

Hong Kong: Embracing The Best of the East, and The Best of the West

Insights

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In continuation of my article on Globalizing in Hong Kong in December 2013, let's discuss some of the practical implications and recent developments in Hong Kong's employment arena. Hong Kong is not just a pivotal financial center of Greater Asia with soaring towers and enigmatic business opportunities; it also embraces traditions and honors family-oriented values.

New Law for Paternity Leave

In late February 2014, the Hong Kong government stated it will seriously review and consider an Amendment to Employment Ordinance [EO] Bill 2014 ["the Bill"] regarding statutory paternity leave. The EO provides mandatory employment rights, obligations, and protections for employees and employers which apply to the formation of employment contracts, wages, benefits, leaves of absence, termination of employment, entitlements upon termination, employment records and other related employer and employee matters.

Be mindful that any employment contract attempting to contract outside the scope of the EO will be deemed null and void. The Bill proposes that working fathers be entitled to three days paid statutory paternity leave and mirrors certain arrangements provided for in maternity leave under the EO.

In summary, the Bill proposes that male employees be entitled to and provided:

- unpaid paternity leave if employed under a continuous employment contract for at least four weeks with more than 18 working hours per week; and
- paid paternity leave if employed under a continuous employment contract for at least 40 weeks with more than 18 working hours per week, at the same level of allowance as maternity pay (e.g. 80% of the daily average of wages earned by the employee during the 12 months preceding the commencement of leave).

To be eligible for paternity leave, the father of a newborn, or a father-to-be, must give advance notice to his employer of his intention to take paternity leave. The Bill was introduced to the Legislative Council on March 28, 2014, which may provide a timeframe of how and when it is expected to come into full force and effect. Once enacted, it is expected that male employees will be able to take the leave at any time during the period of four weeks prior to the expected birth and up to ten weeks after the actual birth.

Enhancing Flexible Family Friendly Work

Although there is no provision under the EO or common law that provides for an employee's right to work flexibly, or flexible hours, an employer who ignores a request for flexible working or simply dismiss these requests is taking a legal risk. This risk is inherent in the public policy reasons for Hong Kong's discrimination ordinances which prohibit any practices that disproportionately and prejudicially effects groups of persons based on a "protected attribute." In Hong Kong, protected attributes include: race, sex/gender, pregnancy, disability, marital status, and family status. Under these discrimination ordinances and the public policy reasons supporting them, if an employee or employees can show a condition of employment or requirement imposed by the employer that has greater effect on a category of persons under a protected attribute, then the employer may likely be engaging in indirect discrimination.

Therefore, if an employer has a straightforward and strict policy of never permitting flexible working and an employee can show that (1) such policy has a disproportionate effect on a particular group of people (e.g. gender, disabled persons, etc.); and (2) the application of this strict policy operates to the detriment of this particular group of people or employee, then an employer is at risk of violating the law for indirect discrimination unless the employer can provide "justification" for the strict policy.

However, employers have to be mindful that "justifying" the blatant refusal to allow for part-time work, job sharing, staggered hours, etc. is not easy, especially for large companies with resources. When considering the employer's "justification" for such refusals, courts will consider (1) whether the objective of the policy was legitimate; (2) whether the means used to achieve the objective is reasonable; (3) whether the justifications outweigh the discriminatory effect balanced on the "principles of proportionality" test; and (4) whether employer will encounter any hardships (e.g. costs, inability to re-organize positions and employees, inability to recruit additional employees, detrimental impact on quality, detrimental impact on business performance, insufficient work for employees, inability to foresee work needs, etc.) and if so, to what degree. Under this analysis, it is best business practice to have a clear well-written policy regarding flexible working and ensure that this policy is communicated to employees.

Flexible working include (note this list is not necessarily exhaustive):

- Part-Time Working, which occurs when employees work less than full time employees in equivalent positions during a day, week, or month.
- Job Sharing, which occurs when a position is shared by two or more people.
- Remote Working, which occurs when employees work from home or at location of their choice.
- Flexitime, which occurs when employees are only required to be at specific work location(s) for specified period of time, and can otherwise arrange other work hours to suit their needs because they do not have to be at any specific work location(s).

- Compressed Hours, which occurs when employees work the same total number of hours as full-time equivalents but work more hours in few days.
- Annual Hours, which occurs when employees commit to working a total number of hours per year, but the pattern of hours per week can vary.
- Staggered Hours, which occurs when employees are able to start and end work at different time that suit their needs.

Moreover, it is best business practice to document all flexible working arrangements and to also document the reasons for declining any flexible working requests. These best business practices will not only help prevent against any claims of indirect discrimination, but can serve as tools to build a healthier and happier working environment for employees.

In addition to preventing legal ramifications of indirect discrimination, companies must be mindful that having a positive reputation is extremely important in Hong Kong (and Greater Asia). Any negative publicity (even word-of-mouth opinion) could detrimentally effect your workforce, clients, and customers, which will effect business operations and growth.

Therefore, companies have even more reason to implement a well written and communicated flexible working policy. After all, establishing and maintaining an honorable family-friendly culture can be key to positive public relations and advancing your business.