

LABOUR LAW

人力資源勞工法例 基礎證書課程

Course code: HRLA-001

**CERTIFICATE COURSE ON EMPLOYMENT ORDINANCE
AND HUMAN RESOURCE MANAGEMENT**
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人力資源勞工法例基礎證書課程

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目錄

1 Introduction.....	6
1.1 Glossary of Chinese Words & Phrases.....	6
1.2 Statutory Framework of Labour Laws in Hong Kong.....	7
1.3 Brief Introduction of Labour Dispute Resolution in Hong Kong.....	8
1.3.1 Trial of Labour Disputes in Hong Kong	10
1.3.2 Costs of Litigation in HK.....	10
1.3.3 Litigation time in HK.....	10
2 僱員薪酬相關的僱傭條例 Wages Related Ordinances.....	11
2.1 Concise Guide to Payment of Wages in Hong Kong.....	11
2.1.1 Statistics.....	11
2.1.2 Overview.....	11
2.2 Wages Definition, Deductions 工資定義工資的支付、扣減工資原則.....	12
2.2.1 Definition of Wages & excluded payments.....	12
2.2.2 Detail examination of Payments excluded from Wages.....	12
2.2.3 Judicial determination of Wages.....	14
2.2.4 Payment of Wages.....	19
2.2.5 Withholding Wages.....	22
2.2.6 Civil Legal Consequences (Liability).....	23
2.2.7 Failure to settle awards – the Legal consequences.....	24
2.2.8 Deduction of Wages.....	25
2.3 End-of-Year Payment and Bonuses 年終酬金.....	28
2.3.1 Statutory Interpretation.....	28
2.3.2 Contractual or Discretionary?.....	29
2.3.3 Offences.....	31
2.4 Liability to Pay Wages of Sub-contractor’s and Nominated Sub-contractor’s Employee (Pt. IXA of EO).....	32
3 僱員法律賦予基本福利相關的條例 Employment Benefits Related Ordinances on Employee’s Entitlement of Leave 假期、休息日.....	34
3.1 Q&A.....	34
3.2 The Employment Ordinance & Statutory min. leave entitlement.....	36
3.3 Maternity Protection 生育保障 & Paternity Leaves.....	36
3.3.1 Concise Guide to Maternity Leave.....	37
3.3.2 Statutory Maternity Leave Entitlement.....	44
3.3.3 Notice.....	45
3.3.4 Paternity Leave in Hong Kong.....	46
3.4 休息日 REST DAY.....	48
3.4.1 Eligibility for Rest Day.....	48
3.4.2 Definition.....	48
3.4.3 Rest Day Pay.....	48
3.4.4 Appointment of Rest Days, i.e., Who decide the days for Rest Days?.....	48
3.4.5 Work on Rest days.....	48
3.4.6 Illegal Express Terms.....	49

目錄

3.4.7 Offences and Penalties.....	50
3.4.8 On non-resident call 休息日候召補償.....	50
3.5 法定假期 Statutory Holiday.....	52
3.5.1 Statutory Definition.....	52
3.5.2 The Statutory Holidays.....	53
3.5.3 Work on Statutory Holidays.....	53
3.5.4 Possible Claims from Employee.....	55
3.5.5 A Statutory Holiday Falling on a Rest Day.....	58
3.5.6 Entitlement of Statutory Holiday Pay.....	58
3.5.7 How to calculate Statutory Holiday Pay?.....	58
3.5.8 Restriction on Pay in lieu of Holiday.....	59
3.5.9 Offences and Penalties.....	59
3.5.10 Statutory Holidays v Public Holidays (公眾假期; 俗稱“銀行假期”).....	59
3.6 Paid Annual Leave 有薪年假 s.41AA, EO.....	61
3.6.1 General Understandings on AL.....	61
3.6.2 有薪年假天數 (S.41AA, EO)	62
3.6.3 怎樣發放年假? 誰人決定怎樣放年假日期?.....	62
3.6.4 Sample Annual Leave Clause.....	65
3.6.5 如年假期內適逢休息日或法定假日, 應怎樣處理?	66
3.6.6 年假薪酬.....	66
3.6.7 以工資代替年假有沒有限制? (s.41E(2)).....	66
3.6.8 Accrued but Unused Annual Leave (s.41AA(8), EO)	66
3.6.9 終止僱傭合約時, 怎樣計算員工年假 (s.41D(2)).....	67
3.6.10 年假可以包括在通知期內嗎?	68
3.6.11 共同假期年的選擇 Choice of Common Leave Year.....	68
3.6.12 年假歇業 Annual Leave Shutdown.....	69
3.7 疾病津貼 Sickness Allowance (s.33, EO).....	69
3.7.1 Q&A.....	69
3.7.2 Who is eligible for SA? 領取疾病津貼的資格.....	69
3.7.3 帶薪病假的累積方法.....	70
3.7.4 帶薪病假的類別.....	71
3.7.5 僱員在什麼情況下不可享有疾病津貼? (s.33(5)).....	71
3.7.6 疾病津貼 Sick Leave Allowance.....	72
3.7.7 病假紀錄 (s.37).....	72
3.7.8 僱員患病職業保障.....	72
3.7.9 違例與罰則.....	72
3.8 濫用病假的問題.....	72
4 Termination of Employment Contract and 僱員保障條例 Employment Protection (沒有正當理由被解僱).....	73
4.1 Concise Guide to Termination of Contract of Employment.....	73
4.1.1 Probation and Termination (Notice Period).....	73
4.1.2 Notice Period.....	73

目錄

4.1.3 代通知金 Payment in Lieu of Notice.....	74
4.1.4 即時終止僱傭合約.....	74
4.1.5 終止僱傭合約的限制.....	75
4.1.6 終止僱傭合約的款項.....	75
4.2 Employment Protection.....	75
4.2.1 Labour Protection v Employment Protection.....	75
4.2.2 Employment Protection Q & A.....	76
4.2.3 Employment Protection governed by EO – Statutory Protection.....	76
4.2.4 解僱或更改僱傭合約條款的正當理由 (Valid Reason)	78
4.2.5 違法解僱的情形.....	78
4.2.6 僱主不合理的解僱、改動合約內容而僱員提出索償.....	78
4.3 終止僱傭金.....	79
4.3.1 S.32O, EO: Award of terminal payments.....	79
4.3.2 Reporting Terminal Payments required by Inland Revenue Department (Tax Issues) Payment in lieu of notice is taxable only for employee.....	80
4.4 補償金.....	82
4.4.1 可以提出補償金的情況.....	82
4.4.2 勞審處考慮有關申索的情況.....	82
4.5 提出補償申索.....	82
4.6 例外情況.....	82
4.7 Severance Payment and Long Service Payment 遣散費及長期服務金.....	82
4.7.1 Severance Pay 遣散費.....	83
4.7.2 Long Service Payment 長期服務金	83
4.7.3 遣散費/長期服務金的計算方法.....	84
4.7.4 遣散費/長期服務金與強制性公積金計畫權益、職業退休計畫的抵銷情況.....	84
4.7.5 其他追討長期服務金的情況.....	85
4.7.6 立法會人力事務委員會遣散費及長期服務金的上限.....	85
4.7.7 Exercise on Termination of Employment Contract.....	86
4.8 Tax Issues of Termination Payments.....	89
4.8.1 IRO S8(1A).....	89
4.8.2 Payment in Lieu of Notice (PILONs).....	89
4.8.3 Payment in Lieu of Leave in Termination.....	90
4.8.4 Employee Compensation Arising from Injury.....	90
4.8.5 Severance Payments and Long Service Payments.....	91
4.8.6 Employee leaving Hong Kong 僱員長期或永遠離開香港.....	91
4.9 Record Keeping.....	91
5 工傷及僱員補償.....	92
5.1 Statistics.....	92
5.2 Case for Reference.....	93
5.2.1 香港特別行政區區域法院 僱員補償案件編號 2006 年第 312 宗 申請人譚權光 及 答辯人臧蘭英判案書.....	93

目錄

5.2.2 TING WA 及 FKD EXPRESS CO., LIMITED DCEC 473/2014.....	98
5.3 Q & A.....	100
5.4 FORMS.....	101
5.5 《僱員補償條例》(香港法例第 282 章) Employee Compensation Ordinance.....	116
5.5.1 適用範圍.....	116
5.5.2 強制投保.....	118
5.6 工傷賠償責任.....	120
5.6.1 因工及在僱用期間遭遇意外 (簡稱工傷意外) An accident arising out of and in the course of employment.....	120
5.6.2 《僱員補償條例》是一個「不問過失」的制度 (no-fault scheme aimed).....	120
5.6.3 僱主不需要為其僱員的工傷負上賠償責任的規定.....	121
5.7 職業病「可獲補償的職業病」"Compensable Occupational Disease".....	121
5.7.1 職業病在香港的定義.....	121
5.7.2 處理職業病程式.....	123
5.8 賠償項目.....	123
5.8.1 取工傷病假.....	123
5.8.2 醫療費.....	123
5.8.3 永久喪失工作能力的補償金額.....	124
5.8.4 永久地部份喪失工作能力.....	124
5.8.5 死亡補償金額.....	124
5.8.6 解決工傷的途徑.....	124
5.8.7 Table on Revision of the Level of Compensation.....	125
5.8.8 Compensation and Tax.....	125
5.8.9 解僱受傷僱員 Offence.....	126
5.9 外地受傷.....	126
5.9.1 僱主處理僱員在香港以外地方因工受傷, 並須在當地接受醫治的應注意事項.....	126
5.9.2 在香港以外地方工作受傷獲得的補償處理.....	126
5.10 呈報工傷意外事故須知.....	127
5.10.1 怎樣向勞工處處長呈報.....	127
5.11 Offence.....	127
5.12 懷疑僱員濫用工傷制度.....	128
6 Appendix.....	129
6.1 Chapter: 221 Title: CRIMINAL PROCEDURE ORDINANCE Gazette Number.....	129
6.2 HKID Symbol & Description.....	130

1. Introduction

1.1 Glossary of Chinese Words & Phrases

Alterative holiday	另定假日
Annual leave pay	年假薪酬
Appropriate medical certificate	適當醫生證明書
Building works	建築工程
Certificate of exemption	豁免證明書
Chinese Winter Solstice Festival	冬節
Commissioner	處長
Confinement	分娩
Constructive Dismissal	法律構成終止 (遭變相解僱)
Continuous Contract	連續性合約
Director	署長
Domestic servant	家庭傭工
End of year payment	年終酬金
Gratuitous [gruh-too-i-tuhs]	送贈 Law: given without receiving any return value.
Gratuity	約滿酬金
In lieu [pronounce as "loo"] of	代替
Labour Tribunal	勞資審裁處
Leave year	假期年
Leave to appeal :	(上訴許可申請) is formal legal language asking for the right to appeal a judgment or ruling
Licence	牌照
Licensee	持牌人
Lock-out	閉廠
Main nominated sub-contractor	主要指定次承辦商
Maternity leave	產假
Minor Employment Claims Adjudication Board	小額薪酬索償仲裁處
Miscarriage	流產
Nominated sub-contractor	指定次承辦商
Notional leave pay	假定假期薪酬
Occupational retirement scheme	職業退休計畫
Outworker	外發工
Portion of the end of year payment	部分年終酬金
Registered Chinese medicine practitioner	註冊中醫
Registered medical practitioner	註冊醫生
Relevant day	有關日期
Relevant mandatory provident fund scheme benefit	有關強制性公積金計畫權益
Relevant occupational retirement scheme benefit	有關職業退休計畫權益
Rest day	休息日
Severance pay	遣散費
Sickness allowance	疾病津貼
Sickness day	病假日

Statutory holiday	法定假日	
Strike	罷工	
Sub-contractor	次承辦商	
Subsidiary	附屬公司	
Substituted holiday	代替假日	
Successor	承繼人	
Summary Dismissal	即時解僱	
Tip and service charge	小費及服務費	
Wage period	工資期	
ex gratia[eks grey-shee-uh] payment(as a favor rather than as a matter of right)		特惠金
Young person	青年 Apprenticeship Ord (Cap. 47) Regulates employment of YP (14 to 19), s.2	

Judiciary

JA Justice of Appeal of the Court of Appeal of the High Court
V-P Vice President

1.2 Statutory Framework of Labour Laws in Hong Kong

Employment Ordinance, Chapter 57

Factories and Industrial Undertakings Ordinance, Chapter 59

(6A 東主的一般責任 (3) ..任何工業經營的東主違反本條的規定，即屬犯罪，可處罰款\$500000。

(4) 任何工業經營的東主無合理辯解而故意違反本條的規定，即屬犯罪，可處罰款\$500000 及監禁 6 個月)

百佳超級市場 (香港) 有限公司作為東主

http://orientaldaily.on.cc/cnt/news/20170513/00176_032.html

叉式起重機工業意外導致一名工人死亡，違反《工廠及工業經營條例》的規定，被勞工處檢控，在沙田裁判法院被判罰款三萬元。

Employees' Compensation Ordinance, Chapter 282

Occupational Safety and Health Ordinance, Chapter 509

Minimum Wage Ordinance, Chapter 608

Protection of Wages on Insolvency Ord (Cap. 380): (36k/22.k/10.5k)

Contracts of Employment Outside HK Ord (Cap. 78)

Labour Relations Ord (Cap. 55)

Trade Union Ord (Cap. 332)

Apprenticeship Ord.(Cap. 47), FIUO (Cap.59): (YP 14-19)

Labour Tribunal Ordinance (Cap. 25)

Pneumoconiosis and Mesothelioma (Compensation) Ord (Cap. 360)

Occupational Deafness (Compensation) Ord. (Cap. 469)

Sex Discrimination Ordinance (Cap 480)

Disability Discrimination Ordinance (Cap 487)

Family Status Discrimination Ordinance (Cap 527)

Race Discrimination Ordinance (Cap 602)

1.3 Brief Introduction of Labour Dispute Resolution in Hong Kong

The courts

In July 1995, the Official Languages Ordinance (Cap 5) was amended to enable any court to use either or both official languages in any proceedings before it as it thinks fit

COURT OF FINAL APPEAL

HIGH COURT

The High Court comprises the Court of Appeal and the Court of First Instance.

DISTRICT COURT

- **Monetary claims**
- Recovery of land, or where the title to an interest in land comes in question
- **Employees' Compensation Ordinance (Cap 282)**, tax recovery claims under the Inland Revenue Ordinance (Cap 112) and distress for rent under the Landlord and Tenant (Consolidation) Ordinance (Cap 7). Matrimonial causes and adoption applications must also be commenced in the District Court (the court which handles these types of cases is known as the Family Court)
- In its criminal jurisdiction, the court may try the more serious cases with the exception of a few very serious offences such as murder, manslaughter and rape. The maximum term of imprisonment it can impose is **seven years**.

MAGISTRATES' COURTS

- Magistrates exercise a criminal jurisdiction, which covers a wide range of indictable and summary offences. Their powers of punishment are generally restricted to a maximum of **two years' imprisonment, or a fine of \$100,000**, but in respect of certain offences their powers are greater.
- Appeals are brought from a magistrate to a judge of the Court of First Instance.
- Special magistrates may be qualified lawyers or persons with substantial experience in the legal field. They deal with cases of a more routine nature, such as hawking and minor traffic cases. In general, they have no power of imprisonment and can only impose a maximum fine of \$50,000.

News: 立會燒垃圾桶案 被告轉區院審訊 ESCC 4190/2015

2016/07/21 報章報導：於去年十二月立法會示威區發生垃圾桶爆炸案，五名男子被控一項串謀縱火罪，其中兩名被告將於八月九日轉往區域法院提訊，另外三名被告則因證據不足而獲撤控。控方會修訂控罪，繼續控告葉卓賢及楊逸朗，指他們串謀身份不詳人士，用火損壞立法會綜合大樓外指定示威區的一個垃圾桶。

五名被告：香港專業教育學院 (IVE) 學生陳祖澤 (十八歲)、無業的葉卓賢 (十九歲)、報稱繪圖員的林國倫 (二十四歲)、培正專業書院學生周樂軒 (十九歲) 及樹仁大學學生楊逸朗 (二十二歲)。陳祖澤、林國倫、周樂軒三人獲撤控，陳向控方申請訟費，金額有待釐定。

CORONER'S COURT

JUVENILE COURT

The Juvenile Court has jurisdiction to hear charges against children (aged under 14) and young persons (aged between 14 and 16) for any offence other than homicide. Children under the age of 10 are deemed not to have reached the age of criminal responsibility and accordingly no court, including the Juvenile Court, has jurisdiction over cases involving such young people. However, the Juvenile Court does have power to deal with care and protection cases involving young people aged up to 18.

TRIBUNAL

LANDS TRIBUNAL

LABOUR TRIBUNAL

- The Labour Tribunal provides a quick, inexpensive and informal method of settling disputes between employees and employers
- No legal representation is allowed
- It deals with claims arising from the alleged breach of a term of a contract of employment, for wages in lieu of notice of termination of service, arrears of wages, statutory holiday pay, annual leave pay, sickness allowance, maternity leave pay, bonus, double pay, severance pay, long service payments and so on.

SMALL CLAIMS TRIBUNAL

The Small Claims Tribunal hears minor monetary claims involving amounts not exceeding \$50,000. The hearing is informal, and no legal representation is allowed.

Obscene Articles Tribunal

Administrative tribunals and boards

ADMINISTRATIVE APPEALS BOARD

The Administrative Appeals Board Ordinance (Cap 442) came into force in 1994 providing for the establishment of an Administrative Appeals Board.

MARKET MISCONDUCT TRIBUNAL

The Market Misconduct Tribunal was established under the Securities and Futures Ordinance (Cap 571) which came into force on 1 April 2003. The Market Misconduct Tribunal replaced the Insider Dealing Tribunal on the same day, subject to certain transitional arrangements.

SECURITIES AND FUTURES APPEALS TRIBUNAL

The Tribunal is a full-time review body which was established under the Securities and Futures Ordinance (Cap 571) on 1 April 2003.

Trial Court & Appellate Court

Trial of Facts vs Trial of Law

Question: Could we deduct late charges from staff?

- s.35 of Cap 25, on an appeal ...the Court of First Instance has no power to receive further evidence.

1.3. 1Trial of Labour Disputes in Hong Kong

1.3.2 Costs of Litigation in HK

http://orientaldaily.on.cc/cnt/news/20170520/00176_030.html

1.3.3 Litigation time in HK

http://orientaldaily.on.cc/cnt/news/20170520/00176_042.html

Please draw:

2. 僱員薪酬相關的僱傭條例 Wages Related Ordinances

2.1 Concise Guide to Payment of Wages in Hong Kong

2.1.1 Statistics

a) *Conviction Records*

<https://www.labour.gov.hk/eng/erb/pd.htm>

Refer to Statistics Folder

b) *2018*

- the LD secured 513 convicted summonses for wage offences and
- 161 convicted summonses for defaults of awards made by the Labour Tribunal (LT) or the Minor Employment Claims Adjudication Board (MECAB).
- Four company directors were sentenced to imprisonment for these offences, and another four company directors/responsible officers were ordered to perform community service.

c) *2012 :*

違例拖欠

- 勞工處就僱主**違例欠薪**發出並由法院審結的傳票有 713 張
- 因欠薪而被**定罪**的傳票共有 525 張
- 一名僱主因拖欠工資而被判**監禁緩刑**
- 另有兩名僱主因違反欠薪罪行被判處**社會服務令**
- 有一間公司及其負責人因欠薪而被罰款共 32 萬元

違例拖欠勞資審裁處或小額薪酬索償仲裁處裁斷款項

- 發出傳票的個案中，有 75 宗的僱主被裁定罪名成立，其中一名僱主被判社會服務令

破產欠薪保障基金委員會為獨立的法定機構

- 共接獲 2 976 宗申請
- 共處理 3 374 宗申請，發放款項 6,400 萬元，而破欠基金錄得的盈餘為 5.28 億元 (Annual Report 2012 Labour Dept)

2.1.2 Overview

- EO regulates & attention must be paid to:
 - Conditions of payment of wages
 - Other contractual benefits: end-of-year payments
 - The manner and form of payment of wages
- EO also sets parameters:
 - Within which an employer could **lawfully make deductions**
- Complex, structured schemes are used nowadays: different components but not all of them are regarded as wages
- Reason for EO to define “Wages” : it forms the base for computation of employee’s statutory benefits and entitlements
- Some components fall within and **some do fall outside** wage definition
- **Non-wage components** could substantially affect employee’s compensation, esp., for wrongful dismissal

- Also affect accrued unused days of annual leave, thus affect amount of payment in lieu of unused days' annual leave substantially

2.2 Wages Definition, Deductions 工資定義工資的支付、扣減工資原則

2.2.1 Definition of Wages & excluded payments

- Definition of Wages is very broad: can potentially include any forms of payment
- Wages do not merely represent a component of an employee's remuneration
- Wages are the **basis of calculation of employee's statutory benefits & entitlements**: holiday pay, annual leave pay, end-of-year payment, maternity leave, severance, long service payment, sickness allowance
- Statutory Definition: s.2(1) EO, "wages" (工資)

國泰港龍工會要求加薪 4%

http://orientaldaily.on.cc/cnt/news/20170303/00176_062.htmlhttp://orientaldaily.on.cc/cnt/news/20170303/00176_062.html

- 工會已向公司提供多項建議，包括要求加薪百分之四
- 關注公司採用新方法計算加班津貼，會要求公司停用新計算方法
- 工會要求薪金和飛行津貼劃一加百分之四，並關注公司去年推出新合約後，逐步改變了員工的加班津貼計算方法，由過去工作超過七十六小時，加班津貼即雙倍計算，變成最新的工作滿九十小時，之後每小時津貼一百一十元，工會將要求停用新的計算方法

2.2.2 Detail examination of Payments excluded from Wages

Case Shared by previous Candidates:

本公司設定長期服務金牌給在公司服務到五年，十年，十五年等以上年資同事，但他們必須在公司 annual dinner 當天還是公司員工，即若在之前離職就沒有。

我們今年有一位做了十年的同事在 annual dinner 前因 performance issue 被 terminate. 我們已告知那同同事公司不會給予金牌。

但幾個月後，那同事再追討金牌，因她發覺公司曾經在兩年前給予金牌給一位做了五年也在 annual dinner 前離職之同事。為何她現在沒有，要追回是她的東西。

我們查過原來兩年前那同事是 layoff 的，HR 有在 annual dinner 後叫她回來取金牌。

可是現在 HR 依然不想給金牌予那位同事，理由是兩年前的同事是 layoff，而現在是 termination, case 不同，所以她沒資格取金牌。

請問 HR 的理句正確和合理嗎？那同事可以告公司嗎？

Reply:

1. 金牌應該是 gratuitous;
2. 送金牌不是 payment;
3. 我相信你們在員工手冊內所述的金牌也沒有說明是多重吧；
4. 基於以上，員工很難將這金牌定性為報酬，所以很難告；
加上；
5. 員工怎樣舉證？你所說的之前員工會出來做證人嗎？我相信更難；
6. 現在需要做的是不要給員工拿到任何與你們的書面溝通或錄音作為日後的證據

a) s.2(1) EO, "wages" (a) the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer

- such benefits are not regarded as wages since they are provided by employer in kind
- if they are not provided in kind but in cash, such payment will be treated as wages: CASTRO EVELYN DIMALANTA v WONG CHOI WAH, HCLA 9/2002 – food allowance in wrongful dismissal; Law Ngan v Ng Kai Hau – assessment of damages in PI cases
- Food allowance in lieu of provision of free food to a domestic helper, the food allowance shall become part of the foreign helper's wages

b) s.2(1) EO, "wages" (b) any contribution paid by the employer on his own account to any retirement scheme; (Amended 41 of 1990 s. 2)

- Every employer is required to enroll its employees in a recognized retirement scheme s.7 of MPF Schemes Ord: Employer to arrange for employees to become scheme members, etc. Version Date: 25/04/2013
(1) Every employer of a relevant employee must take all practicable steps to ensure that the employee becomes a member of a registered scheme within the permitted period after the relevant time.
- Contribution by employer is not a part of wages, but contribution by an employee is considered as the employee's wages

c) ... (c) any commission which is of a gratuitous nature or which is payable only at the discretion of the employer; (Replaced 74 of 1997 s. 3)

- Whether the commission is contractual or gratuitous, the court will decide all the circumstantial facts

d) ... (ca) any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer; (Added 74 of 1997 s. 3)

- Court will consider circumstances under which the attendance allowance is paid
- If it is of a fixed sum and is payable upon an employee's full attendance, employer will not have any right not to pay => part of wages: Chow Wai Yee v Fong's National Engineering Co Ltd

e) ... (cb) any travelling allowance which is of a non-recurrent nature; (Added 74 of 1997 s. 3)

