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## Hong Kong Employment Law Update - September/October 2014

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# Hong Kong Employment Law Update - September/October 2014

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September/October 2014

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## News Update

### Anti-Discrimination Laws Set to Widen

The Equal Opportunities Commission (“**EOC**”) has launched a comprehensive review of discrimination laws in Hong Kong. The Discrimination Law Review (“**DLR**”) will be the first review of Hong Kong’s anti-discrimination legislation since the passing of the four anti-discrimination laws: the Sex Discrimination Ordinance, the Family Status Discrimination Ordinance, the Disability Discrimination Ordinance and, most recently, the Race Discrimination Ordinance. A public consultation process on the DLR which was due to close in early October has been extended as a result of an overwhelming level of interest from the public and other organisations. The EOC announced the new deadline to provide feedback is now 31 October 2014. The EOC will issue a report with recommendations to the government in the middle of 2015.

The DLR seeks to address gaps in the existing legislation and simplify existing laws where possible.

#### **Key topics covered by the DLR relating to employment**

- Whether to legislate against discrimination based on immigration and residency status – a question prompted by the anti-Mainlander protests earlier this year;
- Whether to widen the definition of marital status to include *de facto* relationships;
- Whether to introduce a statutory duty or requirement to provide reasonable accommodation for people with disabilities;
- Whether to extend protection for sexual harassment to workers employed by different employers working in a common workplace; and
- Whether to merge all four anti-discrimination ordinances into one for ease and consistency.

#### **Changes to Sexual Harassment Laws?**

In the short term, we are also likely to see changes to sexual harassment laws following the second reading of the Sex Discrimination (Amendment) Bill in June. The proposed amendments will offer legal protection to employees of service industries from sexual harassment by customers. Currently it is unlawful for a service provider to sexually harass a

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customer, but not for a customer to sexually harass a service provider. The proposed amendments will rectify this hiatus.

## Controversial Amendments to Proposed Statutory Paternity Leave for Hong Kong Fathers

In our [May Newsletter](#) we reported that the Employment (Amendment) Bill 2014 (“**Bill**”), which will introduce paid statutory paternity leave, was likely to come into force later this year. This prediction did not factor in the significant amendments made by the Bills Committee which could impact the timeline of the Bill, following a proposal by Dr Hon Helena Wong on 8 July 2014.

The amendments (a) introduce seven days’ paid paternity leave (“**PL**”) instead of the original three days’ proposed; and (b) provide that PL pay will be paid at the full rate instead of the original four-fifths proposed (collectively, the “**Committee Stage Amendments**”). The Committee Stage Amendments made by the Bills Committee will be submitted to the Legislative Council for endorsement in late October 2014.

It is unclear whether the Committee Stage Amendments will be endorsed and if so, there is a possibility that the Government may withdraw the Bill for further public consultation in light of the drastic changes and potential financial impact on employers. If rejected, the Bill (without Committee Stage Amendments) will hopefully be passed after resumption of the second and third reading by the Legislative Council.

## Changes Proposed to the Labour Tribunal Ordinance

The judiciary has proposed legislative amendments to the Labour Tribunal Ordinance, which, if approved by the Legislative Council, will

- (i) Clarify the jurisdiction of the Labour Tribunal to hear claims for unliquidated sums as well as liquidated sums.
- (ii) Give the Labour Tribunal a general power to order a party to give security if it is just and expedient to do so, in order to minimise undue delays and abuses of the adjudication process.

If the party fails to give security when ordered to do so, the Tribunal may dismiss the claim, stay the proceedings or enter judgment on the claim.

- (iii) Revise the time limit for enforcing Labour Tribunal awards from 12 months to six years, to align with other civil claims.

The proposed amendments are currently under review and, if approved, are expected to be passed into law by mid 2015. We will report on the changes in detail once they have been approved.

## Minimum Wage Rate Review

The Minimum Wage Commission (“**MWC**”) is compiling a recommendation report on the Statutory Minimum Wage (“**SMW**”) rate and will submit

this to the Chief Executive in Council by the end of October 2014. The MWC is tasked with balancing the need to sustain Hong Kong's economic growth and competitiveness with preventing excessively low wages and minimising the loss of low paid jobs.

A public consultation took place earlier this year on the SMW rate. It elicited strongly polarised views with some advocating a rise from the current rate of HK\$30 per hour to HK\$36 per hour and others urging that the current rate should be frozen for 2015

We will update you on the MWC's recommendation once released.

## General Case Update

### Employer Awarded Damages and Injunction For Employee's Breach of Duties

*Dextra China Ltd & Anor v. Lam Wing Kit [2014] HKCU 1039*

#### **In brief:**

The Defendant employee was summarily dismissed on 16 October 2009, as a direct result of multiple breaches of his employment agreement and for misconduct including:

- the establishment of or efforts to establish a PRC enterprise called "Agility" designed to compete directly with Dextra;
- conspiring with current and former employees to poach employees to staff Agility and to create distrust and animosity amongst employees;
- working on establishing and developing Agility during Dextra working hours and using Dextra's resources;
- theft and misuse of Dextra's intellectual property and confidential information; and
- diversion of Dextra's sales and potential sales.

The court found that the Defendant acted in breach of the various duties owed under his employment, including the dissemination of confidential information. Dextra was entitled to summarily terminate the Defendant's employment. Dextra was awarded approximately HK\$ 5 million damages and an injunction restraining the Defendant from further use of the confidential information.

#### **Background:**

Dextra and Dextra Building Products (Guangdong) Limited ("DBPG") alleged that, from April to October 2009, the Defendant masterminded the setting up and operation of Agility, a competing business, assisted by other employees of Dextra/DBPG or its sales agents. Dextra also alleged that the Defendant had solicited Dextra's employees and misappropriated

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International Team of the Year: Labour & Employment – *China Law & Practice Awards 2011 & 2008*

Dextra’s confidential information and that the Defendant was summarily dismissed as a consequence.

The Defendant denied any wrongdoing and claimed wrongful dismissal.

On a full analysis of the facts, the court found:

- During his employment with Dextra, the Defendant was significantly involved, over a number months and on an ongoing basis, in a very senior role with Agility – he was to be a substantial owner and his management experience was vital to it.
- It was irrelevant that the Defendant was doing some genuine work for Dextra at the same time.
- The Defendant acted in breach of these duties and Dextra was entitled to summarily terminate the Defendant’s employment.

**Take away points:**

This case underscores the importance of taking precautions to safeguard confidential information and proprietary interests. Employers are reminded to conduct regular reviews to ensure confidential information is adequately protected, through the use of passwords; restricted access or access on a “need-to-know” basis; and clearly marking confidential documents. Employment contracts should also include tailored non-solicitation, non-competition and confidential information clauses.

Policies for handling confidential information should be checked to ensure that they include instructions to employees to take precautions to keep sensitive information confidential; provide the right to conduct employee monitoring and any breaches of the policy should be dealt with by applying the disciplinary procedure in a consistent manner.

If an employee is suspected of misappropriating confidential information or setting up a rival business, immediate steps should be taken to contain the situation and carry out an investigation. As the burden of proof lies with the employer to show that the employee has taken confidential information, it is recommended that computer forensic specialists are engaged to assist with the investigation and preserve the integrity of the evidence.

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