

WORKERS WITHOUT BORDERS

Commission(s) in charge of the Session/Workshop:

Labour Law and Immigration Commission

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National Report of Hong Kong

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Law Society of Hong Kong

General Reporter

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BIBLIOGRAPHY

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- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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INTRODUCTION

Global mobility is on the rise. More and more companies increasingly operate on a cross-border scale. However, companies assigning their employees to another or multiple countries are often confronted with an increase of formalities and requirements affecting the cross-border employment. At first glance, only the work place of the employee temporarily changes. However, many other legal issues come into play and employees must comply with the rules and regulations governing immigration, employment and labour and social security law of each of those countries.

The aim of the present questionnaire is to outlining the legal aspects and issues affecting the temporary assignments of employees within and outside the European Economic Area (EEA).

1. Immigration

The first question employers should consider is whether the employee needs an authorization to work and reside in the country to which he/she is (temporarily) assigned.

Within the European Union, freedom of movement of persons is one of the main fundamental principles, guaranteeing EEA nationals the right to live and work freely in another EEA member state.

Non-EEA nationals in principle need an authorisation to work within the EEA. Does this obligation also apply to EEA nationals assigned by their employer outside the EEA?

2. Labour and employment law

Secondly, assuming the employee is allowed to work and reside in the relevant country, it is important knowing which law is governing the employment relationship during the assignment period. Is it the law of the employer (home country) or the law of the country where the employee will be assigned (host country)?

Within the European Union, the Rome Convention and the Rome I EC Regulation are the two sources dealing with this matter. Does these sources also apply when a non-EEA national is assigned to an EEA country and when an EEA employee is assigned outside the EEA? Can the employer and employee choose the law applicable to their employment relationship? Which law applies in case no law has been chosen? Can the employee also invoke the protection of statutory provisions of the country where he/she will be assigned?

The labour and employment law part of this questionnaire also includes a part on the strict rules on the 'lease of personnel' in assignment situations. Finally, we will look into (the content of) the assignment letter and the early termination of the assignment and employment relationship.

3. Social Security

The third part of this questionnaire deals with the social security aspects linked to assignments, as it is relevant and important to know in which country the social security must be paid during the assignment.

4. Other obligations and formalities

We will look into possible other obligations and formalities to be complied with in your countries in case of assignments of employees to your countries (e.g., prior notifications, drafting and keeping of social documents, etc.).

5. Social inspection

The last part of this questionnaire is based on whether or not cross-border assignments are a priority for the social inspectorate.

QUESTIONNAIRE

1. IMMIGRATION

1.1. Who needs a work permit to work in your country? Are there types of employees exempted (e.g., based on their nationality or type of work performed (business trips, etc.)?)

In general, unless a person has the right of abode or right to land in Hong Kong, he/she will be required to obtain a visa/entry permit to work in Hong Kong. While each application is determined on its individual merits, an applicant should meet normal immigration requirements (such as holding a valid travel document with adequate returnability to his/her country of residence or citizenship; have no criminal record and raise no security or criminal concerns for Hong Kong and have no likelihood of becoming a burden on Hong Kong) as well as the relevant specific eligibility criteria detailed below before he/she may be considered eligible for a visa/entry permit.

Nevertheless, a person permitted to enter Hong Kong as a visitor may generally engage in the following business-related activities:

- concluding contracts or submitting tenders;
- examining or supervising the installation/packaging of goods or equipment;
- participating in exhibitions or trade fairs (except selling goods or supplying services direct to the general public, or constructing exhibition booths),
- settling compensation or other civil proceedings;
- participating in product orientation; and
- attending short-term seminars or other business meetings.

These categories of activities are not defined in detail, so when in doubt or when the activities will go beyond these categories, the individual should consider applying for a Hong Kong employment visa.

