

A Concise Guide to the
Employment Ordinance



Labour Department

Table of Content

Foreword		3
Chapter 1	Application of the Employment Ordinance	4
Chapter 2	Contract of Employment	5
Chapter 3	Wages	8
Chapter 4	Rest Days, Holidays and Leave	12
Chapter 5	Sickness Allowance	20
Chapter 6	Maternity Protection	24
Chapter 7	End of Year Payment	29
Chapter 8	Termination of Contract of Employment	31
Chapter 9	Employment Protection	36
Chapter 10	Severance Payment and Long Service Payment	40
Chapter 11	Protection against Anti-union Discrimination	46
Chapter 12	Employers' Criminal Liability in Failing to Pay an Award of the Labour Tribunal or Minor Employment Claims Adjudication Board	47
Appendix 1	A Guide to the Calculation of Relevant Statutory Entitlements on the Basis of the 12-Month Average Wages with Examples	51
Appendix 2	Enquiries	60

Foreword

This guide sets out in simple terms the main provisions of the Employment Ordinance (Cap. 57). It should be noted that the Ordinance itself remains the sole authority for the provisions of the law explained. Please refer to the Appendix 2 for enquiries services.

Note:

The Employment (Amendment) Ordinance 2010, which makes it an offence if an employer wilfully and without reasonable excuse fails to pay any sum awarded by the Labour Tribunal or Minor Employment Claims Adjudication Board, has become effective from 29 October 2010. Please refer to Chapter 12 “Employers’ Criminal Liability in Failing to Pay an Award of the Labour Tribunal or Minor Employment Claims Adjudication Board” for details.

With effect from 1 May 2011, employers are required by the Employment Ordinance and the Minimum Wage Ordinance to keep the total number of hours worked by related employees in a wage period, please refer to the leaflet on statutory minimum wage or visit <http://www.labour.gov.hk> for details. Failure to pay minimum wage amounts to a breach of the wage provisions under the Employment Ordinance.

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Chapter 1: Application of the Employment Ordinance

The Employment Ordinance applies to all employees with the following exceptions:

1. a family member who lives in the same dwelling as the employer;
2. an employee as defined in the Contracts for Employment Outside Hong Kong Ordinance;
3. a person serving under a crew agreement under the Merchant Shipping (Seafarers) Ordinance, or on board a ship which is not registered in Hong Kong; and
4. an apprentice whose contract of apprenticeship has been registered under the Apprenticeship Ordinance, other than certain provisions of the Employment Ordinance.

All employees covered by the Employment Ordinance, irrespective of their hours of work, are entitled to basic protection under the Ordinance including payment of wages, restrictions on wages deductions and the granting of statutory holidays, etc.

Employees who are employed under a continuous contract are further entitled to such benefits as rest days, paid annual leave, sickness allowance, severance payment and long service payment, etc.

Continuous Contract of Employment

An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract.

In any dispute as to whether a contract of employment is a continuous contract, the onus of proving that it is not a continuous contract shall be on the employer.

Chapter 2: Contract of Employment

A contract of employment is an agreement on the employment conditions made between an employer and an employee. The agreement can be made orally or in writing and it includes both express and implied terms.

Employers and employees are free to negotiate and agree on the terms and conditions of employment provided that they do not violate the provisions of the Employment Ordinance. Any term of an employment contract which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by this Ordinance shall be void.

Information on Conditions of Service

Before employment begins, an employer must inform each employee clearly the conditions of employment under which he is to be employed with regard to:

1. wages (including rate of wages, overtime rate and any allowance, whether calculated by piece, job, hour, day, week or otherwise);
2. wage period;
3. length of notice required to terminate the contract; and
4. if the employee is entitled to an end of year payment, the end of year payment or proportion and the payment period.

If the contract of employment is in writing, the employer shall give one copy of the written contract to the employee for retention and reference.

If the contract of employment is not in writing, the employer shall provide the employee with such information in writing if the employee, before such employment is entered into, makes a written request.

Whenever there is any change in the conditions of service, whether these have merely been proposed to an employee or are actually in force, the employer shall inform him in an intelligible manner. If such change to conditions of service is in writing or upon the written request from the employee, a copy of the written amendment must be provided to the employee.

NOTE: Statutory entitlements such as holiday pay, annual leave pay, sickness allowance and maternity leave pay are calculated on the basis of wages, particulars of which are established by the terms of employment contracts. Employers and employees should clearly understand the wage components (for example, commission, allowance, etc), wage rate, conditions and arrangements for payment, etc.

Duration of Employment Contract

In the absence of any express agreement to the contrary, every contract of employment which is a continuous contract is deemed to be a contract for one month and renewable from month to month.

Wage and Employment Records

Every employer must at all times keep a record setting out the wage and employment history of each employee covering the period of his employment during the preceding 12 months.

The record should include the following information of the employee:

1. name and identity card number;
2. date of commencement of employment;
3. job title;
4. wages paid in respect of each wage period;
5. wage period;
6. total number of hours worked in each wage period (if applicable*);
7. periods of annual leave, sick leave, maternity leave and holidays entitled and taken, together with details of payments made in respect of such periods;
8. amount of end of year payment and the period to which it relates (if applicable);
9. period of notice required for termination of contract;
10. date of termination of employment (if applicable).

* For details, please refer to the “Concise Guide to Statutory Minimum Wage” published by the Labour Department. This guide book could be downloaded from the homepage of the Labour Department (<http://www.labour.gov.hk>) or obtained at the Offices of the Labour Relations Division of the Labour Department.

The wage and employment records must be kept at the employer's place of business or at the place where the employee is employed, and they should also be kept for a period of another six months after the employee ceases to be employed.

NOTE:

- *Employers should keep proper records in relation to employees' attendance, leave and wages, etc for the purpose of calculating statutory entitlements.*
- *To safeguard their own rights and benefits, employees should also keep proper records in relation to their attendance, leave and wages, etc.*

Offences and Penalties

An employer who fails to keep the above record is liable to prosecution and, upon conviction, to a fine of \$10,000.

Officers of the Labour Department may inspect the above record, inquire any person or seize anything which may appear to be evidence of an offence under the Employment Ordinance. Any person who fails to comply with the requirements of the officers of the Labour Department is liable to prosecution and, upon conviction, to a fine of \$100,000 and to imprisonment for one year.

Chapter 3: Wages

Definition

"Wages" means all remuneration, earnings, allowances, tips and service charges, however designated or calculated, payable to an employee in respect of work done or work to be done. Allowances including travelling allowances, attendance allowances, commission and overtime pay are within the definition of wages. However, it does not include:

1. the value of any accommodation, education, food, fuel, water, light or medical care provided by the employer;
2. employer's contribution to any retirement scheme;
3. commission, attendance allowance or attendance bonus which is of a gratuitous nature or is payable only at the discretion of the employer;
4. non-recurrent travelling allowance or the value of any travelling concession or travelling allowance for actual expenses incurred by the employment;
5. any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;
6. end of year payment, or annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer;
7. gratuity payable on completion or termination of a contract of employment.

An employee's entitlements to end of year payment, maternity leave pay, severance payment, long service payment, sickness allowance, holiday pay, annual leave pay and wages in lieu of notice are calculated according to the above definition of wages.

Overtime pay should also be included in calculating the above payments if :

- it is of a constant character; or
- its monthly average over the past 12 months is not less than 20% of the average monthly wages of the employee during the same period.

Deductions from Wages

An employer is prohibited from deducting wages from his employee, except under the following circumstances:

1. deductions for absence from work. The sum to be deducted should be proportionate to the period of time the employee is absent from work;
2. deductions for damage to or loss of the employer's goods, equipment, or property by the employee's neglect or default. In any one case, the sum to be deducted shall be equivalent to the value of the damage or loss but not exceeding \$300. The total of such deductions shall not exceed one quarter of the wages payable to the employee in that wage period;
3. deductions for the recovery of any advanced or over-paid wages to the employee. The total sum to be deducted shall not exceed one quarter of the wages payable to the employee in that wage period;
4. deductions of the value of food and accommodation the employer supplies to the employee;
5. deductions, at the written request of the employee, in respect of contributions to be paid by the employee through the employer for any medical scheme, superannuation scheme, retirement scheme or thrift scheme;
6. deductions, with the employee's written consent, for the recovery of any loan made by the employer to the employee;
7. deductions which are required or authorized under any enactment to be made from the wages of the employee;
8. deductions for outstanding maintenance payment owed by the employee pursuant to the Attachment of Income Order issued by the court.

Deductions under items (1) to (7) shall have priority over item (8).

Unless with the approval in writing of the Commissioner for Labour, the total of all deductions, except those for absence from work and outstanding maintenance payment, made in any one wage period shall not exceed one half of the wages payable in that period.

Offences and Penalties

An employer who makes illegal deduction from wages of an employee is liable to prosecution and, upon conviction, to a fine of \$100,000 and to imprisonment for one year.