- Non-recurrent travelling allowance fall outside wages definition
- One-off travelling allowances

f) ... (cc) any travelling allowance payable to the employee to defray actual expenses incurred by him by the nature of his employment; (Added 74 of 1997 s. 3)

- If travel expenses are reimbursed
- If the travel allowance is not to defray actual expenses but due to the nature of employee's work, such travel allowance forms a part of wages
- Travel allowance between workplace and place of residence generally forms part of wages

g) ... (cd) the value of any travelling concession 任何交通特惠的價值; (Added 74 of 1997 s. 3)

- Free transportation by paying to transportation service provider directly

- Free air tickets
- Staff free or discount air tickets offered by airline in common practice
- But not for travel benefits like passage allowance or air baggage allowance: *Nkasu v City University of HK [2000]*, “City U contended that passage and air baggage allowance were mere travelling concessions. This was rejected by the court”

h) ... (d) any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;

Kwan v Cathay, FACV5/2012

- ~4000 employees
- FACV5/2012 para 49, “ The Labour Tribunal held that LDA, GDA and DFSC should be included but that OA should be excluded. Cathay appealed to the High Court against the inclusion of LDA, GDA and DFSC. Ms Kwan, Ms Wu and Ms Ho cross-appealed against the exclusion of OA. Both courts below held that OA should not be included. And there is no appeal to this Court against such exclusion. As far as LDA, GDA and DFSC are concerned, Stone J held that they should be excluded but the Court of Appeal held that they should be included. Cathay appeals to this Court against such inclusion. Hence the first question, namely whether LDA, GDA and DFSC should be included.”
- HC and CA held the view that OA fell within the statutory exception and did not form part of the cabin attendants’ wages. The court further held that even if the payments were pre-determined and non-accountable fixed monthly payments, they could constitute reimbursement of expenses.

i) ... (da) any end of year payment, or any proportion thereof, which is payable under Part IIA; (Added 48 of 1984 s. 2)

j) ... (e) any gratuity payable on completion or termination of a contract of employment

- Or ex gratia [eks grey-shee-uh] payment (as a favor rather than as a matter of right: 特惠金) upon termination of employment

k) ... (f) any annual bonus, or any proportion thereof, which is of a gratuitous nature or which is payable only at the discretion of the employer

- In other words, an annual payment does not recognized as end-of-year payment and it is gratuitous, it does not fall in the definition of wage

2.2.3 Judicial determination of Wages

- In case of disputes, courts will be called upon to determine the nature of different items of remuneration and decide which fall within the statutory definition of wages

a) Attendance allowance/bonus & Implied term to pay attendance bonus

- s.2(1) "wages" (工資) subject to subsections (2) and (3), means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, ...
- Courts have been upholding this in a number of cases:

WONG YIN FONG AND 97 OTHERS v ISS Hong Kong Services Limited

para 81. The written employment contracts did not provide for attendance bonus. It is common ground that the D had been paying attendance bonus since 1979 and the practice had always been that such bonus would be paid each month if the worker had not been absent from work, including absent on account of taking annual leave. The Ps contended that the D should not withhold attendance bonus on account of a worker taking annual leave.

para 82. The Presiding Officer held in Paragraph 39 of his judgment that as attendance bonus was not one of the benefit specified by the Employment Ordinance, it was up to an employer to decide whether it should be paid and the terms under which it would be paid.

para 83. Although the law does not stipulate that an employer must pay attendance bonus to his employee, it does not mean that attendance bonus could not be part of the wages. Under Section 2(1) of the Employment Ordinance, the definition of “wages” includes attendance bonus but excludes attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer.

para 84. There have been cases where attendance bonus was held to be part of the wages, see Wong Ping Kong v Tai Hing Cotton Mill [1994] 2 HKLR 107; New Bright Industrial Co Ltd v Wong Sau Chi [1995] 2 HKC 357; Chow Wai Yee v Fong’s National Engineering Co Ltd [1996] 1 HKC 649; WongShun v General Security (HK) Ltd HCME 4 of 2002, 11 April 2003. The question is whether the attendance bonus was given in respect of work done under the contract of employment and not of a gratuitous nature or payable only at the discretion of the employer.

b) Commission

- s.2(1) "wages" (工資) subject to subsections (2) and (3), means all remuneration, earnings, allowances including ..., commission, ... payable to an employee in respect of work done or to be done under his contract of employment, but does not include- (c) any commission which is of a gratuitous nature or which is payable only at the discretion of the employer; (Replaced 74 of 1997 s. 3)
- Before EAO 2007, CFA held that commission payments which were not capable of being determined on a daily basis should not be included in the definition of “wages”. This decision was subjected to severe criticism. It failed to reflect the legislative intent of the EO. Labour Dept put forth a proposal to change EO. EAO 2007 is now including contractual commissions for the purposes of calculating all statutory benefits.

Lisbeth Enterprises Limited v Mandy Luk [2006] 9 HKCFAR 131 (The Philip Wain Case)

- 終審法院須研究「合約佣金」是否應納入假日薪酬及年假薪酬的計算範圍之內：申索人在被告人經營的健美中心任職顧問，申索人有權按合約獲得每月港幣 5,600 元的底薪，以及按月累計及計算的銷售佣金。
- 修訂前的《僱傭條例》第 41 及 41C 條規定，假日薪酬及年假薪酬應參照工資計算。
- 終審法院認為，「工資」一詞應理解為包括按日累計及計算的合約佣金（其金額每日不同），但不包括按月累計及計算的佣金。因此，申索人未能成功追討額外的法定假日薪酬及年假薪酬。

Employment (Amendment) Ordinance 2007

- It was gazetted on 14 May 2007 and became effective on 13 July 2007 (except section 16 in relation to the requirement to keep wage and employment records, which became effective on 13 January 2008).
- There are some changes made to the Amendment Ordinance regarding the calculation of the daily/monthly average wages earned by an employee in determining his statutory entitlements. It is now expressly set out that in calculating the daily/monthly average wages during the period of 12 months or the shorter period:
 - (a) any period therein for which the employee was not paid his wages or full wages by reason of (i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee; (ii) any leave taken by the employee with the agreement of his employer; (iii) his not being provided by his employer with work on any normal working day; or (iv) his absence from work due to temporary incapacity for which compensation is payable under the Employees' Compensation Ordinance; and
 - (b) any wages paid to him for the period referred to in paragraph (a), are to be disregarded.
- In addition, if for any reason it is impracticable to calculate the daily/monthly average wages earned by an employee in the manner provided for in the Amendment Ordinance, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months, or if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the specified date.

c) Tips and Service charges (小費及服務費)

Definition in EO

- s.2(1) "tips and service charges" (小費及服務費) in relation to wages, means sums of money received, directly or indirectly, by an employee in the course of and in connection with his employment which are–
 - (a) paid or derived from payments made by persons other than the employer; and
 - (b) recognized by the employer as part of the employee's wages; (Added 48 of 1984 s. 2)
- "wages" (工資) subject to subsections (2) and (3), means all remuneration, earnings, ... tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment, but does not include...
- It has been established in many cases that Tips & Service charges that are recognized by employer formed part of wages of employee

Lam Pik Shan v Hong Kong Wing On Travel Service Ltd

- Court of Final Appeal affirmed "Tips" Earned by Tour Guides be included in Calculating Annual Leave Pay and Holiday Pay
- The P was a counter sales/escort of Wing On Travel between April 1997 and February 2003 earning a basic salary of **HK\$2,000 per month**

- If the P led tours, after deducting the “head tax” payable to Wing On Travel, she was entitled to the net balance of the service tips paid by patrons.
- **The P’s total income reported to the Inland Revenue Department by Wing On Travel was also inclusive of the tips.**
- The CA affirmed the judgment of the Court of First Instance that Wing On Travel did recognize that tips would form part of the tour guide’s wages. Under the contract of employment, **it was part of the duties of the P to lead tours and she was not given an option to decline to do so.** Tour guides were only paid subsistence level salaries. It was recognized that they would receive tips from tour patrons and that they could not refuse to accept tips.
- After losing the appeal at CA, Wing On Travel applied for leave to appeal before CFA and the application was heard on 19 January 2009.
- The CFA upheld the lower court’s ruling that “tips” received by the P from package tour patrons should be considered as part of her wages. The CFA held that the **“tips” were sums of money received directly or indirectly by an employee in the course of and in connection with her employment** which were paid or derived from payments made by persons other than the employer.
- **And they were recognized by Wing On Travel as part of the employee’s wages.**
- The CFA also agreed that there had never been any difficulty in calculating the amount of such “tips” accruing in respect of each tour guide.

d) Overtime

- **No laws confer this right for employee**
- EO s.2(1) "wages" (工資) subject to subsections (2) and (3), means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, ...
- However, subsection (2), s.2, EO specifically excludes it from calculation of wages:
No account of overtime pay shall be taken in calculating the wages of an employee for the purpose of-
 - (a) any end of year payment under Part IIA;
 - (b) any maternity leave pay under Part III;
 - (c) any severance payment under Part VA;
 - (ca) any long service payment under Part VB; (Added 76 of 1985 s. 2)
 - (d) any sickness allowance under Part VII;
 - (e) any holiday pay under Part VIII; or
 - (f) any annual leave pay under Part VIIIA,
- Subsection (2) unless the overtime pay is of a constant character or the monthly average of the overtime pay over a period of 12 months (or if not applicable, such shorter period of employment) immediately preceding the respective dates specified in subsections (2A) and (2B) is equivalent to or exceeds 20% of his average monthly wages during the same period.

LEUNG KA LAU V HOSPITAL AUTHORITY, FACV22, 23/2008

- On 15 March 2002, proceedings were brought against the HA by 165 doctors in the Labour Tribunal which then transferred the claims to the Court of First Instance

- The proceedings have been conducted as a representative action in which three of the Ps, namely, Dr Leung Ka Lau (“Dr Leung”), Dr So Yung Pak (“Dr So”) and Dr Choi Chi Yee (“Dr Choi”) act as the lead Ps, with the other Ps agreeing to be bound “by any determinations of law or principle in the lead cases”
- The lead Ps are the appellants in FACV No. 22 of 2008 (“the doctors’ appeal”) and the respondents in FACV No. 23 of 2008, (“the HA’s appeal”)
- para 36. It is common ground that the overtime **claim depends on the proper construction of the doctors’ contracts of employment** and that the contractual documents consist of their letters of appointment which incorporate the provisions of the HA’s Human Resources Policy Manual (“HRPM”) in its 1994 edition, its Human Resources Administration Manual (“HRAM”) and its rules and regulations promulgated from time to time, including the Circulars on matters such as the honorarium scheme referred to above
- it was held that such statements could not be read in isolation from the rest of the HA manuals

Even though Overtime is mentioned in contract, it might not be included in wages

- New Bright Industrial Co Ltd v Wong Sau Chi, HCLA66/1994:
 - o Employee’s income comprised of basic and other labels of payments, including, overtime pay or overtime allowances
 - o Redundancy: payment in lieu of notice, annual leave pay and severance payments include overtime?
 - o In contracts of employment: official working hours = 8am to 12noon and 1pm to 5pm, overtime payment will be offered after 5pm in weekdays and 1pm on Saturdays
 - o L/T held that O/T should include
 - o H/C held found that there was **no established pattern of regular O/T** hours to justify inferences of such overtime be by conduct of the parties to adopt it as regular hours

Treatment of Non-recurrent O/T

- To determine if payments of non-recurrent O/T exceeds 20% of an employee’s avg monthly earnings, the employee’s entitlement of statutory benefit should be calculated 12 months preceding the day of the type of employee’s statutory benefit:

s.2 (2) ... unless the overtime pay is of a constant character or the monthly average of the overtime pay over a period of 12 months (or if not applicable, such shorter period of employment) immediately preceding the respective dates specified in subsections (2A) and (2B) is equivalent to or exceeds 20% of his average monthly wages during the same period. (Added 48 of 1984 s. 2. Amended 74 of 1997 s. 3)

(2A) In the calculation of the monthly average of the overtime pay under subsection (2), the date specified for the purpose of that subsection is–

(a) in relation to any end of year payment under Part IIA, the expiry date of the payment period;

(b) in relation to any maternity leave pay under Part III, the commencement date of maternity leave;

(c) in relation to any severance payment under Part VA and any long service payment under Part VB-

(i) subject to subparagraph (ii), the relevant date;

(ii) where the employee's contract of employment is terminated by payment in lieu of notice in accordance with section 7, the date on which the termination takes effect;

(d) in relation to any sickness allowance under Part VII, the first sickness day;

(e) in relation to any holiday pay under Part VIII, the first day of the holiday; and

(f) in relation to any annual leave pay under Part VIIIA, the first day of the annual leave.

(Added 74 of 1997 s. 3)

e) Housing Allowance

- s.2(1) "wages" (工資) subject to subsections (2) and (3), means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment, but does not include- (Amended 48 of

Cap 57 – EMPLOYMENT ORDINANCE 4 1984 s. 2; 76 of 1985 s. 2; 74 of 1997 s. 3)

s.2(1) (a) the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer....

- EO does not explicitly mentioned that Housing Allowance is a form of wages
- The value of housing is regarded as an employee's wages in Judicial determination:

Lau Bun Hay v Mass Transit Railway Corp, HCA1893/1997:

Para 20 – In relation to the housing allowance, Yeung J. in Neckel Nils v. Dual Voltage Company Ltd., Labour Tribunal Appeal No. 100 of 1996 held that since such allowance is earned or payable for work done, it fits squarely within the definition of "wages" to be paid in lieu of notice termination. The learned judge further held that housing allowance is not excludable on the basis of being "the value of accommodation provided by the employer." ...I have to decide by reference to the fact that the housing allowance due to Mr. Lau is a reimbursement. ...was not based on whether the housing allowance in that case was a reimbursement or accountable...I have no doubt that the housing allowance under the employment contract between the MRTC and Mr. Lau forms part of his salary. By refusing to pay this part of the salary in lieu of the third month notice, again, the MRTC was in breach and thereby wrongfully terminated Mr. Lau's employment contract.

2.2.4 Payment of Wages

a) Timing Requirements

Statutory requirement

s.23 EO, Time of payment of wages 30/06/1997

Wages shall become due on the expiry of the last day of the wage period and shall be paid as

soon as is practicable but in any case not later than 7 days thereafter

- So, how to define "as soon as is practicable"?

Case: Secretary for Justice v Sing Pao Newspaper Management Ltd, CAAR 2/2007

- SPao did not willfully make late payment to employees
- It was due to the resignation of the management team which had mislaid accounting records
- Court held that this was not sufficient to constitute reasonable excuse

Statutory presumption of Wage Period

- EO s.2(1) "wage period" (工資期) means the period in respect of which wages are payable under a contract of employment or under section 22
- Presumption under EO s.22 Wage period 30/06/1997, The wage period in respect of which wages are payable under a contract of employment shall, **until the contrary is proved**, be deemed to be 1 month (calendar month, s.3 of Interpretation and General Clauses Ordinance (Cap.1))

Payment due to an employee following the termination of employment contract

- EO s25 Payment on termination, (1) Subject to section 31O, where a contract of employment is terminated any sum due to the employee shall be paid to him as soon as is practicable and in any case not later than 7 days after the day of termination. (Amended 44 of 1971 s. 4; 67 of 1974 s. 4)
- Such payment includes, work done accrued, payment in lieu of notice, unused annual leave, long service payment, etc...
EO s25(2) The sum referred to in subsection (1) shall be—
(a) the equivalent of the amount earned by the employee for work done over the period commencing on the expiry of his wage period next preceding the time of termination up to that time;
(b) the sum (if any) payable under sections 7, 15(2) and 33(4BA); (Amended 57 of 1983 s. 4; 76 of 1985 s. 3; 103 of 1995 s. 7; 7 of 2001 s. 6) : (Payment in lieu of notice)
(ba) any long service payment due to the employee; and (Added 76 of 1985 s. 3. Amended L.N. 34 of 1990)
(c) any other sum due to the employee in respect of his contract of employment.
- If an employee did not give notice of termination, an employer may deduct payment in lieu of notice from this termination payments

Completion of Contracts

- EO s24 Payment on completion 30/06/1997, Wages of an employee on completion of his contract of employment and any other sum payable in respect of his contract shall be due to him on the day of the completion of the contract and shall be paid as soon as is practicable but in any case not later than 7 days thereafter

How about Employee's payment in lieu of notice

- EO does not specify the time limit for employee to pay to employer

- Legislative intent of EO: Chapter: 57 EMPLOYMENT ORDINANCE Gazette Number Version Date Long title 30/06/1997, To provide for the protection of the wages of employees, to regulate general conditions of employment and employment agencies, and for matters connected therewith. (Amended 5 of 1970 s. 2)

b) How to Pay? (in terms of Manner and Place)

- EO s26 Manner and place of payment of wages 30/06/1997
 - (1) Subject to this Ordinance, wages shall be paid on a working day directly to an employee in legal tender* at his place of employment or at any office or other place customarily used by the employer for the purpose of payment of wages or at any other place mutually agreed.
 - (2) With the consent of an employee wages may be paid-
 - (a) by cheque, money order or postal order;
 - (b) into an account in his name with any bank within the meaning of section 2 of the Banking Ordinance (Cap 155); or (Amended 49 of 1995 s. 53)
 - (c) to his duly appointed agent.

* Legal Tender: s.4 of the Legal Tender Notes Issue Ordinance(Cap.65), all banknotes issued in Hong Kong shall be legal tender in Hong Kong to any amount

- Statutory restrictions on places of payment by EO s.27 Payment not to be made in certain places 17 of 2006 01/09/2006
Wages, or any sum due to an employee in respect of his contract of employment on the completion or termination thereof, shall not be paid-
 - (a) in any place of amusement;
 - (b) in any place where cash-sweeps, fixed odds betting or pari-mutuel betting is organized or conducted with the permission or authorization under the Betting Duty Ordinance (Cap 108); (Amended 17 of 2006 s. 23)
 - (c) in any place where intoxicating liquor or any dangerous drug is sold; or
 - (d) in any shop or store for the retail sale of merchandise, except where the employee is employed in such place, shop or store.

c) Remuneration other than wages

- EO s.28 Remuneration other than wages 17 of 2006 01/09/2006
 - (1) A contract of employment may provide for giving to an employee food, accommodation or other allowances or privileges in addition to wages as remuneration for his services.
 - (2) No employer shall give to an employee any intoxicating liquor, dangerous drug, or any ticket or other substitute for ticket for any cash-sweep, fixed odds betting or pari-mutuel betting organized or conducted with the permission or authorization under the Betting Duty Ordinance (Cap 108) as remuneration for his services. (Amended 17 of 2006 s. 23)
- It is an offence and is liable to a fine at level 3: "Section: 63D Minor offences 30/06/1997
- (1) Any person who contravenes section 18(2), 26, 27, 28(2), 29, 30, 41AA(4) or (5), 41F(1), 41G, 44, 45, 47(1), 49A or 72A(1) or (2) shall be guilty of an offence.
- (2) A person who is guilty of an offence under this section is liable on conviction to a fine at level 3 *(Appendix). (Added 103 of 1995 s. 22)

d) Criminal Legal Consequences

Criminal Liability

- EO s63C Offences relating to time and payment of wages L.N. 17 of 2006 30/03/2006
Any employer who willfully and without reasonable excuse contravenes section 23, 24 or 25 commits an offence and is liable to a fine of \$350000 and to imprisonment for 3 years. (Added 31 of 1992 s. 4. Amended 1 of 2006 s. 3)
- So, EO allows the defence of “reasonable excuse”
- But “reasonable excuse” is not defined in any statute
- So, rely on case law: there are ample amount of case related to factual circumstances of the case
- It means a cause which a reasonable man would regard as an excuse or a consistent with reasonable standard of conduct
- Not include employer’s subjective standard

2.2.5 Withholding wages

- How about getting around the statutory prohibition of “failure to pay wages on time”
- EO contains no provisions allowing employer to withhold wages. The court might imply that withholding of wages could not possibly constitute a “reasonable excuse”.

HKSAR v Ching Yeung Development Co Ltd

- Withholding employee’s wages because the employee was suspected of committing a theft
- Para 19. Finally, the prosecution submits that, if an employer refuses to pay wages to an employee because it intends to set off the amount of wages against certain claims that it may have against the employee, then the “withholding” of wages is tantamount to a “deduction” of wages, and such deduction is unlawful unless made in accordance with section 32 of the Employment Ordinance. Therefore, the withholding of wages cannot possibly constitute a “reasonable excuse” under section 63C.

How about not to include commission (which is only paid after the credit period but this period exceeds 7 days) in the wages in lieu of notice?

- ICAP (Hong Kong) Ltd v Elaine Chan: it is not a willful deduction if there is a good reason for paying the commission at a later date upon receipt

Procedures of Prosecution of Offences

- EO s64 Prosecution of offences
(1) No prosecution for an offence under section 31RA(6) or section 63(1) or (3) or 63A(1) or 63B or 63C shall be commenced without the consent in writing of the Commissioner.

(2) Before the Commissioner gives his consent to prosecute under subsection (1) he shall hear the person against whom the allegation is made, or give him an opportunity of being heard.

(3) Subject to subsection (1), a prosecution for any offence under this Ordinance may be brought in the name of the Commissioner and may be commenced and conducted by any officer of the Labour Department authorized in that behalf in writing by the Commissioner.

(4) Nothing in this section shall derogate from the powers of the Secretary for Justice in respect of the prosecution of criminal offences.

Body Incorporate and Director's Liability, Partner's Liability

- A body incorporate cannot be subject to custodial sentence
- s64B Liability of directors, partners, etc.

(1) Where an offence under section 63B or 63C committed by a body corporate 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, manager, secretary or other similar officer of the body corporate, the director, manager, secretary or other similar officer shall be guilty of the like offence.

(2) Where an offence under section 63B or 63C committed by a partner in a firm is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any other partner in the firm or any person concerned in the management of the firm, that partner or the person concerned in the management of the firm shall be guilty of the like offence. (Added 31 of 1992 s. 6)

Mitigating Factors in Sentencing

- Refer to Assignment One
- Case: SECRETARY FOR JUSTICE v SING PAO NEWSPAPER MANAGEMENT LIMITED, CAAR 2/2007:
 - o Magistrate imposed fines ranging from HK\$200 to HK\$500 in respect of each conviction
 - o SJ applied for review of the sentence
 - oDiscussions in Assignment One: Chaotic management, Lack of culpability, Short delay & insubstantial amount, First offender, Financial means of employer, Legal cost

2.2.6 Civil Legal Consequences (Liability)

Payment of interests

EO Section: 25A Interest on late payment of wages 30/06/1997

(1) Subject to subsection (3), if any wages or any sum referred to in section 25(2)(a) are not paid within 7 days from the day on which they become due under sections 23, 24 and 25, the employer shall pay interest at the rate specified in subsection (2) on the outstanding amount of wages or sum from the date on which such wages or sum become due up to the date of actual payment.

(2) The rate of interest specified for the purpose of subsection (1) shall be the rate fixed by the Chief Justice by notice in the Gazette under section 50 of the District Court Ordinance (Cap 336)* .

(3) No interest shall be payable in respect of any period before the commencement* of this section. (Added 74 of 1997 s. 9)

* Also See Appendix II: Judgment Interest Rate fixed by the Chief Justice pursuant to section 50 of the District Court Ordinance (Cap. 336) are published by notice in the Gazette:

Effective Date Annual Rate

1 April 2009 8.000%

1 January 2009 8.192%

.....

Deemed termination of contract under section 7

EO Section: 10A Deemed termination of contract under section 7 30/06/1997

(1) Without prejudice to the rights of an employee under common law, an employee may terminate his contract of employment without notice or payment in lieu of notice if any wages are not paid within one month from the day on which they become due to him under section 23.

(2) Where a contract of employment is terminated under subsection (1), the contract shall be deemed to be terminated by the employer in accordance with section 7 and the employer shall be deemed to have agreed to pay to the employee the sum specified in section 7.

2.2.7 Failure to settle awards – the Legal consequences

EAO 2010 – Maximum Penalty

- It is now incorporated into Part: IXB of EO, OFFENCE OF EMPLOYER'S FAILURE TO PAY ANY SUM PAYABLE UNDER AWARD OF LABOUR TRIBUNAL OR MINOR EMPLOYMENT CLAIMS ADJUDICATION BOARD L.N. 70 of 2010 29/10/2010 (Part IXB added 9 of 2010 s. 4)
- Section: 43P Offence of employer's failure to pay any sum payable under award of tribunal L.N. 70 of 2010 29/10/2010
 - (1) If—
 - (a) an award of a tribunal provides, in whole or in part, for the payment by an employer of any specified entitlement; and
 - (b) the employer willfully and without reasonable excuse fails to pay—
 - (i) any sum payable under the award (other than a sum to which subparagraph (ii) applies) within 14 days after the date of the award; or
 - (ii) any sum payable under the award that is, by the terms of the award, payable otherwise than on the date of the award, within 14 days after the date on which the sum is, by those terms, payable,
 - the employer commits an offence and is liable on conviction to a fine of \$350000 and to imprisonment for 3 years.
 - (2) A reference in subsection (1)(b)(i) or (ii) to any sum payable under an award includes—
 - (a) any part of a sum payable under the award; and
 - (b) in the case of a sum payable by instalments, any instalment or part of an instalment.