1.2. Are there different types of work permits in your legal system? Are there work permits for highly educated/qualified employees? If so, what are the conditions and what is the procedure to be followed? Who needs to file for the application and where? Which information and documents are to be provided to the competent authorities? What is the timing? What is the duration of the work permit? Can it be renewed? Is it possible to apply for permanent status after a certain period of time under the work permit?

A. General Employment Policy (“GEP”)

General Conditions

- Quota-free
- Non-sector specific

- Usually granted for 1 or 2 years, after which the visa can be extended for a further 1 to 3 years
- No cap on number of extensions
- Medical screening not required
- No language criteria

Eligibility Criteria

- This category requires a local employer to act as sponsor
- Applicants must possess special skills, knowledge or experience of value to and not readily available in Hong Kong. For example, the applicant should have a good educational background and normally a first degree in the relevant field, but in special circumstances, good technical qualifications, proven professional abilities and/or relevant experience and achievements supported by documentary evidence may also be accepted
- The remuneration package including income, accommodation, medical and other fringe benefits must be broadly commensurate with the prevailing market level for professionals in Hong Kong.
- There should be no security objection and no known record of serious crime in respect of the applicant
- There must be a genuine job vacancy
- The applicant must have a confirmed offer of employment and be employed in a job relevant to his academic qualifications or work experience that cannot be readily taken up by the local work force
- In the case of an internal transfer from a group company, no minimum length of employment with a linked overseas employer is formally required but the Immigration Department would usually expect at least 12 months.

Restrictions

- This category is not open to Chinese residents of Mainland China except overseas Chinese nationals with permanent residence overseas and where the application is submitted from overseas or where the applicant has been residing overseas for at least one year immediately prior to the application submission.
- It does not apply to nationals of Afghanistan, Cambodia, Cuba, Laos, Korea (Democratic People's Republic of), Nepal and Vietnam.

B. Admission Scheme for Mainland Talents and Professionals

General Conditions

- Quota-free
- Non-sector specific
- Usually granted for 1 or 2 years, after which the visa can be extended for a further 1 to 3 years
- No cap on number of extensions

- Medical screening not required
- No language criteria

Eligibility Criteria

- This category requires a local employer to act as sponsor
- Applicants must possess special skills, knowledge or experience of value to and not readily available in Hong Kong. For example, the applicant should have a good educational background and normally a first degree in the relevant field, but in special circumstances, good technical qualifications, proven professional abilities and/or relevant experience and achievements supported by documentary evidence may also be accepted
- The remuneration package including income, accommodation, medical and other fringe benefits must be broadly commensurate with the prevailing market level for professionals in Hong Kong
- There should be no security objection and no known record of serious crime in respect of the applicant
- There must be a genuine job vacancy
- The applicant must have a confirmed offer of employment and be employed in a job relevant to his academic qualifications or work experience that cannot be readily taken up by the local work force
- In the case of an internal transfer from a group company, no minimum length of employment with a linked overseas employer is formally required but the Immigration Department would usually expect at least 12 months

Restrictions

- This scheme assesses applications with a stricter attitude than that of GEP
- Applicants must obtain consent from their present working unit or relevant government authority

C. Immigration Arrangements for Non-Local Graduates

General Conditions

- Quota-free
- Non-sector specific
- Usually granted for 1 or 2 years, after which the visa can be extended for a further 1 to 3 years
- No cap on number of extensions
- Medical screening not required
- No language criteria
- Can lead to permanent residence
- Non-local graduates who submit applications to the Immigration Department within six months of their graduation (i.e. the date shown on their graduation certificates) are classified as non-local fresh graduates

- Non-local graduates who submit applications beyond six months of their graduation are classified as returning non-local graduates

Eligibility Criteria

- For applicants who are/were non-local students and have obtained an undergraduate degree or higher qualification in a full-time and locally accredited local programme in Hong Kong
- Non-local fresh graduates who wish to apply to stay and work in Hong Kong are not required to secure an offer of employment upon application. They may be granted 12 months' stay without other conditions of stay provided that normal immigration requirements are met
- Returning non-local graduates who wish to return to work in Hong Kong are required to secure an offer of employment upon application. The applications will be favourably considered so long as the job is at a level commonly taken up by degree holders and the remuneration package is at market level. They may be granted 12 months' stay without other conditions of stay provided that normal immigration requirements are met

Restrictions

The scheme does not apply to nationals of Afghanistan, Cambodia, Cuba, Laos, Korea (Democratic People's Republic of), Nepal and Vietnam.