Payment of Wages

Wages shall become due on the expiry of the last day of the wage period. An employer should pay wages to an employee as soon as practicable but in any case not later than seven days after the end of the wage period. An employer is required to pay interest on the outstanding amount of wages to the employee if he fails to pay wages to the employee within seven days when it becomes due.

Offences and Penalties

An employer who willfully and without reasonable excuse fails to pay wages to an employee when it becomes due is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for three years.

An employer who willfully and without reasonable excuse fails to pay interest on the outstanding amount of wages to the employee is liable to prosecution and, upon conviction, to a fine of \$10,000.

Failure to Pay Wages

An employer who is no longer able to pay wages due should terminate the contract of employment in accordance with its terms.

If wages are not paid within one month after they become due, an employee may deem his contract of employment to be terminated by his employer without notice and is entitled to wages in lieu of notice in addition to other statutory and contractual termination payment. To avoid disputes, an employee should inform his employer when he exercises such rights under the Ordinance.

Liability to Pay Wages of Sub-contractor's Employees

The principal contractors, superior sub-contractors and superior nominated sub-contractors engaged in building and construction works are liable for the first two months' unpaid wages of an employee who is employed by the sub-contractor or nominated sub-contractor.

If an employee employed by a sub-contractor or nominated sub-contractor is owed wages, he must serve a written notice to the principal contractor or the main nominated sub-contractor within 60 days (or an additional period

of 90 days permitted by the Commissioner for Labour) after the wages become due. The employee should state the following in the notice:

1. the name and address of the employee;
2. the name and address of his employer;
3. the address of the place of employment of the employee;
4. the particulars of the work in respect of which the wages are due;
and
5. the amount of wages due and the period to which they relate.

The principal contractor, the superior sub-contractors and the superior nominated sub-contractors should pay wages to the employee within 30 days after receiving the notice. They may request every superior sub-contractor or superior nominated sub-contractor to the employee's employer to share out the liability.

The wages paid by the principal contractor, the superior sub-contractors and the superior nominated sub-contractors shall be a debt due by the employer of the employee to them. The debt may be recovered through civil claims proceedings.

Chapter 4: Rest Days, Holidays and Leave

An employee shall enjoy rest days, statutory holidays and paid annual leave during employment.

REST DAY

Eligibility for Rest Day

An employee employed under a continuous contract is entitled to not less than one rest day in every period of seven days.

Definition of a Rest Day

A rest day is defined as a continuous period of not less than 24 hours during which an employee is entitled to abstain from working for his employer.

Appointment of Rest Days

Rest days shall be appointed by the employer. They may be granted on a regular or irregular basis:

- regular rest days - the employer should inform his employees of the arrangement
- irregular rest days - before the beginning of each month, the employer must inform his employees orally or in writing the appointed rest days or by displaying a roster showing the dates of the appointed rest days for each employee

An employer may substitute some other rest day with the consent of the employee, in which case it must be within the same month before the original rest day or within 30 days after it.

Compulsory Work on Rest days

An employer must not compel an employee to work on a rest day except in the event of a breakdown of machinery or plant or in any other unforeseen emergency. For any rest day on which the employee is required to work, the employer should substitute some other rest day within 30 days after the original rest day. The employer should notify the employee of the arrangement within 48 hours after the employee is required to work.

Offences and Penalties

An employer who without reasonable excuse fails to grant rest days to his employees is liable to prosecution and, upon conviction, to a fine of \$50,000.

An employer who compels his employees to work on their rest days is liable to prosecution and, upon conviction, to a fine of \$50,000.

Voluntary Work on Rest Days

An employee, except young persons under the age of 18 employed in industrial undertakings, may work voluntarily on a rest day.

Any condition in a contract of employment which makes payment of any type of annual bonus or end of year payment conditional on an employee agreeing to work on rest days is void.

Rest Day Pay

Whether rest day is paid or not is to be agreed by employers and employees.

STATUTORY HOLIDAYS

An employee, irrespective of his length of service, is entitled to the following statutory holidays :

1. the first day of January
2. Lunar New Year's Day
3. the second day of Lunar New Year
4. the third day of Lunar New Year
5. Ching Ming Festival
6. Labour Day, being the first day of May
7. Tuen Ng Festival
8. Hong Kong Special Administrative Region Establishment Day, being the first day of July
9. the day following the Chinese Mid-Autumn Festival
10. Chung Yeung Festival
11. National Day, being the first day of October
12. Chinese Winter Solstice Festival or Christmas Day (at the option of the employer)

(Regarding payment for statutory holiday, please see the part below on “Holiday Pay”)

Work on Statutory Holidays

If the employer requires the employee to work on a statutory holiday, the employer should make the following arrangement:

Alternative Holiday Arrangement	Prior Notice to Employee on the Date of Alternative Holiday
An alternative holiday should be arranged within 60 days before the statutory holiday; or	To be given not less than 48 hours' prior notice before the alternative holiday
An alternative holiday should be arranged within 60 days after the statutory holiday	To be given not less than 48 hours' prior notice before the statutory holiday

If the employer and employee agree, any day within 30 days before or after the statutory or alternative holiday may be taken by the employee as a substituted holiday.

A Statutory Holiday Falling on a Rest Day

If a statutory holiday falls on a rest day, the employee should be granted a holiday on the next day which is not a statutory holiday or an alternative holiday or a substituted holiday or a rest day.

Holiday Pay

An employee having been employed under a continuous contract for not less than three months immediately preceding a statutory holiday is entitled to the holiday pay. Holiday pay should be paid to the employee not later than the day on which he is next paid his wages after that statutory holiday.

The daily rate of holiday pay is a sum equivalent to the average daily wages

earned by an employee in the 12-month period preceding the following specified dates. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.

Day(s) of Statutory Holiday(s)	Specified Dates
1 day	Day of the statutory holiday
More than 1 consecutive day	First day of the statutory holidays

NOTE: In calculating the average daily wages, an employer has to exclude (i) the periods for which an employee is not paid his wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods. (see Appendix 1 for details)

Restriction on Pay in lieu of Holiday

Regardless of whether an employee is entitled to holiday pay, an employer should grant his employee a statutory holiday, or arrange an “alternative holiday” or “substituted holiday”. An employer must not make any form of payment to the employee in lieu of granting a holiday. In other words, “buy-out” of a holiday is not allowed.

Offences and Penalties

An employer who without reasonable excuse fails to grant statutory holidays, alternative holidays or substituted holidays, or fails to pay holiday pay to an employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

PAID ANNUAL LEAVE

An employee is entitled to annual leave with pay after having been employed under a continuous contract for every 12 months. An employee's entitlement to paid annual leave increases progressively from seven days to a maximum of 14 days according to his length of service:

Years of Service	Annual Leave Entitlements
1	7
2	7
3	8
4	9
5	10
6	11
7	12
8	13
9 or above	14

Granting of Annual Leave

An employee shall take the paid annual leave to which he is entitled within the following period of 12 months.

The time of the leave should be appointed by the employer after consultation with the employee or his representative, confirmed by a written notice to the employee at least 14 days in advance, unless a shorter period has been mutually agreed.

Paid annual leave should be granted for an unbroken period. If the employee so requests, it may be granted in the following manner:

Leave entitlement not exceeding 10 days	up to 3 days can be granted separately; the balance should be granted consecutively
Leave entitlement exceeding 10 days	at least 7 days should be granted consecutively

Any rest day or statutory holiday falling within a period of annual leave will be counted as annual leave and another rest day or holiday must be appointed.

Annual Leave Pay

The daily rate of annual leave pay is a sum equivalent to the average daily wages earned by an employee in the 12-month period preceding the following specified dates. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.

Day(s) of Annual Leave	Specified Dates
1 day	Day of the annual leave
More than 1 consecutive day	First day of the annual leave

NOTE: In calculating the average daily wages, an employer has to exclude (i) the periods for which an employee is not paid his wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods. (see Appendix 1 for details)

Annual leave pay should be paid to the employee not later than the normal pay day after the period of annual leave taken.

Offences and Penalties

An employer who without reasonable excuse fails to grant annual leave to an employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

An employer who fails to pay annual leave pay to an employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

Restriction on Pay in lieu of Leave

An employee may choose to accept payment in lieu of the part of his leave entitlement which exceeds 10 days.

Payment of Annual Leave Pay on Termination of Employment Contract

A leave year means any period of 12 months commencing on the day on which his employment commenced and an anniversary of such day.

If an employee has been employed for a leave year and his employment contract is terminated, irrespective of the reasons of termination, he should be entitled to payment in lieu of any annual leave not yet taken. In

calculating the daily rate of the payment, the “date of termination of contract” should be adopted as the “specified date”. (see the preceding part on Annual Leave Pay)

An employee with three but less than 12 months' employment in a leave year and his employment contract is terminated other than for the reason of summary dismissal due to his serious misconduct, he would be entitled to pro rata annual leave pay.

