

# Corporate Commercial Client Alert

## Employment & Pensions

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*Deacons employment team wishes you all a healthy and fruitful Year of the Rabbit in 2023!*



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# Year 2022 in review: Employment Law

As we begin the year of 2023, we would like to give you a recap of the most significant developments in employment law in Hong Kong in 2022, and also an outlook for 2023 with regards to likely changes in employment law which you should be aware of.

## Part One: Review of 2022

### February 2022

#### Government published Amendment Bill to abolish MPF Offsetting Arrangement after years of consultation

In February 2022, in a move long sought by employees in the city, the Hong Kong Government published the proposal to abolish the MPF offsetting arrangement (i.e. the use of accrued benefits attributable to employer's contributions to offset severance or long service payment payable upon termination), to the extent that it relates to accrued benefits under MPF schemes attributable to employer's mandatory contributions and the equivalent under occupational retirement schemes. The abolition is set to take effect in 2025 (the "cut-off date" is yet to be announced) with a grandfathering arrangement whereby the offsetting of severance or long service payment in respect of service before the "cut-off date" will not be affected.

The Government will introduce a subsidy scheme to help employers cope with the potential additional financial burden arising from the abolition of the MPF offsetting arrangement. The Government will also introduce a Designated Saving Accounts scheme mandating employers (unless exempted) to make contributions to designated accounts to save up for their future severance or long service payment liabilities.

Click [here](#) to read our detailed article about the abolition, or click [here](#) for our short Grab and Go video on this topic.

### February 2022

#### Amendments introduced by the Employment (Amendment) Bill

Although Hong Kong is gradually easing into a post-COVID dynamic, certain of the amendments introduced by Employment (Amendment) Bill 2022 remain relevant. Published in late February 2022 and effective beginning from June 2022, the Bill introduced amendments to the Employment Ordinance so that, in summary:

1. Subject to the employee fulfilling certain criteria, sickness allowance would be payable to an employee on a day on which the employee is subject to a restriction issued under the Prevention and Control of Disease Ordinance (Cap. 599), such as compulsory quarantine and testing orders. Please note that the Prevention and Control of Disease Ordinance does not only cover COVID-19, and the list of infectious diseases covered could be amended from time to time.
2. It is not a valid reason to dismiss an employee or vary the terms of an employee's employment contract on the ground of the employee being subject to the aforementioned restrictions.

Regarding the second point, although it is still currently a valid reason to dismiss an employee or vary the terms of an employee's employment contract if the employee refuses to produce proof of vaccination after the employer makes a request, given the Government has now removed the requirement for COVID-19 vaccination, it is believed that the right of an employer to raise vaccination requests may be suspended in the near future.

Our guidance note on this topic can be found [here](#).

### March 2022

#### Court favours arbitration over Labour Tribunal

It is not uncommon for an employee's employment terms to be drafted in separate documentation. In the case of *Mak v LA* [2022] HKCFI 285, the employee's employment contract provides that the parties submit to the exclusive jurisdiction of the Hong Kong Courts in relation to all employment claims; however, in the share award letters

where his employer awarded him shares, the dispute resolution clause stated that “*any dispute arising out of or in connection with*” the terms of the letter was to be referred to arbitration.

When dispute arose in connection with the shares, the Court found that given the employer established a good prima facie case that the parties are bound by an arbitration clause, the Court is bound to refer the parties to arbitration.

Employers should therefore make sure that there is consistency in the dispute resolution mechanism across the different documents, as it is possible to choose arbitration as the forum for certain labour disputes, and the dispute resolution mechanism in an employment contract does not necessarily override that in other documentation.

Please click [here](#) to watch our Grab and Go episode on this judgment.

## May 2022 New Mandatory Reference Checking Scheme applicable to banking industry job applicants

The Hong Kong Monetary Authority (**HKMA**) adopted the Mandatory Reference Checking Scheme (**MRC Scheme**) on 5 May 2022.

Under the MRC Scheme, if an authorized institution under the supervision of HKMA (**AI**) is recruiting for certain positions, it will be required to approach the former and current AI employer(s) of the candidate to request conduct-related information covering the 7 years prior to the candidate’s application for such position, and the reply must be made within 1 month of the MRC request.