D. Entry for Investment (to establish/join in business) in Hong Kong (Under GEP)

General Conditions

- Usually granted for 1 or 2 years, after which the visa can be extended for another 1 to 3 years
- No cap on number of extensions
- Medical screening not required
- No language criteria

Eligibility Criteria

- The applicant must be in a position to make a substantial contribution to the economy of Hong Kong
- The applicant must have a good educational background and normally a first degree in the relevant field, but in special circumstances, good technical qualifications, proven professional abilities and/or relevant experience and achievements supported by documentary evidence may also be accepted
- There must be no security objection and no known record of serious crime in respect of the applicant

Restrictions

The scheme does not apply to Chinese residents of the Mainland China (except those with permanent residence overseas or who have been residing overseas for at least one year immediately before the submission of application), nationals of

Afghanistan, Cambodia, Cuba, Laos, Korea (Democratic People's Republic of), Nepal and Vietnam.

1.3. Is a separate residence permit required/ granted via the work permit? Please explain.

No separate residence permit is required.

All work visas can ultimately lead to eligibility for permanent residence in Hong Kong as the test for permanent residence is that the applicant has remained lawfully in Hong Kong for a continuous 7 year period immediately prior to his / her application for permanent residence.

1.4. Who can be sanctioned in case of illegal employment in your country (e.g., the employer, the employee, the host company, etc.)? What are the sanctions (civil and/or criminal) in case of illegal employment?

If an employer employs a person who is not lawfully employable, the employer will be liable for a maximum fine of HK\$350,000 and three years' imprisonment. If the employer also fails to take steps to inspect the job seeker's Hong Kong permanent identity card or valid travel document, the employer will be liable for a maximum fine of HK\$150,000 and one year's imprisonment.

Any person who contravenes his / her conditions of stay shall be guilty of an offence and liable on conviction to a maximum fine of HK\$50,000 and to imprisonment for 2 years.

1.5. Did your country implement the European Blue Card Directive 2009/50/EC? If so, please explain the scope, conditions, application process and validity of the blue card?

No.

1.6. Did your country implement the European Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer? If so, please briefly describe and explain importance and impact?

No.

2. LABOUR AND EMPLOYMENT LAW

2.1. In your country, how is the applicable law governing the employment contract during the assignment period determined?

In Hong Kong, the Employment Ordinance (Cap. 57) (“**EO**”) sets out a statutory framework to govern many aspects of the employment contract by incorporating a number of key terms and conditions into every contract of employment which falls within its coverage.

The EO applies to every employee engaged under a contract of employment, to an employer of such an employee, and to a contract of employment between such parties. However, there are some exceptions. The EO does not apply to:

- an employee who is a family member of the proprietor of the employer and who lives in the dwelling as the proprietor;
- an apprentice whose contract of apprenticeship has been registered under the Apprenticeship Ordinance (Cap. 47), other than certain provisions of the EO;
- an employee who serves under crew agreements or on board ships not registered in Hong Kong; and
- an employee who is covered by the Contracts for Employment Outside Hong Kong Ordinance (Cap. 78).

Moreover, the EO applies to all employment contracts under which a person located in Hong Kong agrees to provide manual services for another person who is not in Hong Kong, and the contract is to be performed (whether wholly or partly) outside of Hong Kong.

For employees to whom the EO applies, they will be entitled to the basic protection under the EO irrespective of hours of work. These basic protections include payment of wages, restrictions on wage deductions, the granting of statutory holidays (albeit not necessarily paid) and employment protection in respect of unlawful dismissal.