Calculation of Annual Leave Pay on Termination of Employment Contract:

Period of employment		Annual Leave Entitlements	
Less than 12 months	less than 3 months	Nil	
	3 to 12 months	summary dismissal	Nil
		resignation dismissed other than summary dismissal	$\text{annual leave entitled in the current leave year} \times \frac{\text{period of employment (days)}}{365}$
12 or more than 12 months	less than 3 months in the current leave year	annual leave not yet taken*	
	3 to 12 months in the current leave year	summary dismissal	annual leave not yet taken*
		resignation dismissed other than summary dismissal	$\text{annual leave not yet taken}^* + \frac{\text{annual leave entitled in the current leave year} \times \text{period of employment in the current leave year (days)}}{365}$

* This refers to any untaken annual leave accrued in the previous leave year.

Common Leave Year

An employer may elect any period of 12 consecutive months as the common leave year for all of his employees. Should the employer wish to make this arrangement, he shall give one month's notice either to each of his

employees in writing or by posting a notice in a conspicuous place in the place of employment.

If an employee has not been employed for 12 months in the common leave year, the employer should calculate his leave entitlement on a pro rata basis, and any fraction of a day resulting from the calculation should be counted as a full day's leave.

After consultation with his employer, the employee may opt to take the pro rata annual leave accrued preceding the commencement of the common leave year or carry it forward and combine it with his leave accrued in the next leave year.

[Example]

common leave year: 1.1.2010 to 31.12.2010

commencement date of employment: 1.9.2010

pro rata annual leave: $122^* / 365 \times 7 = 2.34$ days (round up to 3 days)

(*122 is the number of days between 1.9.2010 and 31.12.2010)

The employee may take the 3 days' leave in 2011, or combine it with his 7 days' leave accrued in 2011 and take 10 days' leave in 2012.

Annual Leave Shutdown

If an employer intends to close down his business or part of his business for granting annual leave to his employees, he should inform the affected employees in writing at least one month in advance.

Where an employee is not yet entitled to paid annual leave in respect of any day during the period of shutdown but he has to stop work as a result, he should be granted paid annual leave during that whole period.

If the annual leave an employee is entitled exceeds the number of days of shutdown, he may take the remaining annual leave immediately following the shutdown.

The common leave year elected by the employer should not be affected by an annual leave shutdown as the annual leave granted shall be in respect of the leave year immediately preceding the period of the shutdown.

Chapter 5: Sickness Allowance

Eligibility for Sickness Allowance

An employee employed under a continuous contract is entitled to sickness allowance if the following conditions are fulfilled:

1. the sick leave taken is not less than four consecutive days (unless for any day off taken by a female employee for her pregnancy check-ups, post confinement medical treatment or miscarriage, any such day on which she is absent shall be counted as a sickness day and, subject to the following conditions, be paid sickness allowance);
2. the sick leave is supported by an appropriate medical certificate (see the part below on "Two Categories of Paid Sickness Days"); and
3. the employee has accumulated sufficient number of paid sickness days (see the parts below on "Accumulation of Paid Sickness Days" and "Two Categories of Paid Sickness Days").

An employee shall not be entitled to sickness allowance under the following circumstances:

- the employee, without reasonable excuse, refuses treatment by a company doctor of a medical scheme recognised by the Director of Health or disregards the advice of the doctor. (If the recognised scheme of medical treatment operated by an employer does not cover treatment from a certain medical discipline, the employee may choose to receive treatment from any registered medical practitioner, registered Chinese medicine practitioner or registered dentist under that particular discipline) ;
- the sickness day falls on a statutory holiday on which the employee is entitled to holiday pay; or
- compensation is payable under the Employees' Compensation Ordinance.

Sickness Allowance

The daily rate of sickness allowance is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the following specified dates. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.

Day(s) of sickness day(s)	Specified Dates
1 day	The sickness day
More than 1 consecutive day	The first sickness day

NOTE: In calculating the average daily wages, an employer has to exclude (i) the periods for which an employee is not paid his wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods. (see Appendix 1 for details)

Sickness allowance should be paid to the employee not later than the normal pay day.

Offences and Penalties

An employer who without reasonable excuse fails to pay sickness allowance to an employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

Accumulation of Paid Sickness Days

An employee can accumulate paid sickness days after having been employed under a continuous contract. Paid sickness days are accumulated at the rate of two paid sickness days for each completed month of the employee's employment during the first 12 months, and four paid sickness days for each completed month of employment thereafter. Paid sickness days can be accumulated throughout the whole employment period, but shall not exceed 120 days at any one time.

Two Categories of Paid Sick Leave Days

Paid sick leave days are divided into two categories - paid sick leave days can first be accumulated up to 36 days in Category 1 and then 84 days in Category 2.

Category	Total Number	Conditions for taking paid sick leave day(s)
Category 1	36	<ul style="list-style-type: none">supported by a medical certificate* issued by a registered medical practitioner, a registered Chinese medicine practitioner or a registered dentist
Category 2	84	<ul style="list-style-type: none">sick leave days taken exceeds the number of paid sick leave days remaining in Category 1if required by the employer, a medical certificate* issued by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist attending the employee as an out-patient or in-patient in a hospital should be produced ; upon the employer's request, a brief record of the investigation carried out and the treatment prescribed by the issuer of the medical certificate should also be produced

* The medical certificate should specify the number of days on which, and the nature of the sickness or injury on account of which, the employee is unfit for work.

Record of Sick Leave Days

An employer should keep the following records:

1. the date of commencement and termination of employment of each employee;
2. all paid sick leave days accumulated by each employee, including the number of paid sick leave days accumulated in Category 1 and 2;

3. paid sickness days taken by each employee and deducted from the total number of paid sickness days in either categories;
4. sickness allowance paid and the sickness days in respect of which the sickness allowance was paid.

The record should be signed by the employee within seven days of his return to work from paid sick leave, and the employee has the right to inspect the record.

Employment Protection

An employer is prohibited from terminating the contract of employment of an employee on his paid sickness day, except in cases of summary dismissal due to the employee's serious misconduct.

Offences and Penalties

An employer who contravenes the above provision is liable to prosecution and, upon conviction, to a fine of \$100,000. Besides, the employer is required to pay the following sum of money to the dismissed employee within 7 days after the day of termination:

1. wages in lieu of notice;
2. a further sum equivalent to seven days' wages as compensation**;
and
3. any sickness allowance to which the employee is entitled.

**see Appendix 1 for details of the calculation

The employee may also claim remedies for employment protection against his employer if he is dismissed other than for a valid reason as specified in the Ordinance.

(see the part on Eligibility and Remedies for Employment Protection in Chapter 9)

Chapter 6: Maternity Protection

Maternity Leave

A female employee employed under a continuous contract immediately before the commencement of her maternity leave and having given notice of pregnancy and her intention to take maternity leave to the employer is entitled to the following periods of leave:

- a continuous period of 10 weeks' maternity leave;
- if confinement occurs later than the expected date of confinement, a further period equal to the number of days from the day after the expected date of confinement to the actual date of confinement;
- the employee may enjoy an additional period of leave for not more than four weeks on the grounds of illness or disability due to the pregnancy or confinement.

Taking of Maternity Leave

- With the agreement of her employer, a pregnant employee may decide to commence her maternity leave from two to four weeks before the expected date of confinement;
- If the employee does not decide on the date, or fails to secure her employer's agreement, the employee shall commence her maternity leave four weeks before the expected date of confinement;
- Maternity leave commences on the date of confinement if it occurs before the scheduled maternity leave. In this case, the employee should give notice of the date of confinement and her intention to take 10 weeks' maternity leave to her employer within seven days of her confinement.

Payment for Maternity Leave

An employee is eligible for maternity leave pay if:

1. she has been employed under a continuous contract for not less than 40 weeks immediately before the commencement of scheduled maternity leave;
2. she has given notice of pregnancy and her intention to take maternity leave to her employer after the pregnancy has been confirmed. For example, the presentation of a medical certificate

- confirming her pregnancy to the employer; and
3. she has produced a medical certificate specifying the expected date of confinement if so required by her employer.

Maternity leave should be paid for a period of 10 weeks and it should be paid on the normal pay day of the employee.

The daily rate of maternity leave pay is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the first day of the maternity leave. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.

NOTE: In calculating the average daily wages, an employer has to exclude (i) the periods for which an employee is not paid his wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods. (see Appendix 1 for details)

Offences and Penalties

An employer who fails to grant maternity leave to a pregnant employee or fails to pay maternity leave pay to an eligible pregnant employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

Medical Examination

When the employee's absence from work to attend medical examination in relation to her pregnancy, post confinement medical treatment or miscarriage is supported by an appropriate medical certificate, any such day on which she is absent shall be counted as a sickness day. (see the part on Two Categories of Paid Sickness Days in Chapter 5 and the part on Medical Certificates in this Chapter).

