](#) and will help you ensure your policies comply with local laws.

[Read more.](#)

# How to Dismiss an Employee Correctly



If an employee is not meeting expectations or completing a corrective action plan, do not be afraid to terminate the employee's employment. If your performance evaluations have been done properly, it can be a constructive parting for both you and the employee. However, before you decide to terminate an employee's employment, you should carefully consider the decision and the circumstances. Make sure your facts are accurate and that you can support your decision with documentation.

Next, you should ensure the termination complies with the relevant employment legislation in your jurisdiction. For example, are you required to provide notice when terminating an employee, and if you do not wish to provide notice, do you know the amount of wages to be paid in lieu of notice? Does this termination fall under a situation where you may terminate the employment without notice or payment of wages in lieu of notice?

Remember, when employees leave, it is important for you to focus on protecting your assets, including protecting your confidential information and intellectual property. These issues must be addressed in an [Employment Contract](#) or separately in a *Confidentiality Agreement* or *Non-disclosure Agreement*.

Employees who use company devices to access sensitive company information should either have the device returned, or, if the device is personally owned, such company information should be wiped in accordance with local legislation or local government guidelines. If the employee has access to or managed your social media accounts, ensure that all passwords are changed. Such policies should be



included in your *Employee Policy Handbook*. While it may sound harsh, it is often best to plan for the end right at the beginning.

# Make Sure Your Employees Have the Correct Visa



Before you hire, you should check if the candidate has the right to work in your jurisdiction. Foreign nationals will need a visa before living or working in Hong Kong. You should check that you make the correct visa application for the proposed employee and that the employee does not start working for your company in any capacity until the visa has been obtained.

Hong Kong offers various types of visas for foreign nationals who wish to work in these countries. There are eligibility criteria which determine which visa the foreign national should apply for. Although the visa application for each particular visa may appear straightforward, there are various requirements that need to be complied with when making the application and, more often than not, the Hong Kong immigration department will usually ask for further documents or explanations during the application process.

Through its large network of professionals, **Zegal** [can put you in touch with professional immigration lawyers or agents](#) to help you determine the type of visa that the foreign national should apply for and can assist you in the application procedure. Such lawyers or agents can also assist the preparation of visa applications for family members of the prospective employee should they choose to bring their families to Hong Kong.

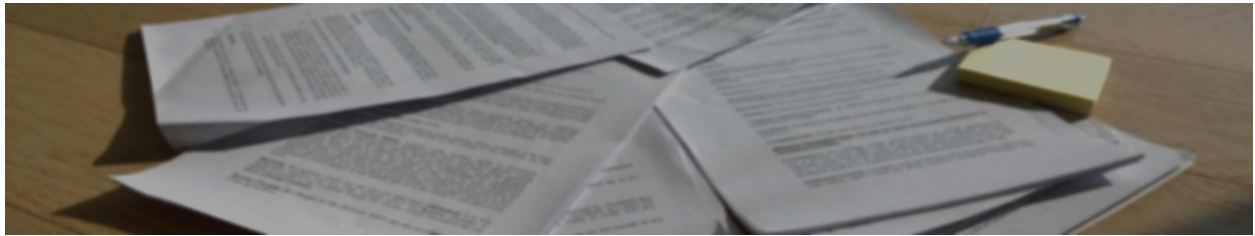
# Ensure Compliance with Local Tax Laws



Many startups and businesses forget that tax obligations commence immediately when you hire your first employee, no matter whether the employee works on the premises and whether he or she works within your jurisdiction or not.

There is a range of tax forms that need to be submitted to the Inland Revenue Department in Hong Kong upon the commencement or termination of employment. Furthermore, different forms will need to be submitted depending on each employee's individual circumstances during their term of employment.

# Ensure Compliance with Local Privacy



## and Data Collection Laws

Familiarise yourself with the laws that are set out in the Personal Data (Privacy) Ordinance (Cap 486). The law imposes obligations on employers with respect to personal information obtained from candidates during the recruitment process and obtained from employees during the period of their employment. Personal information or personal data means any data relating directly or indirectly to a living individual, from which it is possible and practical to ascertain the identity of the individual.

For example, an identity card number and fingerprints, through which an individual can be identified, would be classified as personal data. Alternatively, if it's possible to identify an individual through a combination of data such as with a telephone number, address, or sex and age, then these would also constitute as personal data. As matter of good practice, companies are encouraged to supply candidates and employees with a *Personal Information Collection Statement*, explaining the purpose for which their personal data is collected and how it will be used.

In Hong Kong, an employer is not allowed to request personal information from a candidate if the identity of the employer or recruiting agency is not made clear in the job advertisement. Therefore, be careful with blind advertisement recruitment methods that do not disclose the employer's identity.

Furthermore, the law requires employers to explicitly inform candidates and employees if their personal data will be transferred to third parties and the reasons for this. Unless it is obvious, an employer must also inform candidates and

employees whether it is obligatory or voluntary to supply their personal data. Once employment has commenced, the employer must explain to its employees their right to access and copy their personal information and their right to correct any inaccurate data. There are also legal requirements with respect to the retention period of an employee's personal data and obligations on the employer to maintain security over the employee's personal data.

# Sample of Employment Documents



**Zegal** has 100+ legal documents that make it easy, fast, and affordable for businesses of all sizes to access law in Asia. Below is a sampling of documents related to hiring that are offered for Hong Kong and Singapore. [Sign up for a free trial today.](#)

## [Employment Contract](#)

A contract of employment for an employee of your business.

## [Non-executive Director's Letter of Appointment](#)

A letter appointing a company director who is not involved in the day-to-day management of the company.

## [Option to Purchase Shares](#)

An option to buy a pre-determined number of shares at a predetermined price.

## [Letter Offering Internship](#)

An offer letter setting out the basic terms of an internship.

## [Share Vesting Agreement](#)

A contract granting an individual or company the right to purchase shares.

## [Policy on Use of Copyrighted Material](#)

A document that sets out your company's policy on copyright protection and informs all employees of their relevant legal obligations under the Hong Kong Copyright Ordinance.

## [Director's Service Agreement](#)

A binding employment agreement between your company and a director.

## [Health and Safety Policy](#)

A policy that deals with workplace health and safety in your business.

## [Social Media Policy](#)

A policy that deals with the use of social media by your employees both during and outside of work.

[Disciplinary Policy and Procedure](#)

A disciplinary policy and procedure for your employees.

[Data Protection Policy](#)

A data protection and data security policy for your employees.

[Offer of Employment Letter](#)

A letter offering a job to a potential employee.

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