For employees who are employed under a continuous contract (i.e. the employee has been continuously employed for a minimum duration of 4 consecutive weeks for at least 18 hours a week), they are entitled to further benefits such as rest days, paid annual leave, sickness allowance, paid statutory holidays, maternity leave, severance payments and long service payments.

The statutory provisions of the EO set out a minimum level of benefits and entitlements for employees, and a framework for how those statutory rights and entitlements are to be exercised. It is unlawful for parties to an employment contract to contract out of the provisions of the EO. Any contractual terms which purport to extinguish any right, benefit or protection conferred on an employee under the EO are void.

2.2. Which local employment laws of your country are determined as mandatory minimum laws/ minimum hardcore protective rules and working conditions? Please explain. Is there relevant case law?

- Employment Ordinance (Cap. 57)

- Employees' Compensation Ordinance (Cap. 282)
- General Holidays Ordinance (Cap. 149)
- Minimum Wage Ordinance (Cap. 608)
- Mandatory Provident Fund Schemes Ordinance (Cap. 485)
- Occupational Retirement Schemes Ordinance (Cap. 426)
- Occupational Safety and Health Ordinance (Cap. 509)
- Personal Data (Privacy) Ordinance (Cap. 486)
- Trade Unions Ordinance (Cap. 332)
- Disability Discrimination Ordinance (Cap. 487)
- Family Status Discrimination Ordinance (Cap. 527)
- Race Discrimination Ordinance (Cap. 602)
- Sex Discrimination Ordinance (Cap. 480)

The legal framework of Hong Kong is based on the English common law and therefore, precedents (case law) form a significant part of the employment law principles in Hong Kong.

2.3. Does your country foresee specific rules on the 'lease of personnel'? Is there a principle prohibition of 'lease of personnel'? Please explain and provide examples. What are the sanctions and penalties? Is there a possibility to reduce the risk? Please explain. Is there relevant case law dealing with this matter?

No.

2.4. If you were asked by one of your clients to draft an assignment letter (secondment agreement between the original employer in the home country and the employee), which clauses would you include? What should the assignment letter cover? Is this foreseen by a specific law or based on case law? Please explain.

The terms of the secondment agreement should address the following matters:

- duration of the secondment;
- remuneration including achievement of any bonuses or commission payments;
- assessment of the employee's performance;
- early termination and expiration of the secondment agreement;
- the payment of benefits to the employee;
- occupational safety and health obligations;
- insurance arrangements;
- mechanism for resolving and potential conflicts of interest which may arise out of the work to be done during the secondment;
- confidentiality;

- seek the employee's explicit consent to transfer his/her personal data from the home employing entity to the host entity;
- leave entitlements;
- confirm that the secondment is not intended to create an employee/employer relationship between the employee and the host entity;
- what will happen when the secondment comes to an end;
- relocation and repatriation arrangements; and
- governing law and jurisdiction.

There is no legislation or case law in Hong Kong that governs secondment arrangements.

2.5. Please explain the applicable and most relevant rules of your country in case the employer wishes (1) to early terminate the assignment and (2) to terminate the employment relationship (e.g., is there a right to return? Should the assignment allowances be included in the calculation of the notice indemnity? Etc.). Is there relevant case law?

(1) Early termination of assignment

In a secondment arrangement, there is no employment contract in place with the host entity and the employee does not become an employee of the host entity. Therefore, termination of the secondment will not automatically terminate the employee's employment and normally there is an expectation that the employee will return to his/her former position with the home employing entity.

(2) Termination of employment relationship

The termination arrangements and the calculation of termination payments will depend on the terms of the employment contract and the secondment agreement.

3. SOCIAL SECURITY

3.1. Provide a short overview of the level of social security charges in your country. What are the employer social security contributions? What are the employee social security contributions? Is there a cap/ maximum? Please briefly explain.