The MRC Scheme will be implemented in 2 phases, aiming to cover different positions at each phase. All AIs are requested to put in place necessary internal controls, policies and procedures to deal with the implementation of Phase 1 of the MRC Scheme by 2 May 2023.

In view of the above, AIs may wish to revise their employment documents. For example, if it is not feasible to grant the employment offer to a candidate or for a candidate to commence employment after the MRC process is duly completed, in order to protect themselves, AIs may wish to make the employment offer subject to certain condition precedents, or request a candidate to make certain undertakings failing which the AIs are entitled to end the employment relationship immediately.

In fact, for employing entities which are not AIs, to safeguard the professional qualities of their employees, they should also tighten up their employment documents to cater for the possibility of unsatisfactory background check results.

For more details, please click [here](#) for our earlier article.

## June 2022 The Sex Discrimination Ordinance applies to both women and men

The judgment of *Tan, Shaun Zhi Ming v. Euromoney Institutional Investor (Jersey) Ltd* DCEO 4/2017 [2022] HKDC 622 reminds all of us that discrimination based on someone’s gender, regardless of whether they are female or male, is unlawful.

The Court found that the employer could not show that the reason for terminating the employee was not because of the unproven sexual harassment claim, and inferred that the real reason for termination was the employer’s pro-female bias.

Please click [here](#) to watch our Grab and Go episode on this judgment.

## August 2022

### Discussing employee wages and benefits amongst employers may violate Hong Kong competition law

On 29 August 2022, the Hong Kong Competition Commission (**HKCC**) published an Advisory Bulletin making it clear that the sharing of competitively sensitive information on employees' employment conditions (such as future wages) amongst employers in the context of joint negotiations could be in violation of competition law, as employers should compete with each other on employee terms and conditions.

The Advisory Bulletin is clear that the HKCC would not pursue enforcement action in such context only if (i) the joint negotiations are justified given the industry characteristics, (ii) the conduct is genuinely aimed at improving relevant employment conditions, and (iii) an employee body is a genuine participant in the joint negotiation process.

Any exchange of information regarding employment conditions outside of the above scope should be dealt with caution.

Please click [here](#) for our earlier article, or [here](#) for our Grab and Go episode on the Advisory Bulletin.

## December 2022

### Court confirms that it is not a rest day if the employee is on standby

In March 2021, we [spoke](#) about the District Court decision in the case of *Breton Jean v. H-K Bellawings Jet Limited* [2021] HKDC 46, which ruled that if an employee has to report to duty on a day, that day cannot be considered a rest day under the Employment Ordinance.

The Court of Appeal upheld the District Court's decision, so that regardless of how an employer names a day (e.g. "day off" or "standby") and regardless of whether the employer actually calls an employee to report to duty on such day, to qualify as a rest day under the Employment Ordinance, employers must ensure that the rest day consists of a full 24 hours from which employees are able to abstain from working.

Please click [here](#) to read our earlier article.

## Part Two: Outlook for 2023

### Increase in statutory minimum wage from HK\$37.5 per hour to HK\$40

It has recently been announced that the Chief Executive in Council has adopted the recommendation of the Minimum Wage Commission to raise the statutory minimum wage (SMW) rate from HK\$37.5 per hour to HK\$40.

The new statutory minimum wage rate, subject to passing by the Legislative Council, is set to come into force on the 1<sup>st</sup> of May this year.

### More details on eMPF platform to be released

Last year, the Mandatory Provident Fund Scheme Authority (**MPFA**) established the eMPF Platform, which is a centralised and integrated electronic platform that will standardise, streamline and automate the administration processes of Mandatory Provident Fund (**MPF**) schemes, thereby enhancing the operational efficiency of the MPF System, reducing administration costs and improving user experience.

Given the target to enable sequential and orderly on-boarding of MPF trustees and their schemes to the Platform in 2023, so as to make the Platform fully functional in 2025 at the earliest, we expect that more information regarding the Platform will be released this year.

## Suspension of employer's right to raise requests for COVID-19 vaccination proof

The Hong Kong Government has recently lifted quite a number of anti-pandemic measures, including COVID-19 vaccination requirements, and so it is believed that despite the amendments to the Employment Ordinance in 2022 (as discussed above), the new right conferred on employers to request COVID-19 vaccination proof may become suspended in the coming year.

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