Employment Protection

An employer is prohibited from dismissing a pregnant employee from the date on which she is confirmed pregnant by a medical certificate to the date on which she is due to return to work upon the expiry of her maternity leave if:

1. the employee has been employed under a continuous contract, and
2. she has served a notice of pregnancy to the employer.

If a pregnant employee is dismissed by her employer before she has served a notice of pregnancy, she may serve such notice immediately after being informed of her dismissal. Under such circumstances, her employer must withdraw the dismissal or the notice of dismissal.

However, the employer is not prohibited from dismissing a pregnant employee under the following circumstances :

- the employee is summarily dismissed due to her serious misconduct; or
- where it has been expressly agreed that the employment is on probation, the employee is dismissed for reasons other than pregnancy during the probation period of not more than 12 weeks.

Offences and Penalties

Except for the circumstances provided above, it is an offence for an employer to dismiss a pregnant employee. The employer is liable to prosecution and, upon conviction, to a fine of \$100,000. Besides, the employer is required to pay the following sums of money to the dismissed employee within 7 days after the day of termination:

1. wages in lieu of notice;
2. a further sum equivalent to one month's wages as compensation*;
and
3. 10 weeks' maternity leave pay if, but for the dismissal, she would have been entitled to such payment.

*see Appendix 1 for details of the calculation

The employee may also claim remedies for employment protection against her employer if she is dismissed other than for a valid reason as specified in the Ordinance. (see the part on Eligibility and Remedies for Employment Protection in Chapter 9)

Prohibition of Assignment of Heavy, Hazardous or Harmful Work

If a pregnant employee produces a medical certificate with an opinion as to her unfitness to handle heavy materials, work in places where gas injurious to pregnancy is generated, or do other work injurious to pregnancy, the employer may not allocate such work to the employee. If the employee is already performing such work, the employer shall within 14 days after receiving such request remove her from that work.

Regardless of whether the medical certificate produced by the employee was issued by a registered medical practitioner or registered Chinese medicine practitioner, an employer may, within 14 days after receiving such medical certificate, at the employer's own expense, arrange for the employee to attend another medical examination conducted by a registered medical practitioner or registered Chinese medicine practitioner named by the employer to obtain a second opinion as to the employee's fitness to undertake the work at issue.

The Employment Ordinance provides that if the earnings of the employee is affected as a result of her transfer from heavy, hazardous or harmful work, the maternity leave pay or the payment for termination of employment shall be calculated on the basis of the average daily or monthly (as appropriate) wages earned by the employee in the 12-month period preceding the transfer.

(see Appendix 1 for details of the calculation).

Offences and Penalties

An employer who without reasonable excuse fails to comply with the above requirements is liable to prosecution and, upon conviction, to a fine of \$50,000.

Medical Certificates

Employees shall submit medical certificates issued by registered medical practitioners, registered Chinese medicine practitioners or registered midwives, if so required by employers where applicable, to be eligible for maternity protection. Please refer to the following table for details:

Certification pertaining to	Issued by a registered medical practitioner	Issued by a registered Chinese medicine practitioner	Issued by a registered midwife
Pregnancy and the expected date of confinement	✓	✓	✓
Actual date of confinement	✓	✗	✓
An additional period of not more than 4 weeks of maternity leave on ground of illness or disability due to pregnancy or confinement	✓	✓	✗
Absence from work to attend a medical examination in relation to pregnancy or post confinement medical treatment, or by reason of miscarriage	✓	✓	✗
Unfitness to handle heavy, hazardous or harmful work	✓	✓	✗

Chapter 7: End of Year Payment

Application

The provisions concerning end of year payment apply to an employee employed under a continuous contract who, in accordance with a term of his contract (including agreement made orally or in writing, in express or implied term), is entitled to an end of year payment from his employer.

Definition

End of year payment means any annual payment (including double pay, 13th month payment, end of year bonus) of a contractual nature. It does not include any payment which is of a gratuitous nature or which is payable at the discretion of the employer.

Presumption

For every employment contract made after 27 June 1997, it is presumed that an annual payment or annual bonus is not of a gratuitous nature and is not payable only at the discretion of the employer unless a written term or condition in the contract expresses intention to the contrary.

Eligibility for End of Year Payment

An employee is eligible for an end of year payment if he has been employed under a continuous contract for a whole payment period. The payment period shall be the period specified in the employment contract, or a lunar year if it is not specified.

Amount of End of Year Payment

- The amount as specified in the employment contract.
- If it is not specified, a sum equivalent to the average monthly wages earned by an employee in the 12-month period preceding the day on which it becomes due. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.

NOTE: In calculating the average monthly wages, an employer has to exclude (i) the periods for which an employee is not paid his wages or full wages, including rest day, statutory holiday, annual leave, sickness

day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods. (see Appendix 1 for details)

Proportion of End of Year Payment

An employee is eligible for a pro rata end of year payment if he has been employed under a continuous contract for not less than three months in a payment period and:

- continues to be employed after the expiry of the payment period; or
- is dismissed by the employer (except in cases of summary dismissal due to the employee's serious misconduct).

Any probation period, subject to a maximum of three months, is excluded from the calculation of the qualifying service for pro rata end of year payment. However, excluding the probation period, if an employee has fulfilled the eligibility requirement of no less than three months' employment in a payment period, then the whole employment period (including the probation period) shall be taken into account in calculating the pro rata end of year payment.

Time of Payment

- On the day specified in the employment contract.
- If a day is not specified, payment should be made on the last day of the payment period or within seven days after that day.
- If the employment contract is terminated before the payment period expires and the employee is eligible for pro rata end of year payment, payment should be made on the day the contract is terminated or within seven days after that day.
- If the end of year payment is to be calculated by reference to any profits of the employer, payment should be made on the day the profits are ascertained or within seven days after that day.

Offence and Penalties

An employer who wilfully and without reasonable excuse fails to pay an end of year payment to an eligible employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

Chapter 8: Termination of Contract of Employment

Termination of Employment Contract by Notice or Payment in lieu of Notice

A contract of employment may be terminated by the employer or employee through giving the other party due notice or wages in lieu of notice. In the case of a continuous contract of employment, the length of notice or the amount of wages in lieu of notice required are:

Table 1

Employment Condition		Length of notice	Wages in lieu of notice	
During Probation Period	within the first month of probation	not required	not required	
	after the first month of probation	with agreement to the length of notice	as per agreement, but not less than 7 days	Table 2
		without agreement to the length of notice	not less than 7 days notice	Table 2
No / after probation period	with agreement to the length of notice	as per agreement, but not less than 7 days	Table 2	
	without agreement to the length of notice	not less than 1 month	Table 2	

Table 2

Notice period expressed in days or weeks	Average daily wages earned by an employee in the 12-month period preceding the day when a notice of termination of contract is given*	X	Number of days in the notice period for which wages would normally be payable to the employee	=	Wages in lieu of notice
Notice period expressed in months	Average monthly wages earned by an employee in the 12-month period preceding the day when a notice of termination of contract is given**	X	Number of months specified in the notice period	=	Wages in lieu of notice

*In case a notice has not been given, one shall adopt the average daily wages of the employee in the 12-month period preceding “the day when the contract is terminated”.

**In case a notice has not been given, one shall adopt the average monthly wages of the employee in the 12-month period preceding “the day when the contract is terminated”.

NOTE: In calculating the average daily/monthly wages, (i) the periods for which an employee is not paid his wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods, should be excluded₃₂ (see Appendix 1 for details)

Termination of Employment Contract Without Notice or Wages in lieu of Notice

An employer may summarily dismiss an employee without notice or payment in lieu of notice if the employee, in relation to his employment:

1. wilfully disobeys a lawful and reasonable order;
2. misconducts himself;
3. is guilty of fraud or dishonesty; or
4. is habitually neglectful in his duties.

Taking part by an employee in a strike is not a lawful ground for an employer to terminate the employee's contract of employment without notice or payment in lieu.

NOTE :Summary dismissal is a serious disciplinary action. It only applies to cases where an employee has committed very serious misconduct or fails to improve himself after the employer's repeated warnings.

An employee may terminate his employment contract without notice or payment in lieu of notice if:

1. he reasonably fears physical danger by violence or disease;
2. he is subjected to ill-treatment by the employer; or
3. he has been employed for not less than five years and is certified by registered medical practitioner or a registered Chinese medicine practitioner as being permanently unfit for the type of work he is being engaged (see Chapter 10).

Statutory Restrictions on Termination of Employment Contract

An employer shall not dismiss an employee under the following circumstances:

Maternity Protection	An employer shall not dismiss a female employee who has been confirmed pregnant and has served a notice of pregnancy.
Paid Sick Leave	An employer shall not dismiss an employee whilst the employee is on paid sick leave.
Giving evidence or information to the authorities	An employer shall not dismiss an employee by reason of his giving of evidence or information in any proceedings or inquiry in connection with the enforcement of the Employment Ordinance, work accidents or breach of work safety legislation.
Trade Union Activities	An employer shall not dismiss an employee for trade union membership and activities.
Injury at Work	An employer shall not dismiss an injured employee before having entered into an agreement with the employee for employee's compensation or before the issue of a certificate of assessment.