EAO 2010 – Personal Liability

- Section: 43Q Liability of directors, partners, etc. for offence under section 43P, L.N. 70 of 2010 29/10/2010

(1) Where an offence under section 43P committed by a body corporate 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, manager, secretary or other similar officer of the body corporate, the director, manager, secretary or other similar officer commits the like offence.

(2) Where an offence under section 43P committed by a partner in a firm is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any other partner in the firm or any other person concerned in the management of the firm, the other partner or the other person concerned in the management of the firm commits the like offence.

(3) An offence under section 43P committed by a body corporate is presumed to have been committed with the consent or connivance of, or to be attributable to the neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, if it is proved that, at the time the offence was committed, the director, manager, secretary or other similar officer—

(a) was concerned in the management of the body corporate; or

(b) knew or ought to have known that the award of the tribunal in respect of which the offence was committed had been made against the body corporate.

(4) An offence under section 43P committed by a partner in a firm is presumed to have been committed with the consent or connivance of, or to be attributable to the neglect on the part of—

(a) any other partner in the firm, if it is proved that, at the time the offence was committed, the other partner was concerned in the management of the firm; or

(b) any other partner in the firm or any other person concerned in the management of the firm, if it is proved that, at the time the offence was committed, the other partner or the other person knew or ought to have known that the award of the tribunal in respect of which the offence was committed had been made against the firm.

(5) The presumption under subsection (3) or (4) is rebutted by a person charged with an offence under section 43P by virtue of that subsection if—

(a) there is sufficient evidence to raise an issue that the offence was committed without the person's consent or connivance and was not attributable to the person's neglect; and

(b) the contrary is not proved by the prosecution beyond reasonable doubt.

2.2.8 Deduction of Wages

a) Restrictions in General

- EO Section: 32 Restriction on deductions from wages L.N. 199 of 1998 03/04/1998
 - (1) No deductions shall be made by an employer from the wages of his employee or from any other sum due to the employee otherwise than in accordance with this Ordinance
- EO s.32(2) permitted cat. of deductions but with limits to each cat.
- If agreed nature of deductions between employer & employee falls outside the permitted cat., such deductions are unlawful

b) The Permitted Deductions

- Only apply to an employee's wages but do not apply to other employee benefits, e.g., end-of-year payments, sickness, maternity allowances, ...

Statutory Law Deductions: s.32(2) of Employment Ordinance.

Analysis of each type of Lawful Deductions

Absence from work

- No limit
- s.32(2) of EO, (a) deductions for absence from work:
Provided that–
 - (i) in the case of a contract of employment under which wages are calculated on a basis of time, no such deduction shall exceed a sum proportionate to the period of time during which the employee was absent from work;
 - (ii) no such deduction shall be made for the purpose of defraying or partly defraying the cost of holiday pay or sickness allowance which the employer has paid or may be or may become liable to pay to the employee; (Replaced 39 of 1973 s. 4) (Means no off set of statutory leaves or holidays!)

麥永富 對 匯進髮舍, HCLA42/2000

- 「僱員缺勤，但只能扣除實際缺勤時間的工資」於現實生活中往往被理解為「遲到是缺勤的一種，僱員遲到是可以按實際遲到時間扣除工資」
- 但《僱傭條例》並沒有給“缺勤”任何解釋，亦沒有清楚寫明遲到是缺勤的一種
- 上訴人麥永富向匯進髮舍追討因遲到而被扣的工資，在勞資審裁處敗訴
- 故上訴至高院。高院法官指出僱主只可在《僱傭條例》第 32 條所列明的八種情況下，才可從工資或應付予僱員的款項中扣除所規定的款項
- 同時，高院法官亦指出第 32 (2) 條所列明可扣除工資的情況並不包括僱員遲到的情況

Further Question:

- 但是，如僱傭雙方同意下及僱主按實際遲到時間以比例來扣除工資，是否在高院法庭上也得到相同答案呢？這仍是未知之數。當然，如果合約是時薪，沒有上班時間就可以扣除。

A fixed monthly sum, like, “good attendance allowance”

- The court recognized that the nature of the attendance allowance which was a fixed sum payable upon full attendance within a wage period
- It was not calculated on the basis of time
- It was legitimate for the employer to stipulate the payment of attendance bonus is subject to certain conditions
- So, non-payment of the attendance allowance did not render the employer liable for unlawful deduction of wages
- Case: Wong Yin Fong v ISS Hong Kong Services Ltd.

Deductions for damage to or loss of goods, equipment or property belonging

- Caused damage to or loss of any goods, equipment or property
- The amount deducted for each incident could not be more than HK\$300
- The total amount of deductions due to more than one incident in a wage period could not be more than one quarter
- EO s.32(2) (b) deductions for damage to or loss of goods, equipment or property belonging

to or in the possession or control of the employer or expressly entrusted to an employee for custody, or for loss of money for which an employee is required to account, where such damage or loss is directly attributable to his neglect or default:

Provided that–

- (i) the total amount recoverable by deduction in any one case shall not exceed the equivalent in value of the damage or loss suffered by the employer or \$300, whichever is the less; and
 - (ii) the total of such deductions in any one wage period shall not exceed one quarter of the wages payable to the employee in respect of that wage period
- Case: LAM YAU KUEN (林有權) v EASY (HANG FUNG) TRANSPORTATION CO. LIMITED (依時(恒豐)貨運有限公司) & YING WUI TRANSPORTATION LIMITED (盈匯貨運有限公司), DCCJ 1/2006:
- Employee was liable to pay the costs relating to traffic accidents
 - Employer withheld monies from P's wages
 - Held that employer was in breach of s.32 of EO

Deductions, with the written consent of an employee, for the recovery of any loan made by the employer to the employee

- Must be able to prove that there is a genuine underlying loan
- Case: New York Life Insurance Worldwide Ltd v Fong Hok Yin
 - Agreement: insurance agent was required to repay a development allowance if he joined a competitor after leaving his service with the employer
 - Court held that the arrangement relating to the repayment of development allowance amounted to an unenforceable restraint of trade and it was not recoverable

Deductions required or authorized by Law

- e.g.: Under IRO, employer is required to withhold the payment of the last month of wages if an employee's employment is due to be terminated and he/she is going to leave HK, until a letter of release is issued by the IRD or 30 days after the date of notification to IRD.
- Employer is indemnified in respect of such payment against all criminal & civil proceedings
- s.52, s.76(1), s.76(2) of IRO

Unlawful Deduction under ECO

- it is an offence if an employer makes deduction from employee's earnings to offset insurance liable under ECO
- s.47 of ECO, any person who contravenes, fine at level 3 and imprisonment of 6 months

Maximum Amount of total Deductions during employment

- if the total amount intended to be deducted from an employee's wages exceeds the statutory maximum, an employer is required to spread the deductions over more than one wage period

Maximum Amount of total Deduction after employment

- deduction of an employee's termination payments for damage to the employer's property
- it seems that the court had no problem for employer to deduct all necessary damages from the employee

Deduction of tax in other jurisdictions

- common for China relocated staff
- Case: Leung Yung v First Pacific Davies (China) Ltd

c) Legal Consequences of unlawful deductions from Wages

Criminal

- Offence: s.63B(1) (3) of EO: Max. penalty is a fine at level 6 and imprisonment for one year
- also personal liability on partner, director, manager, secretary or other officer: s.63B 64B of EO
- Written consent of the Commissioner for Labour: s.64 of EO

Civil Liability

- Even if an employee consents to deductions, if a deduction does not all within one of the cat. of deductions recognized by EO
- The deduction is unlawful: s.65 of EO
- Unlawful deductions of wages may result in an employer being liable for **constructive dismissal**: Yip Pak Hung v YPT International Ltd

2.3 End-of-Year Payment and Bonuses 年終酬金

s.11AA Presumption 30/06/1997

(1) It shall be 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 there is a written term or condition in the contract of employment to the contrary.

(2) For the avoidance of doubt, it is hereby declared that subsection (1) **shall not apply to any contract of employment made before the commencement of this section.** (Added 74 of 1997 s. 7)

2.3.1 Statutory Interpretation

- EO Section: 11A Interpretation L.N. 94 of 2007 13/07/2007

(1) In this Part, unless the context otherwise requires— (Amended 7 of 2007 s. 5)

"end of year payment" (年終酬金) means any annual payment (whether described as "thirteenth month payment", "fourteenth month payment", "double pay", "end of year bonus" or otherwise) or annual bonus of a contractual nature, but does not include any annual payment or any annual bonus, or any proportion thereof, which is of a gratuitous nature or which is payable only at the discretion of the employer; (Amended 74 of 1997 s. 6)

"lunar year" (農曆年) means a Chinese lunar year ending immediately before a Lunar New Year's Day;

"payment period" (酬金期) has the meaning assigned to it by section 11C;

"proportion of the end of year payment" (部分年終酬金) means the proportion of the end of year payment calculated in accordance with section 11F.

- So, it must be contractual in nature and any annual payment or any annual bonus
- Or any proportion thereof, which is of a gratuitous nature, falls outside the scope of "end-of-year payment"
- => employee's right to receive it is based on contractual undertakings which could be in express terms (written or oral) or by implication. Section: 11B of EO further confirms: Application of Part IIA 30/06/1997

(1) Subject to any agreement to the contrary and to subsection (2), this Part shall apply to an employee employed under a continuous contract if an end of year payment is payable by the employer to that employee by virtue of a term or condition (whether written or oral, express or implied) of the contract of employment.

2.3.2 Contractual or Discretionary?

- Courts need to take into consideration of a number of factors

Discussion: Case from an enquiry

According to our current contract, we have a Performance Based Incentive Bonus besides the base pay. It mentioned in the contract "the Company may pay you, in addition to your annual remuneration, and at its absolute discretion in relation to amount and timing, a performance based incentive bonus, subject to the satisfactory achievement of your Objectives and the performance of the Company." For the bonus calculation, it will be set at XX% of the annual base salary and pro-rated in any incomplete year of service.

Effective from Oct 1, 2014, the Company would like to change the format for the bonus payout. For example, if a staff entitled 10% of his annual base pay which is HK\$24,000 for the bonus, the new format will divide this HK\$24,000 into 12 months and put it together on their monthly base pay. It looks like the Company can provide 100% of the guarantee bonus. However, the employees normally can get 110% or 130% of their target bonus for the past few years.

In that case, just want to check whether we need to get the employees consent before the Company implements this change? Please help.

a) Wording used in the contracts of employment

- If a "formulaic" bonus scheme under which the employer only reserves its discretion to decide the amount of payment >> contractual

Wong Huey Lan v Colgate-Palmolive (HK) Ltd

- Annual bonuses were described as discretionary
- Under the bonuses scheme, annual bonuses were calculated based on the employee's achievement
- It was held by the court that this no not purely discretionary

Thomas Vincent v SCMP

- Under the SCMP's staff regulations, SCMP may award a discretionary annual staff bonus to those permanent employees who did not receive any commission
- Close examination of the staff regulations, the bonus was not an individual bonus. It was **payable to a class of employees** once the decision to pay was made
- So, Thomas had a contractual entitlement to receive

b) Oral undertakings

- If such oral undertakings were not reflected in the written contract of employment, the oral undertaking may not be capable of giving rise to a contractual entitlement: Case: Gammon (HK) Ltd v Wong Leung Bong

c) Customary practice

- Courts adopts the principle of **“substance 事實 over form”**
- Looks at the substance of the payment instead of judging from the label of the payment
- Therefore, the term “discretionary” does not preclude the EYP & Bonuses from contractual
- For it to be discretionary, discretion must be exercised: Chu Wing v Quali-Hing Enterprise, HCLA21/1993
- Payment of the same amount on fixed dates over an extended period of time may change the nature of bonus from being discretionary to contractual

d) Mechanism to deduct employee's bonuses

- An agreement signed after employment contract was signed
- The agreement provided a mechanism to deduct employee's bonuses if he/she failed to perform satisfactorily
- **The court was in the view that if the bonuses were not contractual in intention, or if they were purely discretionary, there was no need to have such mechanism to be agreed**
- Case : Law Ying Chung v Lo Chun Kie t/a Koon Hing Plastic Factory

e) Other Evidences

- Case: Law Ying Chung v Lo Chun Kie t/a Koon Hing Plastic Factory
- There was nothing in the employment contract which provided for EYP
- But the employee was paid **16 years of EYP** equivalent to at least one-month salary
- However, the **Employer's Returns recorded the yearly bonuses**

f) Statutory Provisions apply if the contract is silent

f.1 Amount of EYP

- Should be either the contractual amount: S.11D(a) of the EO; or,
- S.11D(b) of the EO : if the amount is **not** so specified, it would be a sum equivalent to a full month's wages

f.2 Payment Period

- Normal practice in Hong Kong, CNY, end of calendar or fiscal year
- If not specified, it will be a lunar year: S.11C(b) of the EO

f.3 Time of Payment

- Should be due on the date specified in employment contract
- If silent, payable on the last day of the payment period and in any case no later than 7 days after that day: S.11E(1)b

f.4 Proportion of EYP (s.11F, EO)

- An employee is entitled to pro rata EYP if he/she has been employed under a continuous contract for **not less than 3 months**
- But, if an employee terminates his/her contract of employment or the employment is terminated by employer based on summary dismissal, employee **does not entitle** to EYP: (s.11F (1B) Subsection (1)(a) **shall not apply** where a contract of employment is terminated— (a) by the employee (except such a termination which is in accordance with section 10); or (b) in accordance with section 9. (Added 7 of 2001 s. 4))
- Probation period: probationary period (capped at three months) shall not be taken into account in calculating the qualifying three-month period: S.11F(1A) , EO
- Once the three months' service requirement is satisfied, the whole period (including the probationary period) is counted: S.11F(1), EO
- Amount of pro-rated EYP: The amount of payment depends on the terms of contract. If contract is silent, should be in proportion to full month's wages and the length of employment: S11F(2), EO

e.g.: assume payment period = Jan 01 to Dec 31

Case 1: Dismissed by Employer: If probation = 0 months, need to work for at least 3 months

Join Date	Last date	
July 15 ----- Oct 14 ----- Dec 14 --- Dec 31 -----		Prorata fm July15

Case 2: Dismissed by Employer: If probation = 3 months, need to work for at least 3 months after probation

Join Date	Last Day	
July 15 ----- Oct 14 ----- --- Dec 31 ----- Jan 05 -----		No EYP

Case 3: If employee resign, he/she does not entitle EYP at any time or resign over 65 years of age, except, the resignation is due to illness and Form One is filled.

2.3.3 Offences

- Willfully & without reasonable excuse, fails to make an EYP on time commits an offence
- Max. penalty is a fine at level 5: S.63(1) & 63(7)

2.4 Liability to Pay Wages of Sub-contractor's and Nominated Sub-contractor's Employee (Pt. IXA of EO)

- Privity of Contract
 - o the doctrine of privity in the common law of contract provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it
 - o The premise is that only parties to contracts should be able to sue to enforce their rights or claim damages as such
 - o However, the doctrine has proven problematic due to its implications upon contracts made for the benefit of third parties who are unable to enforce the obligations of the contracting parties.
- S43C to 43F, Part IXA of EO provides a mechanism to enable employee of subcontractors in building & construction works to recover unpaid wages directly from the principal contractors or superior subcontractors

a) Nature of work

- S43F (1) In this Part, unless the context otherwise requires-
"building works" (建築工程) means the construction, site formation, reconstruction, maintenance (including redecoration and external cleaning), repairs, alteration or demolition of the whole or any part of-
 - (a) any building, dock, pier, bridge, viaduct or other structure; or
 - (b) any harbour or port works, reclamation, road, tunnel, sewer, drain, well or waterworks, and any installation works in respect of such building works;
- If duties fall outside the scope, they will not be able to seek protection under Pt. IXA

b) Liability of principal contractor and superior subcontractor

- S43C(1) Subject to this Part, if any wages become due to an employee who is employed by a sub-contractor on any work which the sub-contractor has contracted to perform, and such wages are not paid within the period specified in section 23, 24 or 25, as the case may be, such wages shall be payable to the employee-
 - (a) where the sub-contractor has contracted with the principal contractor, by the principal contractor; and
 - (b) where the sub-contractor has contracted with a superior sub-contractor, by the principal contractor and every superior sub-contractor to the sub-contractor, jointly and severally.

c) Limits of Liability

- 43C(2) The liability of a principal contractor and of a principal contractor and superior sub-contractor or superior sub-contractors jointly and severally under subsection (1) shall be limited-
 - (a) to the wages of an employee whose employment relates wholly to the work which the principal contractor has contracted to perform **and** whose place of employment is wholly on the site of the building works; and
 - (b) to the wages due to such an employee for 2 months without any deductions under this Ordinance and such months shall be the first 2 months of the period in respect of

which the wages are due to the employee.

d) Procedures for Employees to claim

- S.43H Notice by employee to main nominated sub-contractor 30/06/1997
 - (1) Where the wages of an employee who is employed by a nominated sub-contractor are not paid by his employer within the period specified in section 23, 24 or 25, as the case may be, the employee shall serve on the main nominated sub-contractor, within 60 days (or such other additional period not exceeding 90 days as the Commissioner may permit) after the date on which the wages became due, a notice in writing containing the particulars specified in section 43D(1). (Amended 48 of 1984 s. 23)
 - (2) A main nominated sub-contractor who receives a notice under subsection (1) from an employee of a nominated sub-contractor shall, within 14 days after the receipt of the notice, serve a copy of the notice on every superior nominated sub-contractor to that nominated sub-contractor (if any) of whom he is aware.
 - (3) A superior nominated sub-contractor shall not be liable to pay any wages under section 43G to the employee of a nominated sub-contractor if that employee fails to serve a notice on the main nominated sub-contractor under subsection (1).
- (4) A main nominated sub-contractor who without reasonable excuse fails to comply with subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 s.16)

e) Request for Particulars

- Section: 43E Employer to supply information at request of employee 30/06/1997
 - (1) Where an employer who is a sub-contractor fails to pay, within the period specified in section 23, 24 or 25, as the case may be, any wages due to an employee employed by him on work which he has contracted to perform, he shall within 7 days of the receipt of a written request made by the employee supply to the employee the name and address of the principal contractor and every superior sub-contractor to him and shall, within such 7 days' period, deliver a copy of the written request to the principal contractor and every superior sub-contractor to him.
 - (2) An employer who without reasonable excuse fails to comply with subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 s. 15)

f) Recovery of Wages paid by a principal contractor or superior subcontractors

- S.43F Recovery of wages paid by principal contractor or superior sub-contractor 30/06/1997
 - (1) If a principal contractor or superior sub-contractor pays to an employee any wages under section 43C, the wages so paid shall be a debt due by the employer of that employee to the principal contractor or superior subcontractor, as the case may be.
 - (2) Any principal contractor or superior sub-contractor who pays to an employee any wages under section 43C may either-
 - (a) claim contribution from every superior sub-contractor to the employee's employer or from the principal contractor and every other such superior sub-contractor as the case

may be; or

(b) deduct by way of set-off the amount paid by him from any sum due or which may become due—

(i) to any sub-contractor to whom he has sub-contracted all or any part of work that he contracted to perform being work upon which the employee was employed, and

(ii) in respect of the work that he has sub-contracted.

- Chau Mou v Kin Sing Engineering (HK) Co Ltd; Law Ming Chiu v Maeda Corp

3. 僱員法律賦予基本福利相關的條例 Employment Benefits Related Ordinances on Employee's Entitlement of Leave 假期、休息日

3.1 Q&A

a) What are the minimum statutory leave entitlements for a continuous contract?

b) I have served a notice of pregnancy to my boss and my "expected date of confinement" (預產期) is coming soon. When can I commence my maternity leave?

c) Could I notify my employer a medical certificate, which indicated that I am pregnant, issued by a registered midwives (由註冊助產士)?

d) Are there any difference among the medical certificate issued by a medical practitioner, by a registered Chinese medicine practitioner and a registered midwife?

e) I have worked for a new employer for half year, am I eligible for salary in my maternity leave? What are the other conditions that I have to fulfill before I could be qualified for paid maternity leave?

f) So, is the law allowing me to take maternity leave if I only work for a new employer for half year?

g) I am employed on piece rates and daily wages vary from day to day, how much paid maternity leave I am entitled?

h) If my 1st day of Maternity Leave is 20th November, 2013, how is my paid Maternity Leave be calculated? I notice that there is a so call "Specific Day" in EO. How is it related to calculation of my PAID Maternity Leave?

i) I have served a notice of pregnancy to my employer for a week and he fired me today. Does he violate the employment law in Hong Kong?

j) I am pregnant and my doctor told me that the chance of miscarriage is high. I have presented a medical certificate, stipulating that I could not perform heavy work, to my employer last week. My employer transfers me to a new position of light work but the salary of the light duty post is 20% lower than my past post. Could I refuse him?

3.2 The Employment Ordinance & Statutory min. leave entitlement

- EO prescribes certain min. leave entitlements to an employee under a continuous contract
- There are few minor exceptions
- They include:
 - (1) Maternity leave
 - (2) Statutory holiday
 - (3) Rest day
 - (4) Sick leave
 - (5) Annual leave
 - (6) Paternity leave
- Employer is not allowed to provide less than the statutory min.

3.3 Maternity Protection 生育保障 & Paternity Leaves

- Part III of EO: Maternity Protection
- Interpretation of:
 - (1) a Pregnant employee: S.12A, EO: "pregnant employee" (懷孕僱員) means a female employee whose pregnancy has been confirmed by a medical certificate
 - (2) Medical Certificate: S.13, EO: shall be issued by—(a) a registered medical practitioner; (b) a registered Chinese medicine practitioner; or (c) a midwife (助產士) registered under the Midwives Registration Ordinance (Cap 162)
- Entitlement of statutory maternity leave does not matter if the pregnant employee is legally married, divorced, separated or single

Sick Leave Certificate 病假証明 Date: 03/07/2014

To Whom It May Concern,

Re: Name: [REDACTED]
中文姓名: [REDACTED]
ID No.: [REDACTED]
Clinic No.: [REDACTED]

This is to certify that the above-named

- ✓ is having Antenatal Care.
- ✓ is recommended to have 1 day(s) sick leave from 03/07/2014 to 03/07/2014 inclusively.

Yours faithfully,



[REDACTED] 科醫生

[REDACTED] MRCOG(UK)

E14-07-7794

3.3.1 Concise Guide to Maternity Leave

a) Taking Maternity Leave

Q: I have served a notice of pregnancy to my boss and my "expected date of confinement"(預產期) is coming soon. When can I commence my maternity leave?

Ans:

- By agreeing with an employer, employee can commence maternity leave two to four weeks before the expected date of confinement (分娩).
- Maternity leave can also be commenced on the date of confinement if it occurs before the expected date of confinement. Employee should serve a notice of the date of confinement and her intended 10 weeks' maternity leave to her employer within seven days of her confinement.

b) Medical Certificates

Q 1: Could I notify my employer a medical certificate, which indicated that I am pregnant, issued by a registered midwives (由註冊助產士)?

Ans:

Medical certificates could be issued by:

- (1) registered medical practitioners;
- (2) registered Chinese medicine practitioners, or;
- (3) registered midwives

Q 2: Are there any difference among the medical certificate issued by a medical practitioner, by a registered Chinese medicine practitioner and a registered midwife?

Ans:

Certification pertaining to:

- (1) Pregnancy and the expected date of confinement:

Issued by a registered medical practitioner:	OK
Issued by a registered Chinese medicine practitioner:	OK
Issued by a registered midwife:	OK
- (2) Actual date of confinement

Issued by a registered medical practitioner:	OK
Issued by a registered Chinese medicine practitioner:	X
Issued by a registered midwife:	OK
- (3) An additional period of not more than 4 weeks of maternity leave on ground of illness or disability due to pregnancy or confinement

Issued by a registered medical practitioner:	OK
Issued by a registered Chinese medicine practitioner:	OK
Issued by a registered midwife:	X
- (4) Absence from work to attend a medical examination in relation to pregnancy or post confinement medical treatment, or by reason of miscarriage

Issued by a registered medical practitioner:	OK
Issued by a registered Chinese medicine practitioner:	OK
Issued by a registered midwife:	X
- (5) Unfitness to handle heavy, hazardous or harmful work

Issued by a registered medical practitioner:	OK
Issued by a registered Chinese medicine practitioner:	OK
Issued by a registered midwife:	X

c) Eligibility of PAID Maternity Leave related to length of service

Q1: I have worked for a new employer for half year, am I eligible for salary in my maternity leave? What are the other conditions that I have to fulfill before I could be qualified for paid maternity leave?