The overall objective of social security in Hong Kong is to provide for the basic and special needs of the members of the community who are in need of financial or material assistance. Such objective is achieved through a non-contributory social security system administered by the Social Welfare Department. It comprises the Comprehensive Social Security Assistance Scheme, Social Security Allowance Scheme, Criminal and Law Enforcement Injuries Compensation Scheme, Traffic Accident Victims Assistance Scheme and Emergency Relief.

Apart from the above, Hong Kong operates a compulsory saving scheme / pension fund called the Mandatory Provident Fund (“MPF”) which is an employment-based retirement protection system. Except for exempt persons (e.g. he/she is a member of a provident, pension, retirement or superannuation scheme (however described) of a place outside Hong Kong, or a person from overseas who enter Hong Kong for employment for less than 13 months), employees (regular or casual) who are at least 18 but under 65 years old are required to join an MPF scheme within the first 60 days of employment.

Employees and employers who are covered by the MPF system are each required to make regular mandatory contributions calculated at 5% of the employee’s relevant income to an MPF scheme, subject to the minimum and maximum relevant income levels. For a monthly-paid employee, the minimum and maximum relevant income levels are HK\$7,100 and HK\$30,000 respectively.

| Monthly Relevant Income | Amount of Mandatory Contributions Payable by Employer | Amount of Mandatory Contributions Payable by Employee |
|-------------------------|---|---|
| Less than HK\$7,100 | Relevant income x 5% | No contributions required |
| HK\$7,100 to HK\$30,000 | Relevant income x 5% | Relevant income x 5% |
| More than HK\$30,000 | HK\$1,500 | HK\$1,500 |

The current minimum relevant income level of HK\$7,100 per month applies to contribution periods commencing on or after 1 November 2013 while the current maximum relevant income level of HK\$30,000 per month applies to contribution periods commencing on or after 1 June 2014. "Relevant income" refers to all monetary payments paid or payable by an employer to an employee, including wages, salary, leave pay, fees, commissions, bonuses, gratuities, perquisites or allowances, but excluding severance payments or long service payments under the EO.

Employees can claim tax deductions for their employer’s mandatory contributions made to an MPF scheme, subject to the maximum amount as follows:

- (i) HK\$15,000 for the year of assessment 2013-14;
- (ii) HK\$17,500 for the year of assessment 2014-15; and
- (iii) HK\$18,000 for the year of assessment 2015-16 and each subsequent year of assessment.

Any voluntary contributions made by employees are not tax deductible.

3.2. In case of assignments from outside the EEA to your country or from your country to non-EEA countries, with what countries has your country signed a social security agreement?

I am not aware that the Hong Kong Government has entered into any such agreement with other countries.

4. OTHER OBLIGATIONS AND FORMALITIES

4.1. Are there other relevant formalities and obligations in your country in case of assignments to your country (e.g., prior notification to the authorities, drafting and keeping social documents, etc.)?

A. Immigration requirements

In Hong Kong, it is a requirement that any person who does not have a right of abode in Hong Kong and who undertakes work of any kind (whether paid or unpaid) must hold a valid employment visa granted by the Immigration Department. It is not legal for an individual to commence work in Hong Kong with an employment visa pending. The employment should formally commence only after the employment visa has been approved, received and endorsed by the immigration authorities.

Once an employment visa has been issued, if there is any change regarding the employee's sponsorship, the employer must inform the Immigration Department of the change as soon as possible. Overseas employees are not permitted to change employment or take up part time work without the permission of the Immigration Department.

Moreover, the Immigration Ordinance requires the employers to inspect the person's Hong Kong identity card, valid travel document or official passport prior to employing a person.

B. Taxation

The Hong Kong tax system is based on the territorial concept, whereby only income that arises in, or derives from, a Hong Kong office, employment or pension is subject to salaries tax. This is irrespective of whether tax on the income has been paid in other jurisdictions.