Offences and Penalties

An employer dismissing an employee under the above circumstances is liable to prosecution and, upon conviction, to a fine of \$100,000.

Termination Payments

The items and amount of payments payable to an employee on termination of employment or expiry of the contract depend on a number of factors such as the length of service, the terms of employment contract and the reason for termination of contract. For quick reference, termination payments usually include :

- outstanding wages;
- wages in lieu of notice, if any;
- payment in lieu of any untaken annual leave, and any pro rata annual leave pay for the current leave year;
- any outstanding sum of end of year payment, and pro rata end of year payment for the current payment period;
- where appropriate, long service payment or severance payment;
- other payments under the employment contract, such as, gratuity, provident fund, etc.

Time of Making Termination Payments

An employer shall pay all the termination payments, except for severance payment, to the employee as soon as practicable and in any case not later than seven days after the date of termination or expiry of contract.

For severance payment, an employer shall make payment not later than two months from the receipt of a notice from an employee claiming for severance payment.

Offences and Penalties

An employer is required to pay interest on the outstanding wages due to the employee if he fails to pay wages to the employee within seven days after the termination or expiry of contract.

An employer who wilfully and without reasonable excuse fails to pay termination payments when they become due is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for three years.

Chapter 9: Employment Protection

The Part on Employment Protection of the Employment Ordinance aims at discouraging employers from dismissing or varying the terms of the employment contract of their employees in order to evade their liabilities under the Ordinance.

Eligibility and Remedies for Employment Protection

An employee may claim for remedies against an employer under the following situations:

Situation	Conditions	Remedies
Unreasonable Dismissal	<ol style="list-style-type: none">1. the employee has been employed under a continuous contract for a period of not less than 24 months; and2. the employee is dismissed other than for a valid reason as specified in the Ordinance	<ul style="list-style-type: none">• An order for reinstatement or re-engagement; or• An award of terminal payments
Unreasonable Variation of the Terms of the Employment Contract	<ol style="list-style-type: none">1. the employee has been employed under a continuous contract;2. the terms of the employment contract are varied without the employee's consent;3. the employment contract does not contain an express term which allows such a variation; and4. the terms of the employment contract are varied other than for a valid reason as specified in the Ordinance	<ul style="list-style-type: none">• An order for reinstatement or re-engagement; or• An award of terminal payments

Situation	Conditions	Remedies
Unreasonable and Unlawful Dismissal	<ol style="list-style-type: none"> 1. the employee is dismissed other than for a valid reason as specified in the Ordinance; and 2. the dismissal is in contravention of the law (see the part on Statutory Restrictions on Termination of Employment Contract in Chapter 8) 	<ul style="list-style-type: none"> • An order for reinstatement or re-engagement; or • An award of terminal payments and/or award of compensation not exceeding \$150,000

Valid Reasons for Dismissal or Variation of the Terms of the Employment Contract

The five valid reasons for dismissal or variation of the terms of the employment contract are:

- the conduct of the employee
- the capability or qualifications of the employee for performing his work
- redundancy or other genuine operational requirements of the business
- statutory requirements (i.e. it would be contrary to the law to allow an employee to continue to work in his original position or to continue with the original terms in his employment contract)
- other substantial reasons

Making a Claim for Remedies for Employment Protection

An employee who wishes to claim for remedies must serve a written notice to the employer in respect of his claim within three months from the effective date of termination of employment or variation of contract. This deadline may be extended for a further period up to six months if approved by the Commissioner for Labour. If an employee wishes to file a claim with the Labour Tribunal, he must do so within nine months from the effective date of termination of employment or the variation of contract.

Remedies for Employment Protection

Remedies for Employment Protection, to be awarded by the Labour Tribunal, include an order of reinstatement or re-engagement, an award of terminal payments and an award of compensation.

Order of Reinstatement or Re-engagement

An order for reinstatement is an order requiring the employer to treat the employee in all respects as if he had not been dismissed or as if there had been no variation of the terms of the employment contract.

An order for re-engagement is an order requiring the employer, his successor or an associated employer to re-engage the employee in employment on terms comparable to his original terms of employment or in other suitable employment.

An order for reinstatement or re-engagement will only be made if both the employer and the employee agree to it.

Where an employee is ordered to be reinstated or re-engaged, his rights and privileges, including seniority and pension rights, must be restored to him and the continuity of the period of employment shall not be treated as broken.

The employer may also be ordered to pay the employee any arrears of pay and statutory entitlements under the Employment Ordinance which the employee would have accrued if he has not been dismissed or his terms of employment contract has not been varied. Conversely, the employee may be ordered to pay the employer any amount that the employer has paid him because of the dismissal or the variation of the terms of the employment contract.

Award of Terminal Payments

If no order for reinstatement or re-engagement is made, the Labour Tribunal may make an award of terminal payments to be payable by the employer to the employee as it considers fair and appropriate.

Terminal payments means: 1) the statutory entitlements under the Employment Ordinance which the employee is entitled to but has not yet been paid upon dismissal; 2) the entitlements the employee might reasonably be expected to be entitled to under the Employment Ordinance had he been allowed to continue his employment; and 3) any other payments due to the employee under his contract of employment.

An employee may be awarded terminal payments even if he has not attained the qualifying length of service required for the entitlements. In such case, the terminal payments shall be calculated according to his actual length of service.

Award of Compensation

An employee may be awarded compensation up to a maximum of \$150,000 if he is unreasonably and unlawfully dismissed, and no order for reinstatement or re-engagement is made by the Labour Tribunal.

In determining the award of compensation, the Labour Tribunal will consider the circumstances of a claim including:

1. the circumstances of the employer and the employee;
2. the period of employment of the employee;
3. how the dismissal took place;
4. the loss sustained by the employee as a result of the dismissal;
5. possibility of the employee obtaining new employment;
6. whether the employee should bear any fault for the dismissal; and
7. any payments, including terminal payments, that the employee is entitled to receive in respect of the dismissal.

Exclusion

This Part of the Employment Ordinance does not apply to claims involving dismissal on the grounds of sex, disability, family status or race. If an employee is dismissed on the grounds of sex, disability, family status or race, he may claim for remedies under the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance or the Race Discrimination Ordinance respectively.

Chapter 10: Severance Payment and Long Service Payment

Eligibility for Severance Payment and Long Service Payment

An employee is eligible for severance payment or long service payment subject to the following conditions:

Entitlement	Severance Payment	Long Service Payment
Qualifying period of employment	not less than 24 months under a continuous contract	not less than 5 years under a continuous contract
Conditions/ Requirements	The employee is dismissed by reason of redundancy*	The employee is dismissed but : <ul style="list-style-type: none"> • he is not summarily dismissed due to his serious misconduct • his dismissal is not by reason of redundancy
	Employment contract of a fixed term expires without being renewed by reason of redundancy*	Employment contract of a fixed term expires without being renewed*
	The employee is laid off	
The employee resigns on ground of ill health		
The employee, aged 65 or above, resigns on ground of old age		

* If not less than 7 days before the date of dismissal/ expiry of the fixed term contract in case of severance payment, and not less than 7 days before the expiry of the fixed term contract in case of long service payment, the employer has offered in writing to renew the contract of employment or re-engage him under a new contract but the employee has unreasonably refused the offer, the employee is not eligible for the entitlements.

NOTE : An employee will not be simultaneously entitled to both long service payment and severance payment.

Meaning of Redundancy

An employee is taken to be dismissed by reason of redundancy if the dismissal is due to the fact that:

- the employer closes or intends to close his business;
- the employer has ceased, or intends to cease, the business in the place where the employee was employed; or
- the requirement of the business for employees to carry out work of a particular kind, or for the employee to carry out work of a particular kind in the place where the employee was employed, ceases or diminishes or is expected to cease or diminish.

Meaning of Lay-off

If an employee is employed on such terms and conditions that his remuneration depends on his being provided by the employer with work of the kind he is employed to do, he shall be taken to be laid off if the total number of days on which no work is provided or no wages is paid exceeds:

- half of the total number of normal working days in any four consecutive weeks; or
- one-third of the total number of normal working days in any 26 consecutive weeks.

The days of lock-out, rest days, annual leave and statutory holidays should not be counted as normal working days during the above periods.

Amount of Severance Payment/ Long Service Payment

The following formula applies to the calculation of both severance payment and long service payment:

<i>Monthly-paid employee</i>	$(\text{last month wages}^* \times 2/3)^{\#} \times$	reckonable years of service
<i>Daily-rated/piece-rated employee</i>	$(\text{any 18 days' wages}^* \text{ chosen by the employee out of his last 30 normal working days})^{\#} \times$	reckonable years of service

Service of an incomplete year should be calculated on a pro rata basis.