Ans:

- No.
- 10 weeks' PAID maternity leave only applies to employee:
 - (1) Under a continuous contract for NOT less than 40 weeks immediately before the commencement of the scheduled maternity leave (s.14 (2)(a));
 - (2) After the pregnancy is confirmed, a notice of pregnancy and her intention to take maternity leave are served to her employer: by presenting a medical certificate confirming pregnancy;

(3) If required by an employer, she has to produce a medical certificate specifying the expected date of confinement.

d) Eligibility of Maternity Leave related to length of service

Q: So, is the law allowing me to take maternity leave if I only work for a new employer for half year?

Ans:

- If an employee is employed under a continuous contract less than 40 weeks immediately before the commencement of scheduled maternity leave, the employee is eligible for 10 weeks' maternity leave WITHOUT PAY if:
 - (1) A given notice of pregnancy and an intention to take maternity leave is given after pregnancy has been confirmed.

e) 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

f) Calculation of Maternity Leave (1)

Q: I am employed on piece rates and daily wages vary from day to day, how much paid maternity leave I am entitled?

Ans:

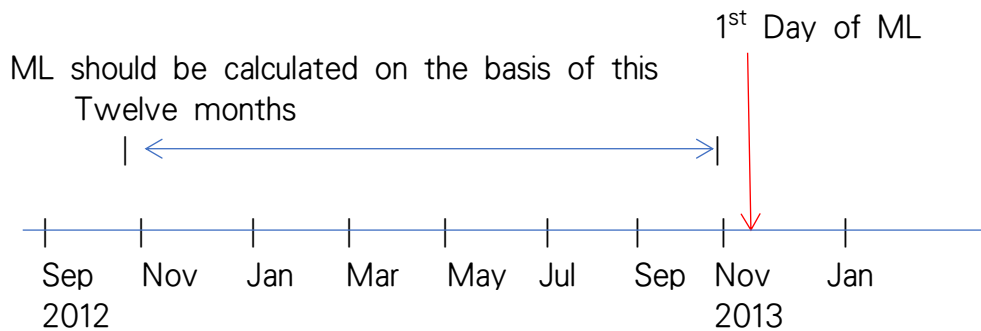
- Maternity leave pay is a sum equivalent to four-fifths (4/5) of the average daily wages earned by an employee in the 12-month period preceding the first day of the maternity leave
- If an employee is employed for less than 12 months, the calculation shall be based on the shorter period
- In calculating the average daily wages, an employer has to exclude:
 - (1) the periods for which an employee is not paid her 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;
 - (2) the sum paid to the employee for above mentioned conditions/periods
- Maternity leave pay should be paid on the normal pay day of the employee

g) Calculation of Maternity Leave (2)

Q. If my 1st day of Maternity Leave is 20th November, 2013, how is my paid Maternity Leave be calculated? I notice that there is a so call "Specific Day" in EO. How is it related to calculation of my PAID Maternity Leave?

Ans: According EAO 2007:

- The specified date is the first day of the maternity leave, i.e. 20th November 2013
- The 12-month average wages, according to law, is calculated on the basis of the wages earned in the period 1st November 2012 and 31st October 2013.



h) Violation

Q: I have served a notice of pregnancy to my employer for a week and he fired me today. Does he violate the employment law in Hong Kong?

Ans:

- It is a violation of employment law in HK for an employer to dismiss 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 her employer.
- If dismissed before she has served a notice of pregnancy:
 - (1) She may serve such notice immediately after being informed of her dismissal
 - (2) Employer must withdraw the dismissal or the notice of dismissal.
- However, employers **are not prohibited** from dismissing pregnant employees:
 - (1) Summarily dismissal due to serious misconduct; or
 - (2) Probation:
 - Expressly agreed that the employment is on probation of not more than 12 weeks.
 - the employee is dismissed for reasons other than pregnancy
- Case: Hong Kong Ming Wah Shipping Company Ltd v Sun Min (CFA case) ruled that:
 - (1) A pregnant employee has the right to remain in her employment and, subject to certain conditions, to receive the prescribed payments during the period of protection
 - (2) There is no basis for cutting down this protection by pointing to an offer of an alternative employment under a new contract with some other entity (company/business organization), albeit an entity which is a member of the same group of companies

i) Prohibition of Assignment of Heavy, Hazardous or Harmful Work (s.15AA)

- (1) Medical Certificate of Unfitness: If a medical certificate is served to an employer with following opinion as to a pregnant employee unfitness to:
 - a. handle heavy materials, or;
 - b. work in places where gas injurious to pregnancy is generated, or;
 - c. 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 remove her from that

work within 14 days after receiving such request

- (2) Second Opinion: An employer may (Regardless of whether the medical certificate produced by the employee was issued by a registered medical practitioner or registered Chinese medicine practitioner):
- a. within 14 days after receiving such medical certificate
 - b. at the employer's own expense to arrange the employee to attend another medical examination
 - c. conducted by a registered medical practitioner or registered Chinese medicine practitioner named by the employer
 - d. to obtain a second opinion as to the employee's fitness to undertake the work at issue

j) I am pregnant and my doctor told me that the chance of miscarriage is high. I have presented a medical certificate, stipulating that I could not perform heavy work, to my employer last week. My employer transfers me to a new position of light work but the salary of the light duty post is 20% lower than my past post. Could I refuse him?

Ans:

- According EO, if the earnings of an 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
- s.15AA(8)

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

k) Offences and Penalties

- (1) Maternity Leave: Fail to grant maternity leave to pregnant employees or fail to pay maternity leave pay to eligible pregnant employees are liable to prosecution and, upon conviction, to a fine of \$50,000;

- (2) It is an offence for an employer to **dismiss** a pregnant employee:

1. Upon conviction, to a fine of \$100,000.

Pay the following within 7 days after the day of termination:

2. wages in lieu of notice;
3. a further sum equivalent to one month's wages as compensation; and
4. 10 weeks' maternity leave pay if, but for the dismissal, she would have been entitled to such payment

- (3) **Remedies for Employment Protection:** 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

l) Sample Maternity Leave Record

僱傭條例 (香港法例第五十七章)
第 15B 條及第 49 條 (2) 款法定表格
分娩假期紀錄

姓名	開始僱用日期	假期		支付工資		
		分娩前	分娩後	平均工資 每月/每日	支付數目	支付日期

m) Sample Notice

懷孕通知書

致：_____ (僱主名稱)

本人_____，現根據香港法例第五十七章《僱傭條例》第 12(4) 條通知你，經*註冊醫生/註冊中醫/註冊助產士證明，本人已經懷孕，並打算放產假。

簽名：_____

日期：_____

註：

1. 請將填妥的通知書正本交給僱主並保留副本以作紀錄。
2. 在僱主同意下，僱員可選擇在預產期前 2 至 4 星期開始放產假。為使勞資雙方能及早作出適當的工作安排，僱員應盡早與僱主協議放產假的開始日期。

n) 對懷孕婦女健康有害的工作

- 在工作上接觸到某些媒體可能會損害懷孕婦女的健康。女性僱員在懷孕期間 特別是首三個月 該避免接觸這些媒體。以下是這些媒體和有機會接觸到這些媒體的工作的一些例子：

媒體

金屬 (鉛、汞)

氣體 (一氧化碳)

溶劑

消毒氣體 (環氧乙烷)

麻醉氣體 (鹵化乙烷、一氧化二氮)

輻射

高熱

傳染性媒體 (德國麻疹病毒、巨細胞病毒)

工作

鎔鉛、製造汽車電池、使用熏劑

汽車修理廠 (汽車廢氣)

乾洗、電子業

醫護行業

醫護行業

X 光照射、製造氣燈罩

製造玻璃、鑄鐵廠

醫護行業

懷孕僱員如果擔心工作上接觸到的媒體會損害健康，應該向醫生請教。若醫生認為該名僱員在工作上接觸到的某些媒體對其懷孕期間的健康有害，僱主應按主診醫生的指示，暫時調派該名僱員至另一工作崗位。

工作性質改變後，大部分懷孕僱員該可按其意願繼續工作，直至分娩前的數星期。

o) 有關懷孕僱員擔任粗重工作的指引

一般人都知道孕婦較易感到疲倦及成因不明的腰背酸痛，而且孕婦龐大的身軀會令她們在擔任某些工作時，感到困難，甚至產生危險。

對於在懷孕期間一切正常順利的家庭傭工，僱主只要將工作程式稍為更改，她們便能繼續工作至懷孕期的最後數星期。需要更改的地方包括：讓她們在午飯後休息片刻，縮短工作時間或採用彈性工作時間，避免她們長時間以同一姿勢工作，以及避免她們長時間從事粗重工作，例如重複提舉重物及攀爬樓梯。

人力操作

就人力操作工作來說，如果懷孕情況正常順利，在首 5 個月懷孕期內的婦女與其他一般婦女無異。下表可作為婦女在懷孕期間可繼續從事各種體力勞動工作的指引，並列出在懷孕期內一切正常順利的健康僱員，能夠在毫無困難或不危害懷孕的情況下擔任的有關體力勞動工作。若懷孕僱員健康有問題時，應就她們是否適合人力操作，向醫生請教。

p) 婦女在懷孕期間可繼續擔任各種不同工作的指引

(採自美國醫學會雜誌)

工作性質	懷孕期(以星期計)
坐著擔任輕巧的工作	
長時間(超過 4 小時)	40
非長時間	40
站立	
長時間(超過 4 小時)	24
非長時間	
(每小時 30 分鐘或以上)	32
(每小時不超過 30 分鐘)	40
俯身及彎腰至膝蓋以下	
重複進行(每小時 10 次或以上)	20
間歇進行	
(每小時兩次至 9 次)	28
(每小時少於兩次)	40
攀爬直梯及柱	
重複進行(在 8 小時輪班工作中重複 4 次或以上)	20
間歇進行(在 8 小時輪班工作中少於 4 次)	28
樓梯	
重複進行(在 8 小時輪班工作中重複 4 次或以上)	28
間歇進行(在 8 小時輪班工作中少於 4 次)	40

提舉物件

重複進行

(負重超過 23 公斤) *	20
(負重 11 至 22 公斤) *	24
(負重不超過 11 公斤)	40

間歇進行

(負重超過 23 公斤) *	30
(負重 11 至 14 公斤)	40

* 個人不應站立提舉 16 至 20 公斤之重物。提舉重物要採用機械輔助設備及多人合作以減少受傷的危險性。

q) 安排懷孕僱員工作的其他考慮因素

僱主須特別考慮在工作中所存在的其他危險情況，其中包括高空工作(使用梯子、工作平臺、杆子等)和操作某些重型機器。如發生意外，可對孕婦或胎兒造成嚴重的傷害。

大約由懷孕中期開始，孕婦的腹部會日漸隆起，姿勢也須作出一些改變。以下問題須加以留意：

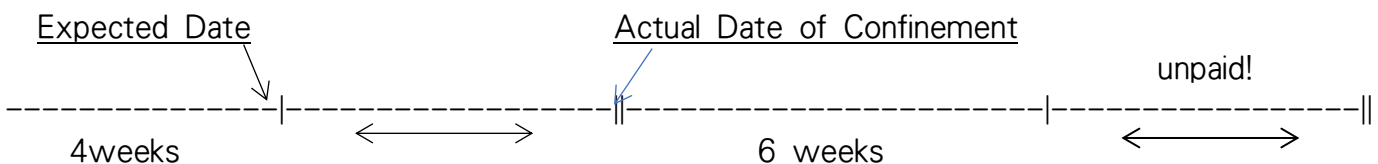
- (a) 平衡 – 在濕滑的地方工作的問題；
- (b) 舒適 – 在狹窄的空間內工作的問題；
- (c) 工作程式 – 由於腹大便秘，孕婦可能不及以前那麼靈活、敏捷，而身體的協調、行動的速度以及四肢的伸展能力也可能受到影響。

座位應該舒適，可讓孕婦經常轉換姿勢，並可在工作間活動自如。

婦女在懷孕期某些階段，特別容易出現暈眩、嘔吐、足踝腫脹、背痛及疲勞等徵狀。如僱主能體諒，將有助減輕懷孕僱員這些不適。相反，某些工作形式或工作安排卻可使這些情況惡化。

3.3.2 Statutory Maternity Leave Entitlement

- A female employee who is employed under a continuous contract of employment (Sch 1, EO) immediately before taking any maternity leave: S.12(1): 在緊接根據本部放取任何假期前根據連續性合約受僱的女性僱員，根據本部有權享有產假。(由 1997 年第 73 號第 3 條代替)
- If contract of employment is providing a more favorable terms than that of EO, the employer is obliged to provide such more favorable terms contractually
- If the employee delivers after the expected date of confinement, she is entitled to a further period of maternity leave equal to the duration between the expected date and the actual date of confinement: s.12(2)(b) . But unpaid!



- A further period of up to four weeks of maternity leave on the grounds of illness or disability arising out of pregnancy or confinement: s.12(2)(c) . But unpaid. However, employee may take accrued sick leave and be paid statutory sickness allowance
- S.12AA: Taking Maternity leave: 產假的開始日期 30/06/1997 (1) 在僱主同意下，懷孕僱員可決定其享有的 10 個星期產假的開始日期，但該日期須在預計分娩日期前不少於 2 個星期

及不超過 4 個星期的期間內。(2) 懷孕僱員如不行使其決定第(1)款所指的開始日期的選擇權，或未能獲得其僱主對其建議中的放假時間表的同意，則產假開始日期須為緊接預計分娩日期前的 4 個星期的首日。(由 1997 年第 73 號第 4 條增補)

- Offence: s.15A (1) 任何僱主如- (a) 不給予產假；(b) 不按照第 14 條付給產假薪酬；或 (c) 不根據第 33(3C)條付給疾病津貼，均屬犯罪，一經定罪，可處第 5 級罰款 (Sch 8 of Criminal Procedure Ordinance = HK\$50,000)。
- The offence is strict liability: A-G v Ng Chung Hing, 1991

3.3.3 Notice

- Intention to take statutory leave: EO s.12(4) 擬根據第(2)款放任何產假的女性僱員在放假前，須於藉醫生證明書證實為懷孕之後，將懷孕一事通知其僱主，並說明其擬放產假；而由女性僱員向其僱主出示證實其懷孕的醫生證明書，即屬一項本款所指的通知。(由 1997 年第 73 號第 3 條代替)
- If requested by the employer – EO s.12(6) 如僱主有此要求，根據第(4)款發出通知的女性僱員須交出指明其預計分娩日期的醫生證明書。(由 1997 年第 73 號第 3 條代替)
- No min. period within which an employee must give notice
- There is **no obligation** for a pregnant employee to notify her employer of her pregnancy if she does not intend to take statutory maternity leave: she may take annual leave or another other types of leave
- The Medical Certificate may be issued by a registered medical practitioner, a registered Chinese medicine practitioner or a registered midwife – EO s.13(1) 簽發醫生證明書的權力 L.N. 203 of 2006 01/12/2006 (1) 為施行第 12(4)或(6)或 12AA 條而簽發的醫生證明書須由以下人士簽發— (a) 註冊醫生；(b) 註冊中醫；或 (c) (儘管有《助產士註冊條例》(第 162 章)第 16 條的規定)根據該條例第 8 條註冊的助產士或根據該條例第 25 條當作已註冊的助產士。

HONG KONG MING WAH SHIPPING COMPANY LIMITED (Applicant) v SUN MIN (Respondent) CACV NO. 37 OF 2004

- Appeal Committee: Mr Justice Bokhary PJ, Mr Justice Chan PJ and Mr Justice Ribeiro PJ
- Date of Hearing : 12 January 2006

Mr Justice Ribeiro PJ:

...This application was dismissed by the Appeal Committee on 12 January 2006 with reasons to be given later. The reasons are now provided as follows.

... The Employment Ordinance... employment protection to employees who become pregnant. Provided that the requirements relating to continuous employment and the giving of notice of pregnancy are satisfied, such an employee is entitled to a period of maternity leave and may be entitled to four-fifths of her normal pay. Additionally – and this is central to the present application – s 15(1)(a) prohibits termination of the employment during the maternity period. It provides:

- " (1) Subject to subsections (1A) and (1B) [which are not presently relevant] –
- (a) after a pregnant employee has served notice of pregnancy on her employer, the employer

shall not terminate her continuous contract of employment otherwise than in accordance with section 9 during the period from the date on which her pregnancy is confirmed by a medical certificate to the date on which she is due to return to work on the expiry of her maternity leave or the date of cessation of pregnancy (otherwise than by reason of confinement)....."

... s 15(1)(a) prohibits all forms of termination of the contract of employment by the employer with the sole exception of a termination in accordance with s 9. Section 9 preserves the common law right of an employer summarily to dismiss an employee for misconduct. Any other form of termination by the employer – whether this occurs lawfully in accordance with the terms of the contract or wrongfully and in breach of the contract – is prohibited.

...s 15(2) imposes a liability to pay the employee sums which she would have been entitled to under the Maternity Protection provisions of the Ordinance. Moreover, by s 15(4), such an employer also commits an offence punishable by a fine.

3.3.4 Paternity Leave in Hong Kong:

a) Employment (Amendment) Ordinance 2014

- The Employment Ordinance (Cap. 57) is amended as set out in sections 3 to 16
- “paternity leave (侍產假) means the paternity leave provided for in Part IIIA;
- paternity leave pay (侍產假薪酬) means pay payable in respect of paternity leave;”

Part IIIA 15E Entitlement to paternity leave

(1) (a) he is the child’s father; (b) he has been employed under a continuous contract immediately before taking leave (means at least 4 weeks); and (c) he has complied with all the requirements in section 15F.

(2) (b) is entitled to take leave for not more than 3 days, whether consecutive or not, for each confinement.

(3) (a) begins 4 weeks before the expected date of the delivery of the child; and (b) ends 10 weeks beginning on the actual date of the delivery of the child.

(4) For subsection (2)(b), multiple births in one pregnancy are taken to be one confinement.

(5) (a) applies to a child born on or after the date on which the Employment (Amendment) Ordinance 2014 (21 of 2014) comes into operation; and (b) does not apply to a miscarriage.

Part III 15F. Notification requirements relating to paternity leave

(1) (a) notify the employer— (i) of his intention at least 3 months before the expected date of the delivery of the child; and (ii) of the intended date of his leave before taking the leave; or (b) (if he does not notify the employer in accordance with paragraph (a)(i)) notify the employer of each intended date of his leave at least 5 days before that date.

(2) If the employer so requires, the employee must also give the employer a written statement signed by the employee—(a) stating that the employee is the child’s father; and (b) stating—(i) the name of the child’s mother; and (ii) the expected date of the delivery, or (if the child has been born) the actual date of the delivery, of the child.

Part III 15G. Paternity leave not affected by other leave entitlements

(2) (b) that day falls on a rest day or holiday or falls within a period of annual leave, he is entitled to take the leave on the day immediately after the rest day, holiday or period of annual leave.

Part III 15H. Entitlement to paternity leave pay

An employee is entitled to pay at the rate specified in section 15I in respect of each day on which he has taken paternity leave if—(a) he has been employed under a continuous contract for a period of not less than 40 weeks immediately before that day; and (b) he has complied with all the requirements in section 15J or 15K.

Part III 15I. Rate of paternity leave pay

(2) The daily rate of paternity leave pay is four-fifths of the employee's average daily wages during—(a) the period of 12 months immediately before the specified date; or (b) if the employee has been employed by the employer for a period shorter than 12 months immediately before the specified date, the shorter period.

Part III 15J. Documentary requirements relating to paternity leave pay: birth in Hong Kong

(1) For section 15H(b), an employee who takes paternity leave in respect of the birth of a child in Hong Kong must provide the employer with the birth certificate of the child— (a) that is issued under the Births and Deaths Registration Ordinance (Cap. 174); and (b) on which the employee's name is entered as the child's father.

(2) Despite subsection (1), if the child is born dead, or if the child dies after birth and no birth certificate has been issued in respect of the child under the Births and Deaths Registration Ordinance (Cap. 174), the employee must provide the employer with— ...

Part III 15L. Payment of paternity leave pay

(2) If an employee has taken paternity leave on a day (leave day) and provided the employer with the requisite document on or before the leave day, the employer must pay him the paternity leave pay in respect of the leave day— (a) not later than the day on which he is next paid his wages after the leave day; or (b) if he has ceased to be employed by the employer, not later than 7 days after the cessation.

.....

(4) Where the employer has paid the employee the paternity leave pay in respect of the leave day before the requisite document is provided, the employer may deduct from his wages an amount equivalent to the paternity leave pay if— (a) he fails to provide the employer with the requisite document within 3 months after the first day on which the paternity leave is taken; or (b) he has ceased to be employed by the employer and fails to provide the employer with the requisite document before the cessation.

Part III 15M. Offence

(1) An employer must—

(a) grant an employee paternity leave to which the employee is entitled; and (b) pay an employee paternity leave pay to which the employee is entitled in accordance with section 15L.

(2) An employer who without reasonable excuse contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5."

3.4 休息日 REST DAY

3.4.1 Eligibility for Rest Day

- Under a continuous contract is entitled to not less than one rest day in every period of seven days

3.4.2 Definition

- A continuous period of not less than 24 hours
- During which an employee is entitled to abstain from working
(s.2, EO: "rest day" (休息日) means a continuous period of not less than 24 hours during which an employee is entitled under Part IV to abstain from working for his employer; (Added 23 of 1970 s. 2. Amended 71 of 1976 s. 2)

3.4.3 Rest Day Pay

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

3.4.4 Appointment of Rest Days, i.e., Who decide the days for Rest Days?

- Shall be appointed by the employer
- Could be granted on a regular or irregular basis:
 - (1) For regular rest days: the employer should inform his employees of the arrangement
 - (2) For 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

3.4.5 Work on Rest days

- (1) Substitute rest day **with consent of employee**: 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.
- (2) **Compulsory Work**:
 - Employer must not compel/force/subdue an employee to work on a rest day
 - Exception: Unforeseen emergency, e.g., in the event of a breakdown of machinery or plant
 - 30 Days rule: 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
 - 48 Hrs rule: The employer should notify the employee of the arrangement within 48 hours after the employee is required to work
- (3) **Voluntary Work** on Rest Days
 - An employee may work voluntarily on a rest day

- Exception: young persons under the age of 18 employed in industrial undertakings,

3.4.6 Illegal Express Terms

- Any term(s) & condition(s) in a contract of employment 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

上訴人 孫曉蘭 &ORS 與 被告公司/答辯公司

Leung King Catering Holding Limited trading as Capital Restaurant, HCLA 114/2003

休息日申索

16. 按照《僱傭條例》第 17 條，一名根據連續性合約由同一僱主僱用的僱員，每七個工作天須獲給予不少於一個休息日。但法例並沒有規定僱主須同時給予該僱員休息日的工資。按照《僱傭條例》第 20 條，僱員可在僱主的同意下或應僱主的要求在休息日為僱主工作。在服務性行業中，尤其是以酒樓業，僱主多採用以薪代假的做法以解決運作上的困難。僱員在沒有選擇的情況下，在入職前簽訂以薪代假的合約把休息日減為每月兩天。這業內的慣例已眾所週知及行之已久。但於 2000 年 4 月高等法院在 Hang Fook Lau Seafood Restaurant v Kwok Sik Yuen [2001] 2 HKC 69 (幸福樓案)裁定這類以薪代假的僱傭合約條款抵觸了《僱傭條例》第 70 條而無效，因為這類合約條款減少了該條例賦予僱員選擇在休息日不工作的權利。這判例對業界帶來不少回響，這包括僱員可提出長達六年的休息日補薪的申索。以每月兩天為例，個人申索額可高達五個半月工資。業內僱主的反應為修改僱傭合約及相應地扣減僱員工資，而把所扣減的工資作加班工資支付僱員予作休息日工作的代薪金，這正是被告公司於 2000 年後，即幸福樓案之後所採取的措施。

17. 在任銳威及其他人訴灣仔新光酒樓有限公司 [2003] 1 HKLRD 793，上訴法庭緩和了幸福樓案所帶來的嚴峻效果。雖然在僱傭合約上以薪代假（或「買假」）條款的合法性方面，上訴庭以大多數認同幸福樓案所定的法律原則，但卻以「雙重利益」的考慮給予以薪代假的合約條款實質效力。上訴庭一致裁定即使涉案合約的相關條款因抵觸《僱傭條例》第 70 條而無效，但若僱員已就休息日工作而獲給予代薪金，僱主毋須再向他支付任何額外補償，否則他們將獲雙重利益。根據幸福樓案及任銳威案，本席得出以下的法律原則。

18. 雖然按照《僱傭條例》第 20 條，僱員可在僱主的同意下或應僱主的要求在休息日為僱主工作，但把休息日工作納入僱員的僱傭合約的條款，成為僱員的合約責任，該條款則有可能因抵觸《僱傭條例》第 70 條而被作廢。由於第 20 條容許僱員在自願的情況下為僱主在休息日工作，所以該合約條款是否抵觸第 70 條則視乎 (1) 該條款是否在自願的情況下訂定；(2) 該條款有沒有剝奪了僱員選擇不在休息日工作的自由和權利。這兩個問題的答案並不取決於這條款是在入職前或入職後訂定。第一個問題的答案是一個事實的裁定，而第二個問題的答案是基於該條款的詮釋的法律問題。若然該條款是僱員在非自願的情況下簽訂或根據該條款的詮釋，僱員沒有權利選擇在休息日不工作，該條款便抵觸了《僱傭條例》第 70 條，並因而無效。但縱使這條款是無效，僱員可否獲休息日工作的補償是另一個基於僱員是否根據該條款已獲補薪的事實的裁定。若僱員已獲休息日補薪，根據任銳威案，他不可再獲補償，否則這便構成雙重利益。

3.4.7 Offences and Penalties

- Without reasonable excuse fails to grant rest days to employees is liable to prosecution

and, upon conviction, to a fine of \$50,000

3.4.8 On non-resident call 休息日候召補償

Case: Leung Ka Lau & Ors v The Hospital Authority [2006] HKEC 399

(1) In the Court of First Instance, Doctors working in public hospitals:

- **successfully** claimed compensation for "rest days" and "holidays" for which they had been deprived
- **lost** their claim on compensation for "overtime" worked

(2) The Court of Appeal:

- upheld the Court of First Instance's dismissal of the overtime claims
- However, the Court of Appeal **varied** the Court of First Instance's order as to how damages should be assessed holding that a doctor "on non-resident call on a rest day or statutory/public holiday but not called upon to provide patient treat that day" should only receive nominal damages

(3) Court of Final Appeal

(a) Overtime: CFA held that there is nothing in the HR Policy Manual, the HR Administration Manual or the HA's rules and regulations to displace the position evident in the letters of appointment which took effect as the prevailing contractual document. The letters of appointment make it clear that the doctors are expected to work overtime and to perform on call duties. There is no suggestion that the doctors are to be recompensed by reference to hours worked beyond normal office hours

The Court therefore dismissed the overtime claims.

