

CHINA

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Severance payment – When and how much?



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It is generally known that Hong Kong legal provisions concerning employee dismissal make it easier for Hong Kong employers to reduce the size of their workforce than their counterparts in Mainland China. Hong Kong employers should, however, note that the Employment Ordinance (Chapter 57) also imposes on them the obligation to compensate a departing employee under certain conditions.

For example, the employer may be obliged to make a severance payment when it dismisses an employee by reason of redundancy who has been employed under a continuous contract for not less than 24 months.

Under the Employment Ordinance, a 'continuous contract' may be found in different scenarios, such as where the employee has been employed for four or more weeks and has worked at least 18 hours each week. (A 'week' is defined as ending on Saturday.)

A dismissal shall be considered due to redundancy if wholly or mainly attributable to the fact that:

- the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed or in the place where the employee was so employed; or
- the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish.

The law presumes redundancy to be the reason for an employee's dismissal, but allows an employer to prove otherwise. For

example, employee misconduct can be so serious to entitle the employer to terminate the relationship without notice or payment in lieu (in other words, a 'summary dismissal'), in which case a severance payment will not be payable.

If a dismissed monthly rated employee is entitled to a severance payment, it is calculated as follows:

[last full month's wages (subject to a maximum limit of HK\$ 22,500) × 2/3] × years of service

If the employee's pay was cut shortly before the dismissal, the employee may instead use the average of his or her wages over the 12 months immediately preceding the termination

date in the calculation. For a monthly rated employee, however, such monthly average is still subject to the same statutory cap of HK\$22,500. The maximum severance payment awardable under the law is HK\$390,000.

The law allows the employer to reduce the severance payment by all gratuities and benefits payable to or in respect of that employee that relate to the period used for calculating the severance payment.

Unless the severance payment has already been made in the interim, an

employee entitled to a severance payment under the Employment Ordinance must submit a written claim to the employer within three months after termination, and the employer must deliver the severance payment within two months after receiving the claim.

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