* An employee may also elect to use his average wages in the last 12 months for the calculation.

The sum should not exceed 2/3 of \$22,500 (i.e. \$15,000).

• *Reckonable Years of Service*

For all manual employees and non-manual employees whose average monthly wages did not exceed \$15,000 for the 12 months preceding 8 June 1990, if the relevant date of termination of employment occurs on or after 1 October 2004, the years of service should be reckoned in full.

For non-manual employees whose average monthly wages exceeded \$15,000 for the 12 months preceding 8 June 1990, their years of service can be reckoned up to 1980.

• *Maximum Amount*

If the relevant date of termination of employment occurs on or after 1 October 2003, the maximum amount of severance payment or long service payment is \$390,000.

Payment of Severance Payment

An employee who wishes to claim for severance payment should serve a

written notice to his employer within three months after the dismissal/ lay off takes effect. The deadline for serving such notice may be extended if approved by the Commissioner for Labour.

The employer shall make the severance payment to the employee not later than two months from the receipt of such a notice.

Offences and Penalties

An employer who without reasonable excuse fails to pay severance payment to an employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

Payment of Long Service Payment

Long service payment should be paid to an employee within seven days after the date of termination of employment contract.

Offences and Penalties

An employer who wilfully and without reasonable excuse fails to pay long service payment to an employee is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for three years.

Offsetting of Severance Payment/ Long Service Payment against Mandatory Provident Fund Scheme benefit, Occupational Retirement Scheme benefit or Gratuity based on length of service

If an employee becomes entitled to severance payment or long service payment and:

- gratuities based on length of service or occupational retirement scheme benefits (excluding any part attributable to employee's contributions) have been paid to the employee; or
- accrued benefit (excluding any part attributable to employee's contributions) is being held in a mandatory provident fund scheme in respect of the employee, or has been paid to the employee,

the severance payment / long service payment is to be offset against the aforementioned amount of gratuities and benefits to the extent that they relate to the employees' years of service for which the severance payment/ long service payment is payable.

(For enquiries on application for payment of an amount from the occupational retirement scheme benefits or accrued benefit in the mandatory provident fund scheme due to severance payment / long service payment paid / payable to an employee, please contact the trustees concerned for details.)

Claiming Long Service Payment on the ground of Ill Health

An employee claiming for long service payment on ground of ill health should forward to the employer a certificate in the form specified by the Commissioner for Labour and issued by a registered medical practitioner or a registered Chinese medicine practitioner, certifying that he is permanently unfit for his present job.

Regardless of whether the certificate produced by the employee was issued by a registered medical practitioner or registered Chinese medicine practitioner, an employer may, within 14 days after receiving such certificate, at the employer's own expense, arrange for the employee to attend another medical examination conducted by a registered medical practitioner or registered Chinese medicine practitioner named by the employer to obtain a second opinion as to the employee's permanent unfitness to undertake the work at issue. The employer should notify the employee in writing details of the appointment not later than 48 hours before the examination is to take place.

Claiming Long Service Payment in the event of the Death of an Employee

Priority in claiming long service payment

- 1st the spouse of the deceased employee
- 2nd children of the deceased employee (if two or more persons apply, the long service payment should be divided equally between them)
- 3rd parents of the deceased employee (if two or more persons apply, the long service payment should be divided equally between them)
- 4th the personal representative of the deceased employee

Application Procedures

The person who wishes to claim for long service payment must serve an application in a specified form to the employer within 30 days after the death of the employee. Where necessary, the Commissioner for Labour may extend the deadline. The form is available at any branch office of the Labour Relations Division.

The employer shall make the payment of Long Service Payment to :

the spouse of the employee	within 7 days after receiving the application
other applicants	within 7 days after the application period expires

Offences and Penalties

An employer who without reasonable excuse fails to pay long service payment to the beneficiaries of a deceased employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

Chapter 11: Protection against Anti-union Discrimination

Right of an Employee in Participating in Trade Unions

Every employee shall have the following rights:

1. to be a member or an officer of a trade union
2. to take part in the activities of the trade union at any appropriate time, if the employee is a member or an officer of a trade union
(Appropriate time means:-
 - outside working hours; or
 - during working hours by arrangement and with the consent of the employer.)
3. to associate with other persons for the purpose of forming or applying for the registration of a trade union.

Statutory Requirements of the Employer

An employer shall not:-

1. prevent or deter an employee from exercising any of the above rights;
2. dismiss, penalise or discriminate against an employee for exercising the above rights;
3. make it a condition of employment that an employee must not exercise the above rights.

Offences and Penalties

Any employer who contravenes the above shall be liable to prosecution and upon conviction, to a fine of \$100,000.

Chapter 12: Employers' Criminal Liability in Failing to Pay an Award of the Labour Tribunal or Minor Employment Claims Adjudication Board

An employer should pay the awarded sum as ordered by the Labour Tribunal ("LT") or the Minor Employment Claims Adjudication Board ("MECAB") without delay.

Defaulting Payment of an Award of a Tribunal is a Criminal Offence

Under the Employment (Amendment) Ordinance 2010 ("the Amendment Ordinance")^{Note 1}, if an award of a tribunal^{Note 2} provides for the payment by an employer of any specified entitlement defined by the Amendment Ordinance (such as wages, end of year payment, maternity leave pay and severance payment, etc)^{Note 3} (see the part below on Coverage of "Specified Entitlements") and the employer wilfully and without reasonable excuse fails to pay the awarded sum within 14 days after it becomes due^{Note 4}, the employer is liable to prosecution and, upon conviction, to a fine of \$350,000 and imprisonment for three years.

The offence applies to the default on any part of a sum payable under the award. In the case of a sum payable by instalments, it also applies to the default on any instalment or part of an instalment.

^{Note 1} The Amendment Ordinance applies to an award of the LT or MECAB made on or after the effective date (i.e. 29 October 2010).

^{Note 2} "an award of a tribunal"— includes an award, an order or a settlement treated as an award of the LT under the Labour Tribunal Ordinance or that of the MECAB under the Minor Employment Claims Adjudication Board Ordinance.

^{Note 3} Unless there is any contrary evidence, if an award of a tribunal provides for the payment of a sum but does not indicate whether or not that sum includes any specified entitlement, and the claim to which the award relates consists, in whole or in part, of any specified entitlement, the award is to be treated as providing for the payment of a specified entitlement.

^{Note 4} If the award does not specify the date on which the awarded sum is payable, the sum should be paid within 14 days after the date of the award.

Company Directors and Responsible Persons are Criminally Liable for Defaulting Payment of an Award of a Tribunal

Where a limited company wilfully and without reasonable excuse fails to pay an awarded sum within 14 days after it becomes due and the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director or other responsible person, such person commits an offence and is liable to prosecution and, upon conviction, to a fine of \$350,000 and imprisonment for three years.

Coverage of “Specified Entitlements”

“Specified entitlements” include wages and statutory entitlements underpinned by criminal sanctions under the Employment Ordinance, such as wages, end of year payment, maternity leave pay, severance payment, long service payment, sickness allowance, holiday pay, annual leave pay as well as terminal payments and compensation for unreasonable and unlawful dismissal awarded under the part on “Employment Protection” of the Employment Ordinance.

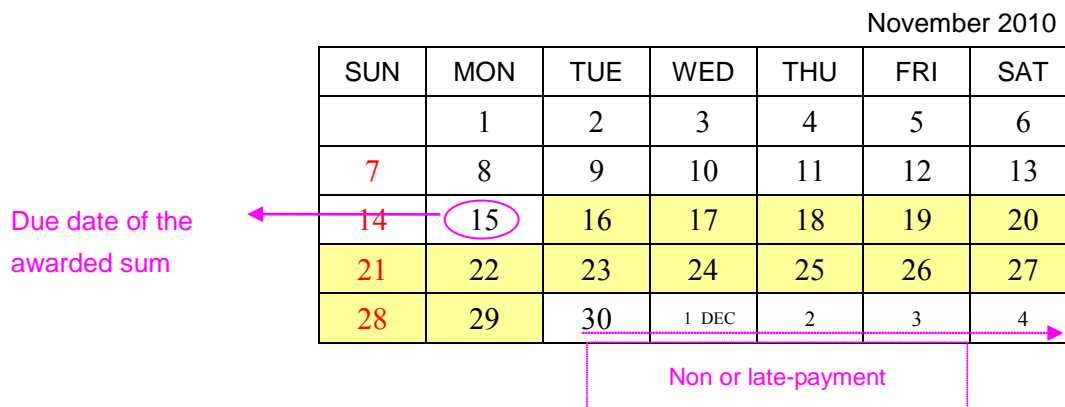
Examples

How to determine the “14-day period after the awarded sum becomes due”

[Example 1] When the awarded sum is payable in a lump sum :

An employer has agreed to terminate the employment of his employee by paying 1-month wages in lieu of notice of \$7,500 in place of giving one month’s notice as per the term under the employment contract. He subsequently refuses to pay the sum.