(b) Nominal damages: CFA pointed out that a "rest day" under the Employment Ordinance means a continuous period of not less than 24 hours during which an employee is entitled to abstain from working for his employer. However, when a doctor is on non-resident call, though he is away from the hospital, he must remain within 30 minutes of the hospital; he must not drink alcohol; and he must remain mentally ready to respond to calls for his services. Therefore, when a doctor is on non-resident call, he is required to provide patient treat should the need arise, and he is NOT entitled to abstain from working from the HA.

The Court concluded that a day rostered on non-resident call could not qualify as a rest day under the Ordinance.

The CFA was of the view that the doctor's loss in such a case was the loss of a rest day. The fact that he might or might not actually have been required to treat any patient during that non-resident call is beside the point. Missing a rest day involves a real and substantial loss, and the award of nominal damages by the Court of Appeal was quite inappropriate.

The Court of Final Appeal ruled that a practical measure of damages acceptable to the doctors would be payment of the equivalent of a full day's wages (at the doctor's then applicable salary) where a rest day has been missed and cannot practicably be replaced by an alternative day off.

(c) Entire day

HA argued that compensation awarded to a rostered doctor who is in fact called on to provide

patient treatment on what might otherwise have been a rest day should be limited to the hours actually worked and not for loss of the entire day.

The Court held that whether the doctors are required to provide their services and for how long in the course of the day spent on call is not relevant. The doctors are entitled to damages designed to compensate them for the entire rest day which they should have been, but were not, granted.

(d) Holiday compensation

The CFA concluded that a doctor who is on call during a statutory or public holiday is thereby deprived of that holiday and such breach on the part of HA sounded in substantial damages equivalent to a full day's wages and not merely in nominal damages.

2012/06/21 報導重點

- 終審法院 09 年裁定公立醫院醫生在休息日及法定假日工作或候召，可獲得一天補假或補薪，追溯期由 1996 年至 2002 年入稟為止。原本有逾 160 名醫生追討，醫管局推出賠償方案後，仍有約一百名醫生繼續申索。
- 高等法院已經完成賠償的計算方式
- 醫院管理局需支付七成訟費。
- 原訟人估計，入稟的 3 名醫生合共可取回約 250 萬元賠償。醫管局回應指會尊重法院裁定，詳細研究判詞後，再決定下一步行動。
- 申索醫生：立法會議員梁家騮、醫生蔡自怡及蘇勇柏，合共向醫管院索償 310 萬元，並要求高等法院厘清計算方式
- 其中蘇勇柏於 03 年在更表上沒有列明之下，6 次於星期日返回醫院巡房，並要求補償，但高等法院法官芮安牟質疑，局方並無嚴格規定醫生，必須於休息日巡房，故裁定此情況下沒有賠償。
- 法院接納醫管局方案，確定日薪的計算方式，是以每個月總日數計，而非實際工作日，如 2 月有 28 日，便將月薪除 28，而月薪包括基本薪金、現金津貼，但不包括房屋津貼及每月 3,500 元的超時工作津貼。
- 雙方亦同意休息日為星期日，由星期日凌晨零時開始至星期一的凌晨零時，但若在星期六晚上 9 時工作至星期日早上 9 時下班，則不獲賠償。
- 醫管局亦要向醫生賠償 6 年相關的利息，以最優惠利率加一厘計算。雙方會就法庭的裁決，計算各申索人得到的賠償，預計於明日或之前完成。梁家騮粗略估計，未計算利息，3 人可得到合共約 250 萬元的賠償。不過，梁家騮認為法庭的計算方式對他們不公平，若按照法庭的計算方法，其加班賠償額將會少 20%。目前仍有約百名醫生追討賠償，醫管局需根據今次裁決，向他們作出賠償。

醫管局回應：於 2006 至 2010 年分別為醫生的申索提出和解補償方案，目前已有逾 92% 合資格的醫生接受方案。

Comparison

Cheng Ho Kee & Others v Secretary for Justice [2006] 9 HKCFAR 705

- (1) Officers of the Correctional Services Department ("CSD") are contractually entitled to recompense for the performance of what was known as "overnight on call". This case did not concern with on-call arrangement during rest day or statutory holiday.
- (2) CFA had to consider whether the performance of "overnight on call" duty falls within Civil

Service Regulations ("CSR") 668 or 669:

- a. Under CSR 668, where an officer is required to stand-by at his place of work beyond his "conditioned hours", he may be paid an overtime allowance.
 - b. CSR 669 provides that any period beyond an officer's conditional hours where the officer is required to be on call either at home or in another fixed location or through the medium of a paging device, so that he is continuously and immediately available to report for duty if required, is not regarded as overtime and is not subject to any recompense.
- (3) In this case, the Court took the view that the area in the immediate vicinity of the penal institution was not a place of work. It was an area with residential and recreational facilities for the officers' use whilst performing "overnight on call". Their "place of work" was the penal institution concerned. Accordingly, the overtime allowance provided for under CSR 668 was not payable to them.
- (4) As a result, the time spent during "overnight on call" is not to be regarded as overtime and is not subject to any recompense.

What we learn from these two cases:

- (1) Court of Final Appeal considered not merely on contract of employment, but also the interpretation of the relevant contractual documents:
 - a. relevant policies and regulations in the doctors' case
 - b. CSR in the officers' case.
- (2) OT payment depends solely on contractual arrangement and does not governed by the EO:
=> Clear and express terms of OT (compensated or not) in the employment and the manners of calculation of OT is highly recommended

3.5 法定假期 Statutory Holiday

3.5.1 Statutory Definition

S.2, EO: "statutory holiday" (法定假日) means a holiday specified as a statutory holiday in section 39(1); (Added 39 of 1973s. 2. Amended 71 of 1976 s. 2; 137 of 1997 s. 2)

Case Shared by Previous Candidates

Morning all, 我想 confirm 嚇, 一個時薪制員工每月返少過 418, 如果提前兩日叫佢嚟勞工假返工, 都淨係按時薪俾佢, 唔使另外補假?

同學 1: 未過 418, 應該唔需要比有薪勞工假的。

同學 2: 但係有權放無薪勞工假?

同學 3: 我諗其實 part time 都有乜話放唔放假嘅

同學 4: 勞工署話非 418 如返法定假日正日都要補假, 但重點係呢個時薪僱員係斷 job 計, 無更表, 我唔知點補

同學 5: 咁如果用 job 計咁就唔會係 418 吧?

Reply: 希望大家處理問題可以有法可依, 所以也把相關法例給大家。

1. 《僱傭條例》第 39 條, 假日的給予(1) ..僱員須在以下日子獲僱主給予法定假日..這裡並沒有規定是長

- 工還是兼職。所以，只要是僱員就可以享有法定假日。
- 2.不過員工要領取法定假日工資，必須在緊接法定假日之前根據連續性合約受其僱主僱用滿 3 個月 (第 40 條)。
 - 3.如果需要員工上班，同學在兩日前通知 (48 小時) 的做法是對的。同學可以參考：第 39 條(2)僱主另選一日(該日並非法定假日或代替假日)作為另定假日，以代替在法定假日給予僱員假日，而該另假日是在緊接該法定假日前後 60 天期間內者；惟僱主須口頭或書面通知其僱員，或在僱傭地點顯處張貼有關他將會給予該另定假日的通知–(a) 凡另定假日是在緊接該法定假日前 60 天期間內者，僱主須於該另定假日最少 48 小時前作出或張貼上述通知；或 (b) 凡另定假日是在緊接法定假日 60 天期間內者，則僱主須於該法定假日最少 48 小時前作出或張貼上述通知。

3.5.2 The Statutory Holidays

An employee, **irrespective of his length of service**, is entitled to the following statutory holidays (S.39, EO: (1) Subject to subsections (1A), (2) and (3), an employee shall be granted a statutory holiday by his employer on each of the following days–

- (a) Lunar New Year's Day or,
if that day falls on a Sunday, then the fourth day of Lunar New Year...
- (b) the second day of Lunar New Year or, “ ”
- (c) the third day of Lunar New Year or, “ ”
- (d) Ching Ming (清明) Festival;...
- (da) Labour Day, being the first day of May; ...
- (e) Tuen Ng (端午) Festival; ...
- (f) the day following the Chinese Mid–Autumn (中秋) Festival or, if that day falls on a Sunday, then the second day following that Festival; ...
- (g) the Chung Yeung (重陽) Festival;
- (h) the Chinese Winter Solstice Festival (冬節) or Christmas Day, at the option of the employer;
- (i) the first day of January; (Replaced 53 of 1976 s. 2)
- (j) Hong Kong Special Administrative Region Establishment Day, being the first day of July; and
- (k) National Day, being the first day of October. (Added 137 of 1997 s. 3. Amended 35 of 1998 s. 5))

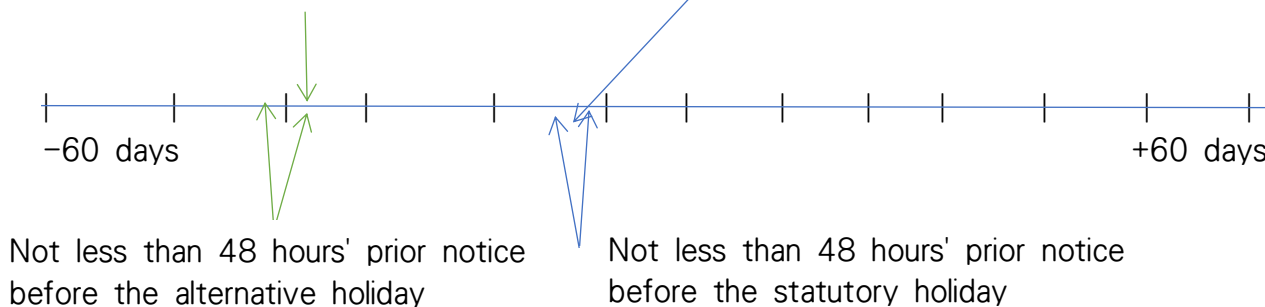
3.5.3 Work on Statutory Holidays

1. The employer should make the following arrangement if he/she requires the employee to work on a statutory holiday:
 - (1) An alternative holiday should be arranged within 60 days BEFORE the statutory holiday: A Prior Notice to Employee on the Date of Alternative Holiday – To be given not less than 48 hours' prior notice before the alternative holiday
 - (2) An alternative holiday should be arranged within 60 days AFTER the statutory holiday: A Prior Notice to Employee on the Date of Alternative Holiday – To be given not less than 48 hours' prior notice before the statutory holiday

Statutory Holiday

(1) An alternative holiday should be arranged within 60 days BEFORE the statutory holiday

(2) An alternative holiday should be arranged with 60 days AFTER the statutory holiday



2. If Both Agree: any day within 30 days before or after the statutory or alternative holiday may be taken by the employee as a substituted holiday

3.5.4 Possible Claims from Employee



LABOUR DEPARTMENT (BRANCH OFFICE)

勞工處(分處)

Your reference 來函編號 :
Our reference 本處檔案編號 : LR 11-2019-0
Tel. number 電話號碼 : 2922
Fax number 傳真號碼 : 2568

勞工處勞資關係科(東港島)
香港太古城太古灣道14號
太古城中心三座12樓

致： H. _____
502A _____
92 C _____
TSIM _____

勞工處勞資關係科 調停會議邀請書

王小姐 (申索人) 最近到本處向你提出申索，有關項目如下：
法定假日薪酬、年假薪酬

本處現附上由申索人提供的申索資料，以供參考（請參閱附件）。請你留意，申索的項目及款額由申索人單方面提出，發出本邀請書並不表示本處同意有關資料準確可靠。勞資雙方可在調停會議上提供進一步的證據（如僱傭記錄），以核實或澄清有關申索。

假如你同意與申索人解決這項糾紛，你可先與申索人協議和解款額，再將回條按下列地址寄回本處。如有需要，你亦可將劃線支票寄回本處轉交申索人（支票抬頭人為申索人姓名，背後請註明檔案編號）。

如你對申索有爭議，本處誠邀你出席以下的調停會議。請注意，調停服務旨在以較簡單、快捷和省時的方法，協助雙方在友善的氣氛下解決勞資爭議。調停主任是中立的中間人，並無裁決權。調停的參與屬自願性質，你可自由決定是否參與調停（請參閱背頁以瞭解本處調停服務的性質。）然而，如你不出席調停會議，申索人有可能會入稟勞資審裁處或小額薪酬索償仲裁處尋求仲裁。會議詳情如下：

日期： 2019 年 2 月 25 日 (星期一) [注意：如天文台於約見時間或約見前的二小時內懸掛 8 號或以上颱風訊號，或黑色暴雨警告，此會議即告取消，本處職員會盡快通知你新的約見時間]
時間： 下午 2 時 30 分
地點： 勞資關係科(東港島)
香港太古城太古灣道 14 號
太古城中心三座 12 樓

請攜同本函、商業登記證副本（如適用）及有關文件的副本（如僱傭合約、出勤記錄、薪金紀錄等）出席會議，以備參考。倘若你不能赴約，可以授權代表出席。

就雙方沒有爭議的款項，應立即支付，不必留待調停會議後才支付。

如有疑問，請致電 2922 與調停主任 李小姐 聯絡。如調停主任未能立即接聽來電，請你在電話留言信箱留言，調停主任會盡快回覆你。

2019 年 1 月 22 日



勞工處處長
(李小姐代)

2017)



第二部份

重要通知/免責聲明：

勞工處並沒有表示或確認下述申索的資料或內容準確可靠。下述申索的資料或內容由申索人單方面提出，並需在調停會議上核實或澄清，屆時勞資雙方可提供進一步的證據(如僱傭記錄)，以核實或澄清有關資料。

為方便進行調停，我們會在舉行調停會議前，把本頁的副本交予被追討的一方，以供參考。申索人在下方簽署後，即表示同意本處把本頁的副本交予被追討人。

申索人姓名：_____ (請用正楷) 申索人簽署：_____

我想追討下列項目：	數額	只供本處使用			
欠薪：(由 年 月 日至 年 月 日) \$		AW	\$	Cause :	
其他津貼：(由 年 月 日至 年 月 日) \$					No. of claimants :
佣金：(由 年 月 日至 年 月 日) \$					No. of recipients :
加班津貼：(由 年 月 日至 年 月 日) \$				Result	<input type="checkbox"/> Settled
被短付的工資：(由 年 月 日至 年 月 日) \$					<input type="checkbox"/> To LT (Appt. _____)
被扣減的工資：(由 年 月 日至 年 月 日) \$					<input type="checkbox"/> To MECAB (Appt. _____)
從工資中被扣減的強積金供款：(由 至) \$					<input type="checkbox"/> To LAD (Appt. _____)
其他(請註明)：	\$	<input type="checkbox"/> To WSD (E/E Appt. _____)	<input type="checkbox"/> (E/R Appt. _____)		
代通知金： 月/日*	\$	W/ON	\$		
法定假日薪酬：(由 2008 至 2015 : 756 日) (請列明日期) <i>免稅</i>	\$ 1,360,800.00		\$		
年假薪酬 <i>免稅</i> (由 2008 至 2015 : 59 日)	\$ 406,200.00		\$		
休息日薪酬：(由 至 : 日) (正常休息日在：)	\$ 88,000.00	RDR	\$		
遣散費/長期服務金*： (服務年資： 年 月)	\$	SP/LSP	\$		
年終酬金： <input type="checkbox"/> 農曆年 <input type="checkbox"/> 新曆年 (酬金期為： <input type="checkbox"/> 其他 _____)	\$	EYP	\$	<input type="checkbox"/> SP notice <input type="checkbox"/> EP notice	
疾病津貼：(病假期間：由 至)	\$	SA	\$	<input type="checkbox"/> Vic. Notice	
產假薪酬：(產假期間：由 至)	\$	MLP	\$	<input type="checkbox"/> Form 1	
侍產假薪酬：(請列明已放取侍產假的日期) ()	\$	PLP			
其他：機票(只適用於外籍家庭傭工)		OTHS	\$		
每月的膳食津貼(只適用於外籍家庭傭工)	\$				
交通津貼(只適用於外籍家庭傭工)	\$				
發還費用	\$				
根據 s.32P 的補償金(只限於被不合理及不合法解僱)：	\$	COMP	\$		
申索總額： \$ 400,000.00		TOTAL	\$		
<input type="checkbox"/> 復職 / <input type="checkbox"/> 再次聘用		RI/RE		<input type="checkbox"/> EP case <input type="checkbox"/> Non-EP case	

* 只適用於被不合理的解僱；被不合理及不合法解僱；或僱傭合約條款被不合理更改的申索。

* 請刪去不適用者

請在適當的空格內填上(✓)號

第二部分

重要通知/免責聲明：

勞工處並沒有表示或確認下述申索的資料或內容準確可靠。下述申索的資料或內容由申索人單方面提出，並需在調停會議上核實或澄清，屆時勞資雙方可提供進一步的證據(如僱傭記錄)，以核實或澄清有關資料。

為方便進行調停，我們會在舉行調停會議前，把本頁的副本交予被迫討的一方，以供參考。申索人在下方簽署後，即表示同意本處把本頁的副本交予被迫討人。

申索人姓名：廖 (請用正楷) 申索人簽署：廖

我想追討下列項目：	數額	只供本處使用			
欠薪：(由 年 月 日至 年 月 日)	\$	AW	\$	Cause :	
其他津貼：(由 年 月 日至 年 月 日)	\$				No. of claimants :
佣金：(由 年 月 日至 年 月 日)	\$				
加班津貼：(由 年 月 日至 年 月 日)	\$			Result	
被短付的工資：(由 年 月 日至 年 月 日)	\$				<input type="checkbox"/> Settled
被扣減的工資：(由 年 月 日至 年 月 日)	\$				<input type="checkbox"/> To LT (Appt. _____)
從工資中被扣減的強積金供款：(由 至)	\$				<input type="checkbox"/> To MECAB (Appt. _____)
其他(請註明)：	\$	<input type="checkbox"/> To LAD (Appt. _____)			
代通知金： 月/日*	\$	WILON	\$	<input type="checkbox"/> To WSD (E/E Appt. _____) (E/R Appt. _____)	
法定假日薪酬：(由2009至2012:30日) (請列明日期)差額	\$ 231,985	SHP	\$	<input type="checkbox"/> SP notice	
年假薪酬差額：(由2009至2012:25日)	\$ 14,795	ALP	\$	<input type="checkbox"/> EP notice	
休息日薪酬：(由 至 : 日) (正常休息日在：)	\$	RDP	\$	<input type="checkbox"/> Vic. Notice	
遣散費/長期服務金*： (服務年資： 年 月)	\$	SP/ LSP	\$	<input type="checkbox"/> Form 1	
年終酬金： (酬金期為： <input type="checkbox"/> 農曆年 <input type="checkbox"/> 新曆年 <input type="checkbox"/> 其他 _____)	\$	EYP	\$		
疾病津貼：(病假期間：由 至)	\$	SA	\$		
產假薪酬：(產假期間：由 至)	\$	MLP	\$		
侍產假薪酬：(請列明已放取侍產假的日期) ()	\$	PLP			
其他：機票(只適用於外籍家庭傭工)		OTHS	\$		
每月的膳食津貼(只適用於外籍家庭傭工)	\$				
交通津貼(只適用於外籍家庭傭工)	\$				
發還費用	\$				
根據 s.32P 的補償金(只限於被不合理及不合法解僱)：	\$	COMP	\$		
申索總額：	\$ 75,477	TOTAL	\$		
<input type="checkbox"/> 復職 / <input type="checkbox"/> 再次聘用		RI/RE		<input type="checkbox"/> EP case <input type="checkbox"/> Non-EP case	

只適用於被不合理的解僱；被不合理及不合法解僱；或僱傭合約條款被不合理更改的申索。

* 請刪去不適用者

請在適當的空格內填上(✓)號

LD

3.5.5 A Statutory Holiday Falling 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
- S.17 Grant of rest days ... (2) Rest days shall be in addition to any statutory holiday, or alternative holiday or substituted holiday, to which an employee is entitled under section 39
- S.39 (4) Where- (a) a statutory holiday falls on a rest day..., the employee shall be granted a holiday on the next day thereafter which is not a statutory holiday or an alternative holiday or a substituted holiday or a rest day

Case Shared by Previous Candidates

想問 20/6 法定假日需不需要補給員工，因為公司返五日但是又沒有 official 定星期六是休息日，合約是 mon-fri, sat/sun occasionally 要返就要返，咁如果星期六日兩日都是休息日是可行的但若是這樣，咁休息日撞上法定假日就一定要補，我公司這個情況應該點處理。

咁如果星期六是非工作日，若平時突發星期六要返是否也要補假給員工呢？

Our contract words:

“you should begin your workday between 8:30 am to 9:30 am and finish between 5:30 pm to 6:30 pm. You are required to work 9 hour day, Monday to Friday with one hour allowed for lunch, and Saturday when required.”