In general, an employment is regarded as located outside Hong Kong if all the following three factors occur outside Hong Kong:

- the place where the contract of employment was negotiated and entered into;
- the place of residence of the employer; and
- the place of payment of the employee's remuneration.

If an employee is assigned to work in Hong Kong under a secondment arrangement, the employee will only be assessed on income attributable to services rendered in Hong Kong and in general, according to the number of days the employee has stayed in Hong Kong (day-in-day-out basis) in a year of assessment. The employee may, under certain circumstances, claim a number of exemptions or partial exemptions from salaries tax, for example, if the employee

has paid tax of substantially the same nature as Hong Kong salaries tax in a territory outside Hong Kong, then part of the income which has already been subject to foreign tax will be exempted from Hong Kong salaries tax.

In Hong Kong, payment of salaries tax is the responsibility of the employee and the employing entity has no withholding obligations in respect of the employee's taxation. However, it is important for employers to comply with the reporting obligations to which they are subject. A company carrying on business in Hong Kong is obliged to file a Form I.R.56B for all its employees on an annual basis, irrespective of whether the employee rendered services in or outside Hong Kong, so long as their total income exceeds the limit as laid down by the Inland Revenue Department.

Moreover, employers must notify the Inland Revenue Department one month before the anticipated date of termination of employment. If the employee whose employment is terminating intends to leave Hong Kong for a period exceeding one month, the employer shall withhold all amounts due to the employee for a period of one month or until a "letter of release" is received from the Inland Revenue Department.

C. MPF requirements

An expatriate employee is exempt from MPF requirements in the following circumstances:

- if the period during which the employee is given permission to remain in Hong Kong for employment purposes is less than 13 months. If the employee subsequently extends his/her employment, the exemption from the MPF requirements ceases after the 13th month, and the employer must enrol the employee within 60 days from the end of the 13th month; or
- if the employee is a member of a provident, pension, retirement or superannuation scheme run in a jurisdiction outside Hong Kong. There is no requirement for the overseas scheme to be approved, recognised by or registered with the MPF Authority.

4.2. What are the penalties and sanctions in case these formalities and obligations are not complied with? Who can be sanctioned? Is there relevant case law?

A. Immigration requirements

Please refer to answer 1.4 above.

B. Taxation

If the requirements under the Inland Revenue Ordinance are not complied with by either the employers or the employees, depending on the nature and/or the degree of culpability of the offence, the Commissioner may institute prosecution, and to compound or assess additional tax (which is a form of penalty) in respect

of the offence. Factors which may affect the course of action to be taken include the strength of evidence, the amount of tax undercharged or would have been undercharged, the sophistication of the scheme and the period of time over which the offence was committed.

C. MPF requirements

An employer failing to comply with the MPF requirements may constitute a criminal offence. The MPF Authority may file a civil claim on behalf of employees to a court of competent jurisdiction to recover contributions in arrears. It may also initiate prosecution against employers, including their officers, directors and partners, who fail to comply with the Mandatory Provident Fund Schemes Ordinance. The following are some common offences and the relevant penalties:

| Type of Employer Non-compliance | Penalty |
|--|---|
| Failure to enrol employees in an MPF scheme | Maximum penalty of a HK\$350,000 fine and imprisonment for three years |
| Failure to pay employer's mandatory contributions to trustee | (a) A fine of HK\$10,000 and imprisonment for 6 months on the first occasion on which the person is convicted of the offence; and (b) A fine of HK\$200,000 and imprisonment for 12 months on each subsequent occasion on which the person is convicted of the offence |
| Failure to pay mandatory contributions to trustee (without deducting 5% from employees' relevant income) | Maximum penalty of a HK\$350,000 fine and imprisonment for three years |

5. SOCIAL INSPECTION

5.1. Are cross-border assignments a priority in your country for the social inspection? Please explain.

Could you please explain the concept of "social inspection"? Otherwise, I am not aware of such concept exists in Hong Kong.