The employee lodges a claim of \$7,500 wages in lieu of notice against his employer at the Labour Relations Division of the Labour Department. After conciliation, the dispute is unresolved. The employee then files a claim for the wages in lieu of notice against the employer with the MECAB. MECAB awards in favour of the employee on 8 November 2010 and makes an award on the same day. The employer is ordered to pay the employee \$7,500 wages in lieu of notice on or before 15 November 2010.



Denotes the 14-day period (i.e. 16 to 29 November 2010) after the awarded sum becomes due. An employer who wilfully and without reasonable excuse fails to pay before the expiry of this period commits an offence.

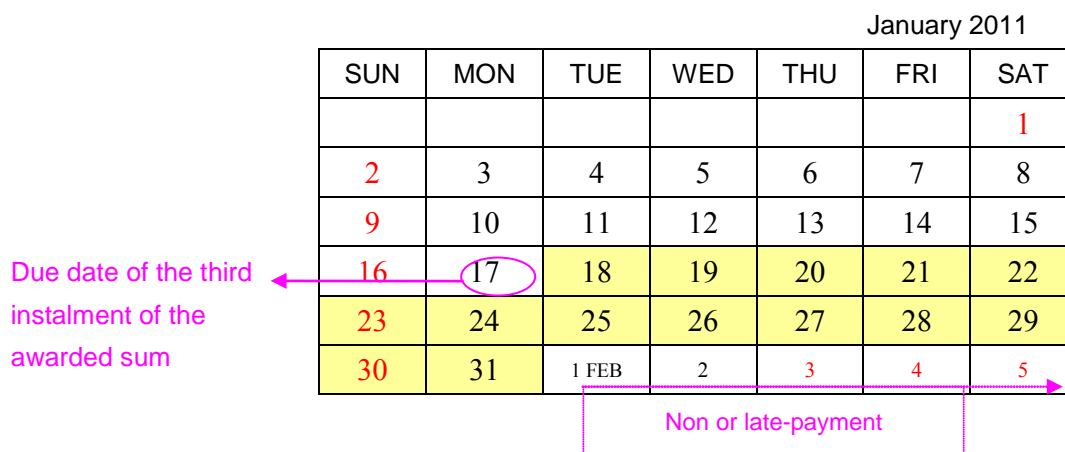
An employer who wilfully and without reasonable excuse fails to pay the awarded sum of \$7,500 within 14 days (i.e. 16 to 29 November 2010) after it becomes due (i.e. the due date 15 November 2010) commits an offence and is liable to prosecution. Upon conviction, the maximum penalties are a fine of \$350,000 and imprisonment for three years.

[Example 2] When the awarded sum is payable by instalments :

An employee files a claim with the LT against his employer for \$12,000 commission. The parties reach a settlement agreement at a hearing on 3 November 2010 and the employer agrees to pay the employee the claim amount by 3 instalments in full and final settlement of the dispute. LT approves the settlement agreement and makes an award on the same day. The awarded sum should be paid on or before the following dates :

No. of Instalments	Date	Payment
First Instalment	17 November 2010	\$4,000
Second Instalment	17 December 2010	\$4,000
Third Instalment	17 January 2011	\$4,000

If the employer only pays the first and second instalments in a total sum of \$8,000 on schedule but fails to pay the third instalment \$4,000 on or before 31 January 2011 (i.e. the expiry of the 14-day period after the third instalment of the awarded sum becomes due), the employer commits an offence and is liable to prosecution.



Denotes the 14-day period (i.e. 18 to 31 January 2011) after the third instalment of the awarded sum becomes due. An employer who wilfully and without reasonable excuse fails to pay before the expiry of this period commits an offence.

An employer who wilfully and without reasonable excuse fails to pay the sum of \$4,000 before the expiry of the 14-day period (i.e. 18 to 31 January 2011) after the third instalment of the awarded sum becomes due (i.e. the due date 17 January 2011) commits an offence and is liable to prosecution. Upon conviction, the maximum penalties are a fine of \$350,000 and imprisonment for three years.

Appendix 1

A Guide to the Calculation of Relevant Statutory Entitlements on the Basis of the 12-Month Average Wages with Examples

Introduction

Provisions under the Employment (Amendment) Ordinance 2007 (“the E(A)O 2007”) relating to the calculation of statutory entitlements became effective on 13 July 2007^(Note 1).

The main objective of the E(A)O 2007 is to ensure that all components of wages ^(Note 2) as defined under the Employment Ordinance (including commission and allowance, etc) are included in the calculation of relevant statutory entitlements.

Upon commencement of the E(A)O 2007, regardless of whether an employee is monthly, daily or piece rated, his relevant statutory entitlements shall be calculated on the basis of his 12-month average wages; and in computing his average wages, any periods and wages that fall under the “disregarding provisions” shall be excluded.

^(Note 1) Application of the E(A)O 2007:

- ⇒ Applicable to employment contracts entered into on or after 13 July 2007.
- ⇒ For employment contracts entered into before the commencement date, the E(A)O 2007 is applicable under the following situations:
 - If maternity leave pay, sickness allowance, holiday pay or annual leave pay is payable by an employer to an employee in respect of a wage period, and the last day of the wage period falls on or after the commencement date.
 - If the due date of the end of year payment (or proportion of it) payable by an employer to an employee falls on or after the commencement date.
 - If the relevant statutory entitlements are payable upon termination of contract and the date of termination falls on or after the commencement date.

^(Note 2) See the part on definition of wages in Chapter 3.

(I) Relevant Statutory Entitlements:

1. Holiday pay
2. Annual leave pay
3. Sickness allowance and related provisions ^(Note 3)
4. Maternity leave pay and related provisions ^(Note 4)
5. End of year payment
6. Wages in lieu of notice

(II) The Revised Mode of Calculation:

Calculating relevant statutory entitlements on the basis of the 12-month average wages

⇒ The relevant statutory entitlements shall be calculated on the basis of the average daily (or monthly) wages earned by an employee in the 12-month ^(Note 5) period preceding the specified dates as stipulated by the E(A)O 2007. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period ^(Note 6).

⇒ The specified dates of the relevant statutory entitlements are:

Statutory Entitlements	Day(s) of Leave	Specified Dates
Holiday Pay	1 day	Day of the statutory holiday
	More than 1 consecutive day	First day of the statutory holidays
Annual Leave Pay	1 day	Day of the annual leave
	More than 1 consecutive day	First day of the annual leave
	Day(s) of untaken leave upon termination of contract	Date of termination of contract

^(Note 3) Including the compensation payable by an employer for wrongfully dismissing an employee on sick leave.

^(Note 4) Including the compensation payable by an employer for wrongfully dismissing a pregnant employee.

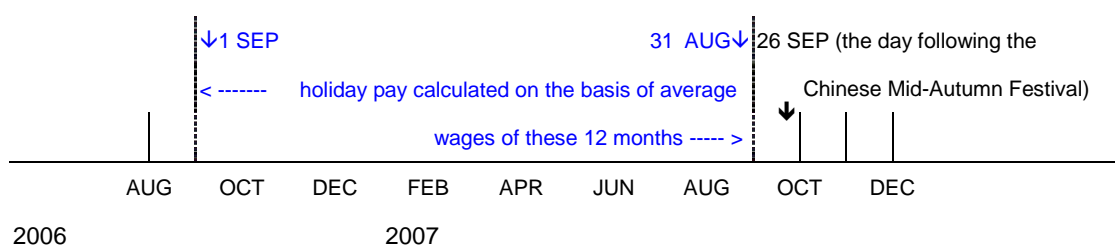
^(Note 5) "Month" refers to "calendar month".

^(Note 6) Suppose an employee commenced employment on 5 July 2007, his period of employment will be less than 12 calendar months before 4 April 2008 (i.e. Ching Ming Festival). His holiday pay for 4 April 2008 shall therefore be calculated on the basis of his average daily wages earned in the period 5 July 2007 and 31 March 2008.

Sickness Allowance ^(Note 7)	1 day	The sickness day
	More than 1 consecutive day	The first sickness day
Maternity Leave Pay ^(Note 8)	More than 1 consecutive day	First day of the maternity leave
End of Year Payment ^(Note 9)	-	Due day of the payment
Wages in lieu of Notice	-	The day when a notice of termination of contract is given (in case a notice has not been given, the day when the contract is terminated)

Example 1 : How to determine the specified date and the 12-month period for calculating holiday pay – in the case of “the Day Following the Chinese Mid-Autumn Festival”

- The specified date is the day of the statutory holiday, i.e. 26 September 2007
- The 12-month average wages is calculated on the basis of the wages earned in the period 1 September 2006 and 31 August 2007.