Reply:

- 1.如果沒有其他的條款說明休息日沒有薪水，你公司的合約應該是不管員工上不上班星期六一定有薪水；
- 2.看你的英文部分與中文的表達有分別，不過看英文部分，看來休息日是星期天，也應該有薪水；
- 3.看來你公司星期六不是休息日，公司在星期六不要求員工上班也發薪水屬於公司額外給員工的。所以，6月20日端午節不用補假期；
- 4.值得注意的是，端午節當天的工資有機會與6月份其他工資不同，因為法定假日當天的工資是法定假日前的平均工資。當然；一般月薪制的員工不會有太大影響，但如果是計算 Commission 或 Tips 的員工就要注意。

3.5.6 Entitlement of Statutory Holiday Pay

- (1) Employees who have been employed under continuous contracts for not less than three months immediately preceding a statutory holiday are entitled to holiday pay
- (2) should be paid to the employee not later than the day on which his next paid wages after that statutory holiday

3.5.7 How to calculate Statutory Holiday Pay?

- 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 specified dates:
 - (1) If Statutory Holiday is one day, the specific date = day of the statutory holiday
 - (2) If S/H is more than one day, the specific date = 1st day of the S/Hs

*does not include EYP and any other items mentioned in definition of wages in s.2, EO

- If an employee is employed for less than 12 months, the calculation shall be based on the shorter period
- Again, in calculating the average daily wages, an employer has to exclude:

b) 以下為政府在憲報公佈的 2014 年公眾假期：

每個星期日	星期日
一月一日 1 月 1 日	星期三*
農曆年初一 1 月 31 日	星期五*
農曆年初二 2 月 1 日	星期六*
農曆年初四 2 月 3 日	星期一*
清明節 4 月 5 日	星期六*
耶穌受難節 4 月 18 日	星期五
耶穌受難節翌日 4 月 19 日	星期六
復活節星期一 4 月 21 日	星期一
勞動節 5 月 1 日	星期四*
佛誕 5 月 6 日	星期二
端午節 6 月 2 日	星期一*
香港特別行政區成立紀念日 7 月 1 日	星期二*
中秋節翌日 9 月 9 日	星期二*
國慶日 10 月 1 日	星期三*
重陽節 10 月 2 日	星期四*
耶誕節 12 月 25 日	星期四* (or 冬至 12 月 22 日)
耶誕節後第一個周日 12 月 26 日	星期五

*Statutory Holidays

c) 公眾假期《公眾假期條例》(General Holidays Ordinance, Cap.149)

- 除了星期日外，香港每年有 17 天公眾假期（俗稱“銀行假期”、“寫字樓假期”、“紅字”、“紅日”等）
- 在香港的日曆上，該 17 天通常以紅色標示
- 根據香港法例第 149 章《公眾假期條例》第 2 條《釋義》，該 17 天是銀行、教育機構、公共機構辦事處和政府部門遵守為假期的日子
- 根據香港法例第 57 章《僱傭條例》，第 39 條《假日的給予》的規定，給予僱員每年 12 天假期，這 12 天稱為法定假日（俗稱“勞工假期”、“工廠假期”等）
- 換言之，耶穌受難節、耶穌受難節翌日、復活節星期一、佛誕和耶誕節後第一個周日，屬“不是法定假日的公眾假期”，非《公眾假期條例》內指定的機構，及無在僱傭合約注明僱員可享有公眾假期的話，便有權要求僱員在上述“不是法定假日的公眾假期”期間如常上班，且不給予任何補假或補薪
- 按照不成文傳統，除了《公眾假期條例》指定的機構外：
 - (1) 俗稱“白領”（主要是辦公室文職工作）的行業是放公眾假期
 - (2) 俗稱“藍領”（傳統上指第二產業，現在可泛指“白領”以外的大部份工種）的行業才會放法定假日，例如製造、建造、紡織、維修、工程、傳媒、保安、潔淨、運輸、物流、批發、零售、餐飲、酒店、客戶服務等，以上述行業為核心業務的公司，即使是文職崗位僱員，通常也是放法定假日

d) 公眾假期適逢星期六、星期日、其它假期

- 實行五天工作制的，當公眾假期適逢星期六，不設補假
- 如適逢星期日或其他假期，則會另日補假

- 一般而言，補假會在該假日之後首個非公眾假期的日子，或由行政長官會同行政會議藉在憲報刊登的命令，指定取代該日的另一日
- 實際上，每年適逢星期六的公眾假期（或其補假日），多可達 5 天
- 耶穌受難節翌日一定是星期六，所以五天工作制的公司員工根本不可能完全享受所有的公眾假期

e) 1983 年至 2010 年的特殊公眾假期安排（農曆新年年初一至三和中秋節翌日，適逢星期日的）

- 在 1982 年及之前，這些假日和其它假日一樣，如適逢星期日，會於該假日後，即農曆年初四和八月十七補假
- 考慮到有意見（特別是方便女性僱員），建議補假安排於前一天，即農曆除夕和中秋節當日。按中國人傳統，為家人準備晚餐團聚，補假安排在前一天可以與家人一起享受一年一度的重要傳統日子
- 所以；從 1983 年起，這些假日如適逢星期日，會於該假日前補假。這等同把補假安排於星期六（如年初一適逢星期日），令不少僱員損失假期
- 如 2010 年的農曆年初一（2 月 14 日）是星期日，當局依例安排除夕（2 月 13 日）星期六作補假日，形成了上述的假期損失
- 2010 年 2 月 13 日，農曆除夕，時任行政長官曾蔭權在沙田年宵市場被傳媒問及有關問題時，表示曾與勞工及福利局局長張建宗討論過有關問題，並研究修改有關法例，避免再出現同樣情況
- 政府于 2011 年向立法會提交《2011 年公眾假期及僱傭法例（補假安排）（修訂）條例草案》，改回 1982 年前的補假方式，於該假日後，以避免上述的損失假期問題，該修訂于同年 12 月 14 日通過，2012 年 2 月 24 日正式生效

3.6 Paid Annual Leave 有薪年假 s.41AA, EO

3.6.1 General Understandings on AL

- 受聘連續性合約滿 12 個月後有權享有受薪年假；依照服務年期，遞增有薪年假天數，由 7 天至最多 14 天的有薪年假
- 有薪年假的金額 = 僱員在享有年假期間之正常工資
 ** 儘管工資包括僱傭合約訂明的傭金，終審法院於 *Lisbeth Enterprises Limited v Mandy Luk* (basic salary \$5600 plus monthly commission) 之案例中指出，除非傭金是按日計算，否則有關傭金不應計算在法定假期及年假薪酬內。但請留意，EO 法例條文已經因應這 CFA 案例修改了，現在按照 EAO2007
- 根據《僱傭條例》第 41G：僱主備存年假紀錄的規定 (30/06/1997)
 僱主須備存一份載有以下資料的紀錄—
 (a) (i) 每名僱員僱傭的開始及終止日期；
 (ii) 每名僱員所放每段年假期間的開始及終止日期；及
 (iii) 僱主為給予其任何僱員年假而停業或停止部分業務的每段期間的開始及終止日期；及
 (b) 每名僱員收取的全部年假薪酬
- Offence 違例與罰則
 (1) 如無合理辯解而不讓僱員放年假，可被檢控，一經定罪，最高可被罰款 5 萬元 (s.63)
 (2) 不支付年假薪酬給僱員，可被檢控，一經定罪，最高可被罰款 5 萬元。(s.63)
 (3) Offence to s.41G, Level 3 (minor offence s.63D)

3.6.2 有薪年假天數 (S.41AA, EO)

服務年期	可享有的有薪年假日數
1	7
2	7
3	8
4	9
5	10
6	11
7	12
8	13
9 或以上	14

3.6.3 怎樣發放年假？誰人決定怎樣放年假日期？

- 在受僱每滿 12 個月後，僱員須於隨後 12 個月之內放取有薪年假
- **假期年**：是指僱員開始受僱日及其周年日起之後的 12 個月期間
- 年假日期應由僱主徵詢僱員或其代表後指定，僱主須在假期開始最少 14 天前，以書面通知僱員年假安排 (s.41AA(3) & (4),EO)
- 如雙方同意，較短時間通知也可以
- 年假須為一段不間斷的期間，如僱員要求，可按下列方式給予年假：
 - (1) 享有年假日數不超過 10 天的僱員：可將不多於 3 天的假期分開發放，而餘下的年假則應連續發放
 - (2) 享有年假日數超過 10 天的僱員：最少連續發放 7 天年假，餘下的年假可分開發放

Case Shared by Previous Candidates

請問有冇咩條例訂明 annual leave 一定係以半日或一日為單位？

這是我給他的回復：[法例的原意是希望員工可以在一年工作後，有一個較長的休息。所以沒有半日的法定概念。香港僱傭條例 s.41AA (5)

- (a) 須在緊接與年假有關的假期年屆滿後 12 個月內由僱主給予並由僱員放取；
- (b) 除(c)段另有規定外，須為一段不間斷的期間；及
- (c) 除第(9)款另有規定外，如僱員向僱主提出要求，須作如下劃分—
 - (i) 如有權享有的年假不超過 10 天，給予的年假須為連續日子，但如該段年假不超過 3 天，則可在任何日子給予(不論是否連續日子)；及
 - (ii) 如有權享有的年假超過 10 天，該段年假中有 7 天須為連續日子，而其餘的年假可在任何日子給予(不論是否連續日子)。

當然，如果公司政策，有假期是超出法定部分的，只要在人事政策寫清楚，怎樣處理都可以！

有一些同學還問了以下實務及有趣的問題：

同學一：“請問是否即超過十天年假的，一年內必須取七天年假才算符合法例？還是其實可以按公司人事政策處理？”

同學二：“好難連續七日啊！” 如果個 staff 要求全部 1、2 日假係 OK 嗎？

希望大家記得以下原則：

- (1) 法例的原意是希望員工可以在一年工作後，有一個較長的休息；
- (2) 法例間接給予僱主權利按照僱主自己的實際業務情況，安排按照員工什麼時候放年假，員工需要遵從有關安排。（這是根據《僱傭條例》41AA (4) 僱主須就其決定給予年假的時間向僱員給予不少於14天的書面通知，但如僱主與僱員雙方議定較短的通知期，則不在此限。）

由於法例是希望保障員工可以放長一點假的權利，如果員工自己要求及僱主同意，問題應該不大。當然；我常常說要瞭解自己的處境，所以大家也應該要知道最壞的違反成本。放心！不用坐牢！根據《僱傭條例》第63條(4)任何僱主如無合理辯解而沒有給予任何僱員按照第41AA或41F(3)條須給予或容許的任何假期。...一經定罪，可處第5級罰款（現在是HK\$50,000）。

*Leading Case: Cathay Pacific Airways Ltd –v– Kwan Siu Wa Becky And Others
(26/09/2012, FACV5/2012)*

- The case concerned with leave pay as calculated under the EO prior to the Employment (Amendment) Ordinance (“Pre-EAO leave pay”). The decision affects how payment is calculated only for leave taken before 13 July 2007. It is still relevant to employers as there is a 6-year limitation period to recover a shortfall in statutory payments, therefore employees can still make a claim Pre-EAO leave pay until July 2013
- The argument was whether certain payments were “wages” for the purpose of annual leave and holiday pay. The Payments in dispute were:
 - (1) line duty allowance (“LDA”) – a payment for the hours which they are on board the plane, calculated up to minute;
 - (2) ground duty allowance (“GDA”) – a payment for the hours on duty, also calculated up to minute;
 - (3) in-flight duty-free sales commission (“Duty Free Commission, DFC”) – commission for in-flight duty-free sales made. DFC is a fixed percentage although it is not guaranteed. It is only earned if a sale is made; and
 - (4) outport allowance (“OA”) – an allowance that spend time overseas between flights.

FACV5/2012 para 49:

“ The Labour Tribunal held that LDA, GDA and DFSC should be included but that OA should be excluded. Cathay appealed to the High Court against the inclusion of LDA, GDA and DFSC. Ms Kwan, Ms Wu and Ms Ho cross-appealed against the exclusion of OA. Both courts below held that OA should not be included. And there is no appeal to this Court against such exclusion. As far as LDA, GDA and DFSC are concerned, Stone J held that they should be excluded but the Court of Appeal held that they should be included. Cathay appeals to this Court against such inclusion. Hence the first question, namely whether LDA, GDA and DFSC should be included.”

CX contended that the CA erred in holding that:

- (1) LDA, GDA and DFSC should be included in the calculation of statutory holiday pay and statutory annual leave pay;
- (2) where the contracts of employment provide for periods of annual leave in excess statutory minimum, in the absence of contractual provision to the contrary, the parties

must have intended that the statutory rate of annual leave pay would apply to the excess contractual annual leave

For the contention relating to OT of one of the employees (Ms Ho), the parties were in agreement that the case would be referred to LT and the CFA set aside the order to remit the question of overtime to the Labour Tribunal

Decision of CFA

- (1) The CFA agreed with the CA that the allowances and commission should fall within the definition of “wages” => should be included in the calculation of statutory holiday pay and statutory annual leave pay
(One of CX’s arguments was due to the fact that LDA, GDA and DFSC lacked the “requisite quality of dailiness” (Lisbeth case to support its argument). CJ Ma held that “it is wrong to regard Lisbeth as being authority for the proposition that there is this additional requirement of dailiness”. He further held that Lisbeth was a case which was decided on its own particular facts. NPJ Lord Neuberger went as far as to say “I am by no means convinced that Lisbeth was rightly decided.”);
- (2) The relevant level of payment for additional annual leave was wholly dependent on the true construction of the relevant contracts of employment between the parties. BUT, it found that there was nothing in these contracts which made a distinction between statutory leave and excess. On that basis, it was held that the same rate of pay applied irrespective of whether the leave was statutory annual leave or contractual annual leave.

Archer, Harold Dean vs The Hong Kong Channel Limited

- The plaintiff was the managing director of a company that produced television programmes for hotels. According to his employment contract he was entitled two weeks paid leave in each calendar year, in addition to Hong Kong public holidays.
- It was expressly stated in the plaintiff’s employment contract that he was required to take annual leave at the end of the calendar year in which it was earned and that all unused leave would be forfeited.
- During the plaintiff’s employment with the company, both parties conducted themselves in accordance with the contract, but once the plaintiff’s employment was terminated, he lodged a claim against the company seeking, among others, a payment representing seven days’ annual leave accumulated during the previous year.
- The company disputed this claim, pointing out that under the terms of the plaintiff’s employment contract he had not been allowed to accumulate leave from previous years.
- In examining whether the company was acting within the law when it required the plaintiff to forfeit his unused annual leave, the Court referred to Section 41AA(5)(a) of the Employment Ordinance. The ordinance stipulates that employers should grant their employees annual leave “within the period of 12 months beginning immediately after the expiration of the leave year to which it relates.”
- The Court ruled that in this case the plaintiff’s employment contract ran counter to the Employment Ordinance as the contract stated that the plaintiff would forfeit his annual

leave if he did not take it within the year in which he earned it. This provision in the employment contract was considered void and the Court ruled against the employer.

- You could refer to Employment Ordinance, Chap 57, S41 AA(4) and AA(8). Cited below:
s.41AA(4) An employer shall give an employee not less than 14 days' notice in writing of the time he has determined for the grant of a period of annual leave, except where a shorter period of notice is agreed to by the employer and employee.
s.41AA(8) Where–
 - (a) an employer continues to employ an employee after the expiration of a period during which annual leave should have been granted to him and the employer has not granted that leave, then at the option of the employee but subject to paragraph (b) the employer shall (whether or not proceedings have been taken for an offence under section 63(4)(e))–
 - (i) pay to the employee, in addition to any pay due to him, compensation equal in amount to the annual leave pay which he would have received had the leave been granted so as to end on the expiration of the period during which it should have been granted; or
 - (ii) grant the employee paid leave equal to the leave which should have been granted;
 - (b) an employee opts under paragraph (a) to take paid leave, he shall take the leave on such day or days as may be agreed to by the employer and him or, if there is no such agreement, as shall be specified by the employer.
- You might also interest to know 41D for a pro-rata calculation of annual leaves for an employee employed over 3 months but less than a year.
- For full Employment Ordinance, pls refer to this link:

3.6.4 Sample Annual Leave Clause

Leave & Additional Holidays per Year

Annual Leave: Employee is entitled to statutory annual leave according to Employment Ordinance (Cap. 57) in Hong Kong.

Paid Holidays in Addition to Statutory Entitlement (“PHASE”): The company shall grant the employee of this contract Additional Paid Holidays per year under below schedule. So, the employee will be entitled to a maximum of **20 days** of paid holidays per year.

<u>By the end of</u>	<u>Additional Holidays</u>
1 st Year	13
2 nd Year	13
3 rd Year	12
4 th Year	11
5 th Year	10
6 th Year	9
7 th Year	8
8 th Year	7
9 th Year onwards	6

“PHASE” will be subject to sole discretion of the Company. The Company has the sole discretion to alternate, increase or deduct or forfeit “PHASE” (“PHASE ALTERNATION”). However, the company will consider the package offered to, the seniority, the performance of staff and any other factors upon the sole discretion of the company to decide the number of days of “PHASE”. “PHASE ALTERNATION” could be issued by the employer in Employee Manual, Notice to Employee or Memo.

Holiday Pay of “PHASE” should be calculation base on the calendar month of the month that “PHASE” is taken.

3.6.5 如年假期內適逢休息日或法定假日，應怎樣處理？

- 該日應視作年假，而僱主必須為僱員另定休息日或法定假日

Case Shared by Previous Candidates

請問呢，「如年假期內適逢休息日或法定假日，該日應視作年假，而僱主必須為僱員另定休息日或法定假日。」點理解？是咪會補放法定假日？

Reply: 因為年假沒有另定年假的觀念，所以是另定休息日或法定假日。

3.6.6 年假薪酬

- 相等於僱員在「指明日期」前 12 個月內所賺取的每日平均工資
 - 如僱員的受僱期不足 12 個月，則以該段較短期間計算
- | | |
|-------------|---------------|
| <u>年假日數</u> | <u>「指明日期」</u> |
| 一天 | 年假當天 |
| 連續多於一天 | 年假首天 |
- 在計算每日平均工資時，僱主須剔除：
 - (1) 未有付給僱員工資或全部工資的期間，包括休息日、法定假日、年假、病假、產假、工傷病假或在其同意下放取的假期，以及沒有向僱員提供工作的任何正常工作日；連同
 - (2) 就該期間已支付的款項
 - 最遲須於年假後的第一個發薪日支付年假薪酬

3.6.7 以工資代替年假有沒有限制？(s.41E(2))

- 僱員可以選擇接受款項代替部分年假，但祇限於超逾 10 天的年假部分
- 但僱主不得在僱傭合約內加入任何條款，令僱員放棄全部或部分年假，包括支付工資以代替年假的條款

3.6.8 Accrued but Unused Annual Leave (s.41AA(8), EO)

(8) 凡-

(a) 僱主在本應給予僱員年假的期間內未有給予該假期，而在該期間屆滿後，繼續僱用該僱員，則在符合(b)段的規定並在僱員選擇下，僱主(不論曾否就第 63(4)(e)條所訂罪行採取法律程式)-

- (i) 除到期付給僱員的任何薪酬外，須另付給他一筆補償，款額相等於假若該僱員獲給予年假，而年假在應給予年假的期間屆滿時終結，該僱員本會收取的年假薪酬；或
- (ii) 須給予僱員相等於本應給予假期的有薪假期；

(b) 僱員根據(a)段選擇放有薪假期，他須在與僱主雙方協議的日子放假，或如未有協議者，則由僱主指明放假的日子。

An example to demonstrate the mechanism of s.41AA(3) & (4) and 41AA(8)

Assuming a calendar year is the common leave year. Statutory annual leave (SAL) accrued in 2010 should be taken in 2011.

In 2011: the employer can direct the employee to take the SAL accrued in 2010 by consulting with the employee. If no agreement is reached, the employer could give not less than 14 days written notice to the employee of when the leave should be taken. The employee cannot object the time nominated if the employer had already consulted with him/her before. (s.41AA(3) & (4), EO)

In 2012: if SAL accrued in 2010 is not taken in 2011, if employee elects to have such accrued leave paid out, the employer must comply with his/her selection even though the employer still direct the employee to take annual leave by consulting and giving him/her not less than 14 day's written notice. (s.41AA(8), EO)

3.6.9 終止僱傭合約時，怎樣計算員工年假 (s.41D(2))

需要考慮：

- (1) 如受僱滿整個假期年而仍未放取有薪年假
- (2) 不論以任何理由終止僱傭合約
- (3) 僱主須支付工資給僱員以代替未放取的年假
- (4) 計算該等年假薪酬時，應以「終止合約的日期」為「指明日期」
- (5) 如僱員在個別假期年內只受僱滿 3 個月但不足 12 個月，除因犯嚴重過失而遭即時解僱外，僱主須支付按比例計算的年假薪酬給僱員

計算方法：

<u>受僱期</u>	<u>可享有的年假日數</u>
少於 3 個月	(無)
3 至 12 個月	
因犯嚴重過失而遭即時解僱 辭職 或 非即時解僱	(無) (可享有的年假日數 x 受僱日數/365)
12 個月或以上及	
該假期年受僱少於 3 個月	(上年度未放取的年假)
12 個月或以上及	
該假期年受僱滿 3 至 12 個月	
因犯嚴重過失而遭即時解僱 辭職 或 非即時解僱	(上年度未放取的年假) (上年度未放取的年假+ 可享有的年假日數 x 該假期年受僱日數/365)

3.6.10 年假可以包括在通知期內嗎？

- S.6(2A), EO: 在不損害第 41D 條的規定下，僱員根據第 41AA 條有權享有的年假，不得計算在第 (2) 款所訂終止僱傭合約所需的通知期內
- 但從 Kao, Lee & Yip v Lau Wing & Others 判詞中，可以認為這只是對僱主有約束力

Kao, Lee & Yip v Lau Wing & Others CFA, 29.10.08

- lawyers gave 3 months' notice or payment in lieu of notice to terminate employment
- one lawyer had half day annual leave

Ruling:

- Payment in lieu of notice can be made unilaterally—"agreeing to pay" not required acceptance s.7(1A) => s.7(1A) could be made unilateral
- **Employee can give notice over a period which includes accrued annual leave entitlement => s.6 (2A) was intended solely for benefit of employees. But not for Employer!**

Scenario Analysis

If accrued AL = 10days

Scenario 1 : If staff resigned on 8th April and company accepts staff to use AL to set off Notice Period, the last day is 22nd April 2015. And employer has to pay employee upto 7th May 2015.

|-----|-----|-----|---|---|-----|
1st Apr 8th Apr (Wed) 22nd Apr(Wed) 1st 2nd 3rd May 7th May
2015 Notice by Employee Last Day (Sat & Sun)

Scenario 2 : If staff resigned on 8th April and company does not accept staff to use 10 days AL to set off Notice Period, the last day is 27th April 2015.

|-----|-----|-----|-----|
1st Apr 8th Apr (Wed) 27th Apr (Mon) 7th May
2015 Notice by Employee Last Day

Payment to employee = payment upto 27th Apr – 10days salary (short notice) + prorata annual leave upto 27th Apr 2015 (a bit more than 10 days).