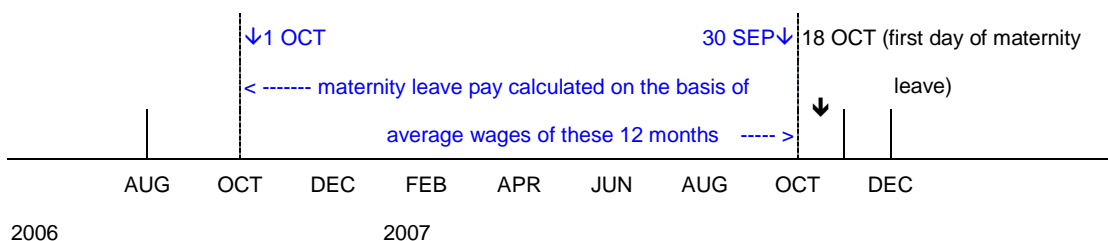
^(Note 7) In calculating the 7 days' wages as compensation payable to an employee wrongfully dismissed on a sickness day, the employer shall adopt the date of termination of contract as the specified date.

^(Note 8) In calculating the 1 month's wages as compensation payable to a pregnant employee wrongfully dismissed, the employer shall adopt the date of termination of contract as the specified date.

^(Note 9) Applicable to situation in which the amount of end of year payment has not been specified in the contract.

Example 2 : How to determine the specified date and the 12-month period for calculating maternity leave pay – in the case of 10-week maternity leave commencing 18 October 2007

- The specified date is the first day of the maternity leave, i.e. 18 October 2007
- The 12-month average wages is calculated on the basis of the wages earned in the period 1 October 2006 and 30 September 2007.



Periods and Wages to be Disregarded

⇒ To avoid deflating the average wages and hence reducing the amount of statutory entitlements, in calculating the 12-month average daily (or monthly) wages, one has to identify the following situations as stipulated by the E(A)O 2007 under which an employee is **not paid his wages or full wages** and then exclude the **periods together with the wages** paid to the employee for such periods^(Note 10):

- (i) The employee's taking any of the following leave:
 - leave provided under the Employment Ordinance (i.e. rest day, statutory holiday, annual leave, maternity leave or sickness day);
 - sick leave due to work injuries as provided under the Employees' Compensation Ordinance; or
 - leave taken with the agreement of the employer;
- (ii) The employee not being provided by the employer with work on any normal working day.

^(Note 10) To simplify the administrative work involved in calculating average wages, the E(A)O 2007 has made a technical amendment to presume the sum payable for the periods under (i) and (ii) as wages. By doing so, an employer does not have to exclude his employee's full-paid leave (be it statutory holiday, annual leave, maternity leave or any other leave taken with agreement of the employer) as well as the sum paid correspondingly when calculating average wages. It is noteworthy that the definition of wages under the Employment Ordinance has not been changed as a result of this amendment.

Example 3 : How to exclude the periods and wages that fall under the “disregarding provisions” – in the case of 7-day annual leave commencing 20 November 2007

- Assuming the employee is monthly rated and she has taken 10-week maternity leave commencing 8 August 2007 with maternity leave pay at four-fifths of her wages.
- The 7-day annual leave pay shall be calculated on the basis of her average daily wages in the past 12 months (i.e. from 1 November 2006 to 31 October 2007).
- Periods and wages to be excluded in calculating the average daily wages:
 - Excluding the period of 10-week maternity leave from the 12-month period (i.e. 365 days minus 70 days)
 - Excluding the 10-week maternity leave pay from the total wages earned in the 12-month period

$$\text{Average daily wages} = \frac{\text{Total wages in the 12-month period} - \text{10-week maternity leave pay (\$)}}{365 - 70 \text{ (days)}}$$

Examples on Calculation

(Note: The hypothetical examples below illustrate how relevant statutory entitlements should be calculated.)

Example 1

Calculating holiday pay for 1 January 2008

Assumptions

- Remuneration: Daily- rated at \$300 with no-pay rest days
- 12-month wages earned in 2007: \$92,700 including –
 - wages of \$90,300 for working 301 days (i.e. 365 days – 52 rest days – 12 statutory holidays)
 - payments of \$2,400 for 8 statutory holidays
- Leave taken with less than full wages in 2007:
 - 52 rest days without pay
 - 4 statutory holidays without pay (falling within the first 3 months of employment)

Periods and wages to be disregarded

- 52 days of no-pay rest days
 - 4 days of no-pay statutory holidays
- (Note: as the above 56 days are no-pay leave, the amount to be excluded will be \$0)

Calculating holiday pay on the basis of the 12-month average

- Calculating the average daily wages earned in 2007

$$\frac{92,700 - 0 (\$)}{365 - 52 - 4 (\text{days})} = \$300$$

- Holiday pay for 1 January 2008: \$300

Example 2

Calculating sickness allowance for 4 sickness days

Assumptions

- Remuneration: Monthly-rated at \$10,000 with paid rest days
- 12-month wages earned before the first sickness day: \$120,000 including wages for services rendered and payments for leave
- Leave taken in the 12-month period: 71 days of full pay leave comprising –
 - 52 rest days
 - 12 statutory holidays
 - 7 days of annual leave

Periods and wages to be disregarded

- No period and sum have to be excluded because the employee is not paid less than his full wages for the leave taken in the 12-month period

Calculating sickness allowance on the basis of the 12-month average

- Calculating the average daily wages earned in the 12-month period:

$$\frac{120,000 - 0 (\$)}{365 - 0 (\text{days})} = \$329$$

- 4-day sickness allowance: $\$329 \times 4/5 \times 4 = \$1,053$

Example 3

Calculating 7-day annual leave pay

Assumptions

- Remuneration: Monthly-rated at \$9,000 with paid rest days
- 12-month wages earned before the first day of annual leave: \$108,000 including wages for services rendered and payments for leave
- Leave taken in the 12-month period: 71 days of full pay leave comprising –
 - 52 rest days
 - 12 statutory holidays
 - 7 days of annual leave

Periods and wages to be disregarded

- No period and sum have to be excluded because the employee is not paid less than his full wages for the leave taken in the 12-month period

Calculating annual leave pay on the basis of the 12-month average

- Calculating the average daily wages earned in the 12-month period:
$$\frac{108,000 - 0 (\$)}{365 - 0 (\text{days})} = \$296$$
- 7-day annual leave pay : $\$296 \times 7 = \$2,072$

Example 4

Calculating 1-month wages in lieu of notice

Assumptions

- Remuneration:
 - Basic pay at \$6,000 per month
 - Contractual commission accrued and calculated on a monthly basis according to a sliding scale
- 12-month wages earned before the date on which notice of termination is given: \$600,000 including basic pay and commission
- Leave taken with less than full wages in the 12-month period: 15 days of half-pay study leave (i.e. 50% of basic pay) at \$1,500

Periods and wages to be disregarded

- 15 days of study leave with half pay at \$1,500

Calculating 1-month wages in lieu of notice on the basis of the 12-month average

- Calculating the average monthly wages earned in the 12-month period:

(a) No. of months included in the calculation -

$$\frac{365 - 15 \text{ days}}{365 \text{ days}} \times 12 = 11.5 \text{ months}$$

(b) The average monthly wages -

$$\frac{600,000 - 1,500 (\$)}{11.5 \text{ (months)}} = \$52,043$$

- 1-month wages in lieu of notice: \$52,043

Appendix 2

Enquiries

- Enquiry Hotline: 2717 1771 (the hotline is handled by “1823”)
- Hotline for reporting breaches of the Employment Ordinance: 2815 2200
- Homepage Address: <http://www.labour.gov.hk>
- Enquiry in person to Offices of the Labour Relations Division:

Hong Kong	
Hong Kong East 34/F., Revenue Tower, 5 Gloucester Road, Hong Kong.	Hong Kong West 3/F., Western Magistracy Building, 2A Pokfulam Road, Hong Kong.
Kowloon	
Kowloon East Room 1206, 12/F., Stelux House, 698 Prince Edward Road East, San Po Kong, Kowloon.	Kowloon West Room 1009, 10/F., Cheung Sha Wan Government Offices, 303 Cheung Sha Wan Road, Shamshuipo, Kowloon.
Kowloon South 2/F., Mongkok Government Offices, 30 Luen Wan Street, Mongkok, Kowloon.	Kwun Tong 6/F., Kowloon East Government Offices, 12 Lei Yue Mun Road, Kwun Tong, Kowloon.
New Territories	
Tsuen Wan 5/F., Tsuen Wan Government Offices, 38 Sai Lau Kok Road, Tsuen Wan, New Territories.	Kwai Chung 6/F., Kwai Hing Government Offices, 166-174 Hing Fong Road, Kwai Chung, New Territories.
Tuen Mun Unit 2, East Wing, 22/F, Tuen Mun Central Square, 22 Hoi Wing Road, Tuen Mun, New Territories.	Shatin & Tai Po Rooms 304-313, 3/F., Sha Tin Government Offices, 1 Sheung Wo Che Road, Sha Tin, New Territories.