3.6.11 共同假期年的選擇 Choice of Common Leave Year

(S.41AB, EO, Option for common leave year 30/06/1997)

- 僱主可指定任何共同假期年
- 應於 1 個月前以書面方式通知每名僱員，或於工作地點的顯眼地方張貼告示
- 如僱員在指定的共同假期年內並未按連續性合約受僱滿 12 個月，則該僱員可享有的年假應按比例計算
- 在共同假期年開始前已按比例計算的年假，僱員可與僱主商議：
 - (1) 放假；
 - (2) 或將之累積，與來年可享用的年假合併

怎樣計算共同假期年年假：

假如共同假期年：2014 年 1 月 1 日至 12 月 31 日，僱員開始受僱日期：2014 年 9 月 16 日

- 僱員享有按比例計算的年假：
- 107 (由 2014 年 9 月 16 日至 12 月 31 日的日數) $\div 365 \times 7$
= 2.05 天 (進位至 3 天)
- => 僱員可選擇在 2015 年內放這 3 天年假，或將之與 2015 年可享有的 7 天年假合併 (共 10 天)，在 2016 年內享用。

3.6.12 年假歇業 Annual Leave Shutdown

(S.41F, EO: Annual leave shutdown 30/06/1997)

- 如機構因放年假而暫時全部或部分歇業，須於 1 個月前以書面通知僱員
- 如僱員未足資格領取暫時歇業期間的年假薪酬，但因暫時休業而需要停工，則該僱員亦應在整段歇業期間享有年假及年假薪酬
- 如僱員可享有的年假日數多於歇業期日數，可在歇業期後的第一個工作天開始，放取超出歇業期日數的有薪年假
- 如僱主因放年假曾暫時全部或部分歇業，由僱主所指定的共同假期年並不會因年假歇業而更改，因為所發放的年假，應屬於剛歇業前的那個共同假期年的

3.7 疾病津貼 Sickness Allowance (s.33, EO)

3.7.1 Q&A

a) *Who is eligible for SA?*

b) 法例對“病假不少於連續 4 天”有沒有例外呢？

c) 僱主有提供醫療計畫，如果僱員沒有到該醫療計畫應診，但又要得到疾病津貼，有沒有例外情況？

d) 我公司人事政策，員工可以每年首 6 天不需要按照勞工法例規定連續 4 天才可以享有疾病津貼，在每年的首 6 天，病假 1 天都可以享有疾病津貼。首 6 天后，按照勞工法例享有疾病津貼。在剛過去的端午節，僱員生病，端午節後，員工拿醫生證明要求公司發放疾病津貼 (這次是員工今年第一次申請病假)，公司是否需要給付疾病津貼？

e) 什麼是有效的醫生證明書？

f) 我的僱主在我病假期內，打電話通知我病假後不用上班，我的工資計算到病假放畢當天。我可以怎樣做？

3.7.2 Who is eligible for SA? 領取疾病津貼的資格

- 按連續性合約受僱，及：
 - (1) 病假不少於連續 4 天；例外：懷孕僱員因產前檢查、產後治療或流產而缺勤，在這些情況下，每一天病假均可享有疾病津貼(s.33(3A))
 - (2) 能出示適當的醫生證明書(s.33 (6),(7))；及
 - (3) 已累積足夠的有薪病假

問題 2：如果令一員工只入職一個半月，他的病假津貼日數只有 2 天，他去看醫生，而醫生給予他 4 天病假。如果我們給予他 2 天病假津貼，另外兩天沒有工資，而我們把他的累積病假津貼記錄 = 0。如 勞工處人員到我公司檢查有關病假記錄，我們是否合法？

《僱傭條例》規定，僱員按連續性合約受僱，在最初受僱的 12 個月內每服務滿 1 個月，便可累積 2 天有薪病假；之後每服務滿 1 個月可累積 4 天。有薪病假最多可累積至 120 天。

《僱傭條例》亦規定，僱員如連續放病假日 4 天或超過 4 天者，有權獲得病假日總數的疾病津貼，惟該等病假日總數不得超過緊接開始放該等病假日前該僱員累積的有薪病假日數。僱員獲付給疾病津貼的病假日數，須從僱員所累積的有薪病假日總數中扣除。換言之，《僱傭條例》所訂立的疾病津貼，適用於不少於連續 4 天的病假。

如果僱主給予的有薪病假少於連續 4 天，由於這些病假與法例有別，僱主不能就那些不足連續 4 天的有薪病假從僱員的累積有薪病假額中扣除。因此，你提出的問題 1 例子，因僱員只有 7 月 24、25 日兩天病假，少於連續 4 天，所以不能從其按《僱傭條例》所累積有薪病假額扣除。至於問題 2 提出的例子，如該等病假為連續 4 天，則僱主可從其按《僱傭條例》累積的有薪病假日總數中扣除其所累積的日數，即 2 天。

如果僱主作出非《僱傭條例》所容許的扣除安排而扣除淨盡僱員所累積的有薪病假，因而沒有就某段本應為有薪病假日的期間向僱員支付疾病津貼、或在該期間將僱員解僱，僱主可能須為沒有支付疾病津貼或在有薪病假期間開除僱員負上刑事責任。為免觸犯法例，僱主應根據《僱傭條例》的相關規定就計算僱員累積的有薪病假日總數作出適當安排。

3.7.4 帶薪病假的類別

- 分為第 1 類及第 2 類
- 第 1 類：病假最多可累積 36 天
 - (1) 有註冊醫生、註冊中醫或註冊牙醫簽發的醫生證明書
- 第 2 類：36 天以外的病假，最多可累積 84 天
 - (1) 病假日數超過第 1 類病假的尚餘日數
 - (2) 如僱主要求，須出示由僱員在醫院門診部或留院時為他診治的註冊醫生、註冊中醫或註冊牙醫所簽發的醫生證明書 (s.33 (5A))；
 - (3) 如僱主要求，亦須提交該證明書的簽發者所作過的診斷及治療的簡略紀錄
- 有效的醫生證明書須指明 (s.33 (7))：
 - (1) 不適宜工作的日數，及
 - (2) 導致不適宜工作的疾病或損傷性質

3.7.5 僱員在什麼情況下不可享有疾病津貼？(s.33(5))

- (1) 衛生署署長認可的醫療計畫：如僱員無合理解釋，拒絕接受僱主的醫療計畫下的公司醫生：
 - 診治或
 - 不聽從該等醫生的指導例外：如僱主的認可醫療計畫沒有某一醫療系統的治疗，僱員可選擇向沒有被涵蓋的醫療系統下的任何註冊醫生、註冊中醫或註冊牙醫求診
- (2) 病假適逢法定假日而僱員可享有該假日薪酬；或
- (3) 僱員因工受傷，根據《僱員補償條例》，可獲得補償。

3.7.6 疾病津貼 Sick Leave Allowance

- 疾病津貼款額 = 僱員在「指明日期」前 12 個月內所賺取的每日平均工資的五分之四
- 如受僱期不足 12 個月，則以該段較短期間計算
- 須剔除
 - (1) 未有付給僱員工資或全部工資的期間，包括休息日、法定假日、年假、病假、產假、工傷病假或在其同意下放取的假期，以及沒有向僱員提供工作的任何正常工作日；連同
 - (2) 就該期間已支付的款項。
- 病假「指明日期」
 - (1) 病假一天的，指明日期 = 病假當天
 - (2) 連續多於一天，指明日期 = 病假首天
- 疾病津貼須不遲于正常發薪日支付

3.7.7 病假紀錄 (s.37)

- 僱主必須保存紀錄：
 1. 僱員開始及終止僱傭合約的日期；
 2. 僱員所累積的全部有薪病假，包括第 1 類及第 2 類有薪病假的總數；
 3. 僱員曾享用的有薪病假日數，及從第 1 類或第 2 類有薪病假日數中扣除的紀錄；
 4. 僱員曾領取的疾病津貼，及放取有薪病假的日期。
- 上述紀錄必須在僱員放完帶薪病假，復工後 7 天內由僱員簽署確認
- 僱員亦有權查看其病假紀錄

3.7.8 僱員患病職業保障

- 僱主不可在僱員放取有薪病假期間解僱僱員(s.33(4B))
- 因僱員犯嚴重過失而將其時解僱例外

3.7.9 違例與罰則

- (1) 如無合理辯解而不支付疾病津貼給僱員，可被檢控(s.33(4BA))
 - 一經定罪，最高可被罰款 5 萬元
- (2) 僱主在僱員放取有薪病假期間解僱僱員，可被檢控
 - 一經定罪，最高可被罰款 10 萬元(s.33(4BB))，及；
 - 僱主必須在終止合約後 7 天內，支付下列款項給僱員(s.33(4BA))：
 1. 解僱代通知金，及；
 2. 一筆相等於 7 天工資的賠償款項，及；
 3. 僱員應得的疾病津貼，及；
 4. 若僱主並非基於條例規定的正當理由解僱僱員，僱員可向僱主提出「僱傭保障」補償的申索

3.8 濫用病假的問題

http://orientaldaily.on.cc/cnt/news/20170303/00176_062.htmlhttp://orientaldaily.on.cc/cnt/news/20170303/00176_062.html

關注病假制度

- 工會亦關注病假制度，以往員工若一年內請病假多於廿四日，才會納入監察名單，需定期與管理層會面，並親自交醫生紙，
- 但去年九月起，改為半年內請病假多於九至十日，便要納入監察名單，致使很多員工有病也不敢請病假

4. Termination of Employment Contract and 僱員保障條例 Employment Protection (沒有正當理由被解僱)

4.1 Concise Guide to Termination of Contract of Employment

4.1.1 Probation and Termination (Notice Period):

- (1) 在試用期內：試用期內的首個月
 - 無需通知期
 - 無需代通知金
- (2) 在試用期內(probation>1mth)：試用期內的第一個月後 + 僱傭合約有明確規定
 - 依照協議的通知期，但不少過 7 天*
- (3) 在試用期內(probation>1mth)：試用期內的第一個月後 BUT 僱傭合約無明確規定
 - 不少過 7 天通知*
- (4) 無試用期/ 在試用期之後：僱傭合約有明確規定
 - 依照協議的通知期，但不少過 7 天*
- (5) 無試用期/ 在試用期之後：僱傭合約無明確規定
 - 不少過 1 個月通知

* 法律沒有明文規定，但建議通知當天不算在內，或可以跟員工協商。

4.1.2 Notice Period

a) 怎樣定義 7 天通知期？有沒有法律規定？

Sample Letter of Termination (1)

Date: 11th September 2013

Dear XXXX,

Thank you

This letter serves 7 days notice to you and your last day of service will be _____.

.....

Yours faithfully,
HR MANAGER

Sample Letter of Termination (2)

Date: 11th September 2013

Dear XXXX,

Thank you

This letter serves one month notice to you and your last day of service will be _____.

.....

Yours faithfully,

HR MANAGER

Sample Letter of Termination (3)

Date: 31st July 2013

Dear XXXX,

Thank you

This letter serves one month notice to you and your last day of service will be _____.

.....

Yours faithfully,

HR MANAGER

b) 怎樣定義一個月通知期？有沒有法律規定？

4.1.3 代通知金 Payment in Lieu of Notice

4.1.4 即時終止僱傭合約

a.1 僱主提出

- 即時解僱是嚴重的紀律處分，祇有在僱員犯了非常嚴重的過失或經多次警告仍不改善的情況下才適用。
 - S.9, EO 僱主不給予通知而終止合約的情況
- (1) 如有以下情況，僱主可無須給予通知或代通知金而終止僱傭合約-
- (a) 僱員在與其僱傭有關的事宜上-
- (i) 故意不服從合法而又合理的命令；
 - (ii) 行為不當，與正當及忠誠履行職責(Due & Faithful)的原則不相符；
 - (iii) 犯有欺詐或不忠實行為(Guilty of Fraud & Dishonesty)；或
 - (iv) 慣常疏忽職責(habitual neglectful)；或
- (b) 僱主因任何其他理由而有權根據普通法無須給予通知而終止合約。

*僱員參加罷工，並非僱主無須給予通知或代通知金而終止合約的合法理由。

a.2 僱員提出

- S.10, EO, 僱員在以下情況, 亦可以即時終止僱傭合約, 而無須預先通知或給予代通知金:
 1. 合理地恐懼身體會受到暴力或疾病的危害;
 2. 受僱主苛待; 或
 3. 已為僱主連續工作不少於 5 年, 而經註冊醫生或註冊中醫發出指定的證明書, 證明永久不適合擔任現時的工作

a.3 S.10A

a.4 S.11(2)

4.1.5 終止僱傭合約的限制

- 請參考違法解僱

4.1.6 終止僱傭合約的款項

- 請參考終止僱傭金
- 支付款項
 - (1) 除遣散費外, 僱主最遲要在合約終止日或合約到期日後 7 天內支付解僱補償
 - (2) 僱主須在接獲僱員所發追討遣散費的通知後 2 個月內支付遣散費
- 違例與罰則
 - (1) 如果未能在僱傭合約終止日或合約到期日後 7 天內支付工資, 須就尚未清付的款額支付利息給僱員
 - (2) 如故意及無合理辯解而不依時支付解僱補償給僱員, 可被檢控, 一經定罪, 最高可被罰款 35 萬元及監禁 3 年

4.2 Employment Protection

4.2.1 Labour Protection v Employment Protection

a) 職業保障: 僱主在以下情況不可解僱僱員

- 僱員已證實懷孕及已發出懷孕通知
- 僱員正在放取有薪病假
- 僱員工傷期間
- 因僱員參與職工會或其活動
- 因僱員向公職人員就執行《僱傭條例》、因工遭遇意外或違反工作安全法例而進行的法律程式中提供證據或資料
- 僱員出任陪審員

b) 僱傭保障

- 《僱傭條例》「僱傭保障」部份, 旨在防止僱主為了逃避在條例規定下的責任而解僱僱員或更改僱傭合約條款僱員在下列情況下可向僱主提出申索不合理的解僱(僱員已按連續性合約受僱不少於 24 個月); 或僱傭合約條款遭不合理更改; 或不合理及不合法解僱

4.2.2 Employment Protection Q & A

- a) 其實香港《僱傭條例》的每一條幾乎都是為了保障僱員而設，但《僱傭條例》第 VIA 部特別提出「僱傭保障」部分，到底是對僱員保障甚麼（什麼情況？）？
- b) 解僱或更改僱傭合約條款的有什麼正當理由？
- c) 根據《僱傭條例》，什麼情形是違法解僱？
- d) 僱主不合理的解僱、改動合約內容，僱員可以提出什麼索償？
- e) 如果僱員發現自己被不合理的解僱，僱員可以怎樣做？有沒有時限呢？
- f) 僱員在什麼情況可以提出補償金？
- g) LT 在判處補償金的時候會考慮什麼因素？
- h) 何謂違法及無理解僱？

4.2.3 Employment Protection governed by EO – Statutory Protection

- General Speaking: 僱主只要給予僱員 1) 適當的通知期 或 2) 代通知金去終止僱傭合約，而不需要作出額外保償；
- But: 但在下列情形下，僱員可享有更多的權益：
 - (1) 服務年資滿兩年可享有遣散費
 - (2) 服務年資滿五年可享有長期服務金
 - (3) 「僱傭條例」第 VIA 部份「僱傭保障」
- 「僱傭保障」是「僱傭條例」一個比較新的制度，在 1997 年才引入
- 「僱傭保障」的主要功能：針對僱主為了迴避本應承擔的責任，而在僱員快滿有關服務年資時予以解僱，而作出補救
- **無理解僱**：是針對僱主因迴避本應承擔的責任而解僱已連續服務滿兩年的僱員
- **僱主合法解僱權力**：僱主必須證明解僱是基於以下五項正當理由其中一項：
 - (1) 僱員的行為；
 - (2) 僱員履行受僱工作的能力或資格；
 - (3) 裁員或其他真正的業務運作需要；
 - (4) 僱傭雙方(或其中一方)如維持僱傭關係或僱傭合約中任何條款即屬違法；
 - (5) 或其他實質理由
- Summary Dismissal (s.9, EO): 一般而言，僱主即時解僱 (summary dismissal) 僱員，不屬違法或無理解僱。但如僱員的行為並未嚴重到即時解僱的程度，法院須考慮申索的情況來決定是否無理解僱

(1) S.32A to S.32Q, Part: VIA of EO, EMPLOYMENT PROTECTION 30/06/19 97 (Part VIA added 75 of 1997 s. 4)

- (2) Aims of this Part of Employment Ordinance: 《僱傭條例》的「僱傭保障」部分目的：
 - 是防止僱主為了逃避在條例規定下的責任而解僱僱員或更改僱傭合約條款。

(Discourage employers from dismissing or varying the terms of the employment contract of their employees in order to evade their liabilities under the Ordinance)

- 就是這部分對連續性合約受僱一段不少於 24 個月的期間，而僱員是因為僱主擬使由僱傭條例賦予該僱員的任何權利、利益或保障終絕或減少而遭僱主解僱的，可以向僱主提出索償。也同時防止僱主單方面更改僱傭合約條款
 - 遇到條例下訂明的「不 合 理 解 僱」、「不 合 理 的 更 改 僱 傭 合 約 條 款」或「不 合 理 及 不 合 法 解 僱」情況，可以向僱主提出補償申索
- (3) 僱傭條例條款：條：32A 僱員享有僱傭保障的權利 30/06/1997
- (1) 僱員在以下情況下可根據本部獲針對其僱主而授予補救-
- (a) 僱員在有關日期終結時根據連續性合約受僱一段不少於 24 個月的期間，而該僱員是因為僱主擬使由本條例賦予該僱員或將由本條例賦予該僱員的任何權利、利益或保障終絕或減少而遭僱主解僱的；
- (b) 僱員根據連續性合約受僱，而僱主是因為他擬使由本條例賦予該僱員或將由本條例賦予該僱員的任何權利、利益或保障終絕或減少而在未經該僱員同意下並在該僱員的僱傭合約中沒有准許更改僱傭合約條款的明訂條款的情況下，更改其僱傭合約的條款的；或
- (c) 僱員是在並非基於第 32K 條所指的正当理由的情況下遭僱主在違反以下條文的情況下解僱的-
- (i) 第 15(1)、21B(2)(b)、33(4B)或 72B(1)條；
- (ii) 《工廠及工業經營條例》(第 59 章)第 6 條；或
- (iii) 《僱員補償條例》(第 282 章)第 48 條，
- 不論該僱主是否已就該項解僱而被定罪。

Case: Lam Mei Fung & others v. UA Cinema Circuit Ltd

- 勞資審裁處裁定，僱主是因僱員是工會會員而將其解僱，所以不是正當的理由
- 雖然僱員並未累積五年服務年資，裁定僱員可獲終止僱傭金及補償金

Case: Thomas Vincent v. South China Morning Post Publisher Ltd., CACV 253/2002

- 僱傭合約規定《南華早報》可以一個月的通知期去終止合約
- 在 1998 年 12 月 11 日，《南華早報》給予原告一個月的通知期去終止其合約，通知期滿時原告人只差三個星期就累積五年的服務年資
- 《南華早報》拒絕付給長期服務金
- 原告向《南華早報》索償，其中一項即是終止僱傭金
- 《南華早報》的抗辯理由是原告於 1998 年 12 月 4 日刊登於「Premier Soccer」的一篇文章(原告聲稱是他自己寫的)，大部份是抄襲《Sunday Times》的另一篇文章
- 基於蓄意侵犯版權及抄襲的理由，《南華早報》以一個月的通知期去終止其合約(即是並非即時解僱)
- 上訴庭對無理解僱，與構成正當理由，作出以下說明：
 - (1) 「僱傭保障」適用於僱主給予適當的通知期或代通知金去終止僱傭合約
 - (2) 「僱傭條例」有一「法定的推定」(statutory presumption)，即除非僱主能夠證明僱員的解僱是基於正當理由，否則僱主會被視為迴避本應承擔的責任
 - (3) 法庭只應考慮僱主是否基於正當理由解僱僱員，而「正當」並不包含是否合理(reasonableness)的意思
 - (4) 若僱主基於僱員的行為去解僱僱員，則該行為必須是有事實根據及實質的
 - (5) 並不是僱員的所有行為都構成正當理由：僱員的瑣碎行為(例如僱員只是戴著一條鮮艷

的領帶)，不足以構成正當理由
上訴庭認為，由於原審法官已判定僱員因為侵犯版權及抄襲而被解僱(雖然不是即時解僱)，這構成正當理由，所以僱員不應獲得終止僱傭金

4.2.4 解僱或更改僱傭合約條款的正當理由 (Valid Reason)

- 根據 S.32K, EO,如證明能夠根據下列項理由中的任何一項而解僱僱員或更改僱傭合約條款，即屬具有正當理由：
 - (a) 該僱員的行為；
 - (b) 該僱員執行他受該僱主僱用從事的種類的工作的能力或資格；
 - (c) 該僱員屬裁員對象或僱主其他真正的業務運作需要；
 - (d) 如該僱員繼續受僱於該僱主，或在其僱傭合約條款沒有作出該項更改的情況下繼續如此受僱，則該僱員或僱主或他們兩人均會就有關僱傭違反法律的事實；或
 - (e) 法院或勞資審裁處認為足以成為解僱該僱員或更改該僱傭合約條款的充分因由的任何其他實質理由

4.2.5 違法解僱的情形

- (1) 生育保障：解僱懷孕僱員；
 - (2) 有薪病假期間：僱員放有薪病假期間解被解僱；
 - (3) 向當局提供證據或資料：僱員在任何有關執行勞工法例、工業意外或違反工業安全條例的法律程式或聆訊中作供或提供資料而被解僱；
 - (4) 參加工會活動：僱員參與職工會或職工會的活動而被解僱；或
 - (5) 工傷期間：在未達成工傷補償協議之前，或在有關的評估證明書（即判傷證明書）仍未發出之前，解僱該名工傷僱員
- 並且，非基於《僱傭條例》列明的有效理由被解僱

Offence 違例與罰則

僱主如在上述情況下解僱僱員，即屬違法，可被檢控，一經定罪，最高可被罰款 10 萬元(level 6)。

4.2.6 僱主不合理的解僱、改動合約內容而僱員提出索償

根據 Part IVA, EO, 僱員可根據以下的情況向僱主提出補償的申索：

情況 (1) 不合理的解僱：

索償的資格：(1) 僱員已按連續性合約受僱不少於 24 個月；以及
(2) 僱主並非基於條例規定的正當理由解僱僱員

補償內容：僱員可以獲得：

- (1) 複職(reinstatement)或再次聘用(reengagement)；或
- (2) 終止僱傭金

情況 (2) 不合理的更改僱傭合約條款：

索償的資格 (1) 僱員按連續性合約受僱；
(2) 僱主未經僱員同意而更改僱傭合約條款；
(3) 僱傭合約並沒有明文規定僱主可以作出該項更改；以及
(4) 僱主並非基於條例規定的正當理由更改僱傭合約條款

補償內容：與情況 (1) 一樣

情況 (3) 不合理及不合法解僱：

索償的資格：(1) 僱主並非基於條例規定的正當理由解僱僱員；以及
(2) 解僱是違法的

補償內容：僱員可獲得：

- (1) 複職或再次聘用；或
- (2) 終止僱傭金及/或不超過 15 萬元的補償金

4.3 終止僱傭金

4.3.1 S.320, EO: Award of terminal payments

- L/T 可裁定僱主須支付僱員合理及適當的終止僱傭金
- 終止僱傭金是指：
 - (1) 僱員根據《僱傭條例》可享有但在被解僱時未獲支付的法定權益；
 - (2) 僱員假若繼續受僱而根據《僱傭條例》可合理地預期有權享有的權益；及
 - (3) 僱員根據僱傭合約可享有的任何其他款項。
- 如僱員未達到享有這些權益所需的服務年資，也可以獲得終止僱傭金。在這情形下，終止僱傭金應按實際的受僱期計算。

S.320 終止僱傭金的判給 30/06/1997

(1) ...如沒有根據第 32N 條作出複職的命令或再次聘用的命令，法院或勞資審裁處可作出按其認為在有關情況下屬公正和恰當的並由僱主支付予僱員的終止僱傭金的判給。

(2) 本條所指的終止僱傭金是指僱員在僱傭合約終止時有權享有而未獲支付的根據本條例可享有的法定權利，或假若他獲准許繼續其原有僱傭工作或以僱傭合約的原有條款受僱以達致根據本條例就有關享有權而規定的最短可享利益服務年資，則他在僱傭合約終止時可合理地預期有權享有的本條例下的法定權利。

(3) 在符合第(4)款的規定下，終止僱傭金包括—

- (a) 根據僱員的僱傭合約應付予僱員的任何工資及其他款項；
- (b) 在沒有給予妥當通知而解僱的情況下，根據第 II 部須支付的任何代通知金；
- (c) 根據第 IIA 部須支付的任何年終酬金；
- (d) 根據第 III 部須支付的任何產假薪酬或款項；
- (e) 根據第 VA 部須支付的任何遣散費或根據第 VB 部須支付的任何長期服務金；
- (f) 根據第 VII 部須支付的任何疾病津貼或款項；
- (g) 根據第 VIII 部須支付的任何假日薪酬；
- (h) 根據第 VIIIA 部須支付的任何年假薪酬；及
- (i) 根據本條例和根據僱員的僱傭合約應付的該僱員的任何其他款項。

4.3.2 Reporting Terminal Payments required by Inland Revenue Department (Tax Issues) : Payment in lieu of notice is taxable only for employee

S/N008032



INLAND REVENUE DEPARTMENT
REVENUE TOWER,
5 GLOUCESTER ROAD, WAN CHAI,
HONG KONG.
Web site: www.ird.gov.hk

Your Ref.:

ALL CORRESPONDENCE SHOULD BE ADDRESSED TO: —
COMMISSIONER OF INLAND REVENUE,
G.P.O. BOX 132, HONG KONG.

IN ANY COMMUNICATION PLEASE QUOTE OUR FILE NO.

File No. : 6D1 - 5

劍橋英語院士

CA

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HK

Tel. No. : 183 5311

Fax No. : 2877 1232

Date of Issuc : 21 FEB 2013

Dear Sir / Madam,

Employer's Return (Form IR56B) in Computerized Format prepared by self-developed software Reporting Payments in Lieu of Notice accrued on or after 1 April 2012

Following the clarification in the relevant provisions of the law by the Court of Final Appeal, payments in lieu of notice accrued on or after 1 April 2012 (including payments made under section 7 of the Employment Ordinance) will be assessed to salaries tax. Employers are required to report payments in lieu of notice accrued on or after 1 April 2012 in the Employer's Notifications (Forms IR56F and IR56G) or in Employer's Returns (Form IR56B) in cases where Employer's Notifications have not been filed.

To comply with the new reporting requirement, we have already changed the description of both item 13(d) of Form IR56F and item 11(d) of Form IR56G to "**Payment in Lieu of Notice, Back Pay, Terminal Awards or Gratuities**". Correspondingly, item 11(f) of the Employer's Return for Remuneration and Pensions [Form IR56B] will also be similarly changed. Employers who currently file the Employer's Returns and Notifications in computerized format prepared by their self-developed programmes are required to make appropriate changes to the computer software so as to ensure reporting payments in lieu of notice accrued on or after 1 April 2012 under the respective items of the abovementioned forms.

According to our records, your company has obtained our approval for using software developed in accordance with this Department's Requirement Specifications for preparing and submitting Forms IR56B in computerized format. You are required to modify the software to change the description of the relevant data field under item 11(f) of the Form IR56B to "**Back Pay, Payment in Lieu of Notice, Terminal Awards or Gratuities**" and to amend the content of the relevant data field accordingly. **This letter serves as a notice and approval for your making of this change.** No separate application on approval for the changes made is required. If the computer software cannot be changed in time, your company should use the printed form provided by this Department to prepare and submit the Employer's Return manually. Alternatively, you may file the Employer's Return and the IR56B forms through the Electronic Filing of Employer's Return service under eTAX if the prescribed conditions for using the said e-service are met. For details please see the IRD webpage at www.ird.gov.hk/eng/tax/err.htm.

Our Department will introduce on 2 April 2013 a new e-service under eTAX. The new service allows employer to submit online his Annual Employer's Return (BIR56A) and at the same time upload a file (in XML format) containing not more than 200 IR56B records generated by the Employer's Software approved by the IRD for this purpose. When submitting the Annual Employer's Return for 2012-13, you may choose either to file softcopy of IR56B records through the Internet (in XML format), or as usual to submit by physical delivery a CDROM or diskette containing the records (in Fixed Data Field Length layout) to IRD. For the details of data specifications, please refer to the Requirement Specifications for Form IR56B in IRD's webpage www.ird.gov.hk/eng/esc/crc.htm. **No prior approval is required for using your approved software to prepare the data file in XML format for submitting through the Internet under eTAX.**

Yours faithfully,

Assessor

IRC2823 (1/2013)



稅務局
香港灣仔告士打道5號
稅務大樓
網址：www.ird.gov.hk

S/N008032

來函編號：

來函請寄「香港郵政總局郵箱132號稅務局局長收」

來函請敘明本局檔案號碼

檔案號碼：6D1 - 5

劍橋英語院士
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電話號碼：183 5311

傳真號碼：2877 1232

發出日期：2013年2月21日

先生/女士：

以自行研發的電腦軟件製備每年的僱主報稅表(IR56B 表格)
申報自2012年4月1日及以後累算的代通知金

由於終審法院已澄清相關的法例條文，在2012年4月1日或以後累算的代通知金(包括根據《僱傭條例》第7條所收取的代通知金)須要評定薪俸稅。因此，僱主須要在僱主通知書(包括IR56F及IR56G表格)，或在沒有提交僱主通知書的情況下，在每年提交的僱主報稅表(IR56B表格)，申報於2012年4月1日及以後累算支付給僱員的代通知金。

為配合上述申報規定，本局已將僱主通知書IR56F表格中第13(d)項及IR56G表格中第11(d)項的描述更改為「代通知金，補發薪金，退休或終止服務時的獎賞或酬金」。同樣地，每年僱主填報的薪酬及退休金報稅表[IR56B表格]，亦須作出相若的修訂。因此，現時提交以自行研發的電腦軟件製作每年僱主報稅表及通知書的僱主須為其電腦軟件作出適當更改，以確保自2012年4月1日或以後累算的代通知金可於前述表格內申報。

根據本局紀錄，貴公司曾獲本局批准使用依照本局規格要求而自行研發的軟件以製備及遞交電腦格式IR56B表格。貴公司必須更改軟件，將電腦格式IR56B表格內第11(f)項有關資料項目的描述，修訂為「補發薪金，代通知金，退休或終止服務時的獎賞或酬金」，並將有關資料項目的內容作適當的修改，以符合前述的新規定。此信函是通知及批核貴公司作出上述更改，你無需為這項修改另行來信申請批核。倘若貴公司未能及時更改電腦軟件，貴公司須使用本局供應的印製本表格以人手填報及提交僱主報稅表，如合乎條件你亦可經由「稅務易」的僱主電子報稅服務呈交僱主報稅表及IR56B表格，詳情請參閱本局網頁〈www.ird.gov.hk/chi/tax/err.htm〉。

本局將於2013年4月2日在「稅務易」推出新的電子報稅服務，新服務可讓僱主在網上透過「稅務易」平台提交每年的僱主報稅表(BIR56A)時，一同上載經由本局批准的軟件以XML格式製作，並載有不多於200個IR56B紀錄的電子檔案。在提交2012-13年度僱主報稅表(BIR56A)時，你可選擇在網上提交XML格式的IR56B資料檔案，或沿用以往的方法直接向本局提交載有固定數據字段及長度格式的IR56B資料檔案的光碟或磁碟。有關製備IR56B表格和檔案的規格要求，請參閱本局網頁〈www.ird.gov.hk/chi/ese/erc.htm〉。使用已獲本局批准的電腦軟件去製備XML格式資料檔案以便經「稅務易」平台在網上提交不需事先批准。

評稅主任

IRC2823 (1/2013)

4.4 補償金

4.4.1 可以提出補償金的情況

- (1) 僱員被不合理及不合法解僱,及;
- (2) 勞審處沒有作出複職或再次聘用的命令

僱員可能會獲判得最高金額為 15 萬元的補償金 (s.32P(4), EO)

4.4.2 勞審處考慮有關申索的情況：

- 在裁定僱主是否需要支付補償金給僱員以及補償的金額的考慮包括：
(S.32P, EO, 補償的判給 L.N. 312 of 1998 11/09/1998)

...申索的情況包括-

- (a) 僱主和僱員的情況；
- (b) 僱員根據僱傭合約受僱於僱主的時間；
- (c) 作出解僱的方式；
- (d) 僱員所蒙受的可歸因於遭解僱的任何損失；
- (e) 僱員獲受僱於新職的可能性；
- (f) 由僱員承擔的任何分擔過失；及
- (g) 僱員根據本條例有權就該項解僱而收取的任何款項，包括根據第 32O 條作出的任何終止僱傭金的判給。

4.5 提出補償申索

- (1) 如要提出補償申索，必須在被解僱後或被更改的合約條款生效後 3 個月內，向僱主發出書面通知；
- (2) 如果有充分理由，勞工處處長可把限期再延長 6 個月；
- (3) 向勞資審裁處（勞審處）提出申索，必須在被解僱後或被更改的合約條款生效後 9 個月內提出

4.6 例外情況

S.32Q, EO 例外情況 L.N. 166 of 2009 10/07/2009

本部不適用於-

- (a) 屬《性別歧視條例》(第 480 章)所指的性別歧視的作為；
- (b) 屬《殘疾歧視條例》(第 487 章)所指的基於任何人或其有連絡人士的殘疾而歧視他們的作為；(由 2001 年第 7 號第 7 條修訂)
- (c) 屬《家庭崗位歧視條例》(第 527 章)所指的基於任何人的家庭崗位而歧視他們的作為；或(由 2001 年第 7 號第 7 條增補。由 2008 年第 29 號第 87 條修訂)
- (d) 屬《種族歧視條例》(第 602 章)所指的基於任何人的種族或其近親的種族而歧視該人的作為。(由 2008 年第 29 號第 87 條增補)

4.7 Severance Payment and Long Service Payment 遣散費及長期服務金

● Meaning of Redundancy 裁員的定義

(S.31B(2),EO)

僱員若基於以下原因被解僱，即視作因裁員而被解僱：

- (1) 僱主結束或準備結束營業而解僱僱員；
- (2) 僱主停止或準備停止經營僱員受僱的工作場所而解僱僱員；或

(3) 僱主對僱員所擔任的工作，或對僱員在其受僱地點所擔任的工作需求量縮減或預期會縮減而解僱僱員

- 停工 Layoff：Statutory Definition in Hong Kong (S.31E, EO 停工 30/06/1997)

凡僱傭合約的條款及條件，訂明僱員的報酬須視乎他獲僱主提供其所受僱的該種工作而定，..根據該僱傭合約受僱的僱員在以下情況須視為被停工：凡僱主未有向僱員提供該等工作的日子總數超過—

(a) 在任何連續 4 個星期的期間內正常工作日總數的一半；或

(b) 在任何連續 26 個星期的期間內正常工作日總數的三分之一，

- 而該僱員並未獲付一筆款額相等於該僱員在未獲提供工作的日子中假若獲提供工作本可賺取的工資的款項。（由 1990 年第 41 號第 8 條修訂）

- 上述正常工作日數，並不包括閉廠、休息日、年假及法定假日等日數在內

- 長期服務金

4.7.1 Severance Pay 遣散費

a) Statutory Definition in HK

Part VA, EO：遣散費 30/06/1997

S.31B 關於領取遣散費權利的一般條文 30/06/1997

(1) 受僱期 根據連續性合約受僱不少於 24 個月

(2) 僱員因裁員而遭解僱 (redundancy 1)

(3) 有固定期限的僱傭合約在期限屆滿後，因裁員的理由沒有續訂合約 (redundancy 2)

(4) 僱員遭停工(layoff)

就以上 (2) 及 (3)：若僱主在合約終止日或合約期限屆滿日之前不少於 7 天，以書面要求僱員續訂合約或以新合約重新聘用，而僱員不合理地拒絕該項要求，則僱員無權獲得遣散費

b) 支付遣散費

- 追討遣散費、須在解僱 / 被停工後 3 個月內，以書面向僱主發出申索遣散費的通知（如有需要，勞工處處長可以將發出申索通知的期限延長）

- 僱主必須在收到僱員以書面發出申索遣散費的通知後的 2 個月內，支付遣散費。

- S31O, EO: Making of severance payment

(1) Where an employee is entitled to a severance payment under this Part, his employer shall make the severance payment to him not later than 2 months from the receipt of a notice in accordance with paragraph (b) of section 31N

c) Offence 違例與罰則

- 僱主如無合理辯解而拖延支付遣散費給僱員,可被檢控，一經定罪，最高可被罰款 5 萬元(level 5)。

4.7.2 Long Service Payment 長期服務金

a) Part VB, EO 長期服務金 L.N. 203 of 2006 01/12/2006

S.31R 僱員領取長期服務金權利的一般條文 L.N. 203 of 2006 01/12/2006

(1) 根據連續性合約受僱不少於 5 年

(2) 僱員遭解僱，但並非基於：(i) 因犯嚴重過失而遭即時解僱；(ii) 因裁員而遭解僱

- (3) 有固定期限的僱傭合約，在合約期滿後不獲續約(若僱主在合約期滿之前不少於 7 天，以書面要求僱員續約或以新合約重新聘用，而僱員不合理地拒絕該項要求，則僱員無權獲得長期服務金)
- (4) 僱員在職期間死亡
- (5) 僱員因健康理由而辭職
- (6) 65 歲或以上的僱員因年老而辭職

b) 長期服務金支付時間

- 須在僱傭合約終止後 7 天內支付長期服務金

c) 違例與罰則 (Offence)

- 如故意及無合理辯解而逾期不支付長期服務金給僱員，可被檢控，一經定罪，最高可被罰款 35 萬元及監禁 3 年 (s.25 (2) (ba), Cap. 57)。

4.7.3 遣散費/長期服務金的計算方法

a) 月薪僱員

- 僱員可選擇以他最後 12 個月的平均工資 或 最後一個月的工資 $\times 2/3 \times$ 可追溯的服務年資
- 月工資以 HK\$ 22,500 的三分之二(即\$15,000)為上限

b) 日薪或件薪僱員

- 僱員最後工作的 30 個正常工作日中由僱員選任何 18 天工資 或以他最後 12 個月的平均工資 \times 可追溯的服務年資
- 月工資以 HK\$ 22,500 的三分之二(即\$15,000)為上限

c) 僱員在同一時間，只可享有遣散費或長期服務金的補償

d) 僱員可追溯的服務年資

- (1) 所有體力勞動僱員及在 1990 年 6 月 8 日前 12 個月平均月薪不超過\$ 15,000 的非體力勞動僱員，如終止僱傭合約的有關日期是在 2004 年 10 月 1 日或以後，可追溯全部的服務年資
- (2) 在 1990 年 6 月 8 日前 12 個月平均月薪超過\$15,000 的非體力勞動僱員，其服務年資可追溯至 1980 年。

e) 最高款額

- 僱傭合約是在 2003 年 10 月 1 日或以後終止的
- 僱員可得的遣散費 / 長期服務金的最高款額為 HK\$390,000

4.7.4 遣散費/長期服務金與強制性公積金計畫權益、職業退休計畫的抵銷情況

a) 可以抵銷款項：

- (1) 如僱員享有一筆按服務年資支付的酬金或一筆職業退休計畫利益 (非歸因於僱員供款的部分) 已支付予該僱員；或
- (2) 僱員在強制性公積金計畫中，就該僱員持有一筆累算權益 (非歸因於僱員供款的部分)，或該筆累算權益已支付予該僱員；則遣散費或長期服務金可與上述的款項抵銷，但須與遣散費或長期服務金的服務年資有關的款額為限。

b) 如何抵銷

- 法例規定 僱主可以利用僱主供款所產生的累算權益 抵銷向員工支付的長期服務金 / 遣散費 僱主可從僱員帳戶抵銷的款額，不應多於向僱員支付的長期服務金 / 遣散費款額
- 進行抵銷的方法有兩種：
 - (1) 如僱主已向僱員支付長期服務金或遣散費：僱主可以透過受託人安排，從僱員的帳戶內提取由僱主供款所產生的累算權益。僱主可能需要僱員書面確認已收妥該筆款項，以便向受託人申請抵銷款項
 - (2) 僱主未向僱員支付長期服務金或遣散費：僱員可以直接向受託人提交書面申請，以提取帳戶內僱主供款所產生的累算權益。受託人將要求你提供證據，以證明僱員有權及僱主並未向僱員發放長期服務金或遣散費

4.7.5 其他追討長期服務金的情況

a) 僱員因健康理由 (s.31R(3))

- 僱員須向僱主呈交註冊醫生或註冊中醫發出指定的證明書，證明他/她永久不適合擔任現時的工作 (Form 1)
- 僱主可在收到有關證明書的 14 天內，安排僱員接受由僱主指名的註冊醫生或註冊中醫進行的另一次身體檢查，獲取另一意見，費用由僱主承擔。僱主須在僱員往驗身前最少 48 小時，書面通知有關重新評估安排的詳情

b) 僱員在職期間死亡

- 必須在僱員死亡後 30 天內向僱主申請領取長期服務金
- 勞工處處長可把限期延長
- 由僱員的配偶提出申請的，僱主在收到申請表格後 7 天內支付
- 由合資格其他人士提出申請的，僱主在申請期滿後 7 天內支付
- 領取長期服務金的優先次序
 - 第一：配偶
 - 第二：子女(如超過 1 人申請，金額將平均分配)
 - 第三：父母(如超過 1 人申請，金額將平均分配)
 - 第四：已故僱員的遺產代理人
- Offence 違例與罰則：無合理辯解而逾期不支付長期服務金給已故僱員的家屬，可被檢控，最高可被罰款 5 萬元

4.7.6 立法會人力事務委員會遣散費及長期服務金的上限

- 勞工及福利局 勞工處 資料 文件 立法會 CB(2)2019/13-14(03)號文件 2014 年 7 月 17 日
- 回復意見：有意見認為應研究調升現時用以計算遣散費及長期服務金的月薪上限，讓僱員被遣散或在長時間為同一僱主工作而遭解僱後，可得到較寬裕的金錢補償，以應付失去工作期間的經濟需要
- 現時遣散費及長期服務金款額的月薪上限為 22,500 元，僱員可得的遣散費及長期服務金最高款額為 390,000 元，而可追溯的服務年資並無限制
- 根據政府統計處的綜合住戶統計調查，在 2014 年第 1 季，就業人士的每月就業收入中位數為 13,000 元
- 勞工處認為：
 - 《僱傭條例》中訂定的遣散費及長期服務金款額的月薪上限(即 22,500 元)，仍超越現

時大部分僱員的月薪水準

- 因結業或生意需求縮減而需要裁員的僱主，尤其是中小企，會因而增加財政負擔，有關影響不容忽視。現時在香港有超過百分之九十八的企業為中小企，必須小心衡量他們的承擔能力。
- 基於上述考慮，政府不建議更改現時適用於遣散費及長期服務金的法定最高款額水準

4.7.7 Exercise on Termination of Employment Contract

SAMPLE LETTER OF TERMINATION FOR TERMINATION INITIATED BY THE COMPANY

<Print on your business letterhead>

<Date>

Private and confidential

<Insert name of Employee>

<Insert address of Employee>

Dear <name of Employee>,

Termination of your employment

We would like to thank you for your always honorable services to the company. We regret to inform that you will be relieved from company duties and other formalities on the date specified below. *(Optional)*

This letter is to inform you that the employment contract (the AGREEMENT) signed between you and ABC HK Limited on <Date> will be terminated with effective from <insert the last date of service of the employee intended by your company>.

Option A: Use this option if you want the person to work his or her notice period.

The contract of employment between you and the company shall be terminated by notice according to Clause 1 of the employment contract. Your notice period is 90 days. Therefore, your employment will end on <insert the last date of service of the employee intended by your company>.

Option B: Use this option if you want the person to leave immediately and be paid in lieu of notice.

Your employment will end immediately by payment in lieu of service. You will be paid a sum of \$<insert an amount which is equal to 90 days of your salary¹>.

Following is applicable for both Option A & B:

You will also be paid your accrued statutory entitlements and outstanding remuneration of the following²:

1. Outstanding salary, if any, =
2. Annual Leave Pay, if any, =

¹ For Calculation, please refer to Appendix I

² Please refer to Appendix II

3. Long Service Payment³ =

You may aware that the company is trying her very best to compensate you for no less than the required statutory entitlements in Hong Kong. As the same time, we would like to remind you the below agreed terms that are mentioned in your employment contract:

Paragraph 4 states, that “this Agreement contains provisions regarding confidentiality and non-competition and Employee acknowledges, understands and agrees that an agreement as to non-

competition and confidentiality is necessary for the protection of ABC; and,

Paragraph 5 states, that “Employee acknowledges, understands and agrees that the product line of ABC is extremely narrow in scope and is marketed for world-wide distribution”, and you are obliged to observe, pay particular attention and act in accordance with the confidentiality and non-competition terms and conditions stipulated at but not limited to, Clause 7 and 8, etc...in the contract of employment even after the termination of the contract of employment.

You are also required to:

1. Be punctual and abide to all other rules and regulations of the company during the remaining period of your working with the company; and,
2. Carry out your original job and duties as usual; and,
3. Handover your current responsibilities, information and materials, company properties, etc., that are contained in Schedule 1.

You need to come to the personnel department in the office at office hours on XXXX / the last day* together with the above schedule 1 signed by related staff of the company to collect your terminal payments specified above.

If you have any questions, please don't hesitate to contact <insert a staff responsible for handover>.

Yours sincerely,

Position & Department

Date:

CONFIRMATION BY EMPLOYEE

I, _____, ID# _____ acknowledge that the employment contract mentioned above shall be terminated according to above date. And I confirmed that the above information is correct, and I agree with the entitlements calculated and I shall also comply with terms and conditions mentioned above upon full payment of the entitlements mentioned. I would also like to confirm that this is the full and final settlement by my employer on termination of my employment contract and there shall not be any claims, whatsoever, under any excuse to ABC Hong Kong Limited after I have confirmed received of the entitlements.

³ Please refer to Appendix III

I confirm that I will go to the personnel department in the office at office hours on the date specified above together with the above schedule 1 signed by related staff of the company to collect my terminal payments specified above.

<Name of Employee>

Schedule 1: Handover of Responsibilities, Information & Materials, Company Properties, etc....

Staff leaving of the company is requested to handover below Operation, Information & Materials, Company Properties, etc....to below designated personnel or departments:

● **RESPONSIBILITIES (A SEPARATED SHEET IS REQUIRED IF NECESSARY):**

- a. Operation details...
- b. ...

Signed by Leaving Staff,

Date:

Confirmed by,

Department
Date:

● **INFORMATION & MATERIALS**

Details of Information (a separated sheet is required if necessary):

- a. Products Development ...
- b. Intellectual Properties information...

Signed by Leaving Staff,

Date:

Confirmed by,

Department
Date:

● COMPANY PROPERTIES

List of Company Properties (a separated sheet is required if necessary):

- a. ...
- b. ...

Signed by Leaving Staff,

Date:

Confirmed by,

Department
Date:

4.8 Tax Issues of Termination Payments

4.8.1 IRO S8(1A)

Section: 8 Charge of salaries tax E.R. 2 of 2012 02/08/2012

Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources– (a) any office or employment of profit; and (b) any pension. (1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment– (a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services; (Amended 69 of 1987 s. 2)

4.8.2 Payment in Lieu of Notice (PILONs)

- Prior to the year of assessment 2012/13, payments in lieu of notice paid in accordance with the terms of employment contract or the provisions of the Employment Ordinance were not assessed to tax
- the Court of Final Appeal and Court of First Instance in their recent decisions have given clear guidance that payments in lieu of notice contractually agreed should be assessed to tax
 - o Fuchs, Walter Alfred Heinz v Commissioner of Inland Revenue (“the Fuchs case”) and
 - o the withdrawal of the appeal to the Court of Appeal by the taxpayers in Mrs. Murad and Others v CIR (“the Murad case”)

a) FROM 1 APRIL 2012 ONWARDS:

- any payment in lieu of notice whether paid under an explicit term or under an implied

- term (s.7, EO) will be assessed to tax
- s.7 EO provides that either the employer or the employee may terminate a contract of employment by agreeing to make a payment in lieu of notice to the other party
- employer is required to report the payment in lieu of notice on the "Notification by an employer of an employee who is about to cease to be employed" (Form IR56F) or the "Notification by an employer of an employee who is about to depart from Hong Kong" (Form IR56G)
- an employee has to report it Tax Return – Individuals (BIR60) from 1 April 2012 onwards
- In other words, if an employee is given sufficient notice of termination and receive income during the notice period, his/her income during the notice period is a normal reward derived should also be assessed to salaries tax

b) When the Employment is terminated:

- a) after working for 7 days: 7 days' salary income is taxable
 - b) after working for 1 month: 1 month's salary and 7 days' salary in lieu of notice (that is, the employment was terminated immediately, and no notice period was given to the employee) are taxable.
 - c) after working for 1 month and 7 days: 1 month and 7 days (that is, the employee continued to work during the notice period) are taxable
 - d) after working for 15 months: 15 months and 1 month's salary in lieu of notice (that is, the employment was terminated immediately, and no notice period was given to the employee) are taxable.
 - e) after working for XX years and XX months and 6 months' salary in lieu of notice in accordance with the employee's terms of employment: the 6 months' salary in lieu of notice is taxable.
- => all salary in lieu of notice is taxable**

c) If the employee pays payment in lieu of notice to the employer, can he deduct the amount as outgoings and expenses under salaries tax?

- deductions under salaries tax are restricted to expenses wholly, exclusively and necessarily incurred in the production of assessable income
- Payment in exchange for early termination of employment with the employer is not accepted as allowable deduction

4.8.3 Payment in Lieu of Leave in Termination

- Cash in lieu of leave is similar to the salary paid and is taxable
- Need to fill in Form IR56F or 56G
- Need to fill in Form BIR60

4.8.4 Employee Compensation Arising from Injury

- personal injury through an accident arising out of and in the course of an employment, the payments that an employee receives under the Employees' Compensation Ordinance are not considered as income
- employer need not report such payments on Form IR56B, 56F or 56G

- employee need not report them on BIR60

4.8.5 Severance Payments and Long Service Payments

- Severance payment on redundancy is the means whereby an employee is compensated for loss of employment through **no fault of his own** while payment in lieu of notice is an income from employment
- Sums paid strictly in accordance with the provisions of the Employment Ordinance (EO) are not assessable to salaries tax

However,

- employer and employee have to report sums that were paid in excess of your statutory entitlement
- details of the payment are contained in the letter of employment; the issue becomes less clear

The recent Court of First Instance decision in the case of *The Commissioner of Inland Revenue v Yung Tse Kwong* [2004] considered whether a severance payment made in these circumstances is taxable

4.8.6 Employee leaving Hong Kong 僱員長期或永遠離開香港

- 向該僱員查詢他的預計離港日期
- 在他預計離港日期前 1 個月，填交 2 份 IR56G 表格 (或經僱主電子報稅)
- 由填報 IR56G 表格日起，不可付給他任何薪酬(包括薪金、傭金、花紅和發還給他的租金 / 開支，無論是金錢或其等值)，直至他辦妥清稅手續及向你出示稅務局發出的「同意釋款書」後，才可支付已扣存的款項給他
- S.52(6) & (7), IRO (Cap. 112)

4.9 Record Keeping

- Please refer to sample forms provided by LD

5. 工傷及僱員補償

5.1 Statistics

香港僱主為什麼要關心工傷？讓我們看看統計：

Year	Number of employees' compensation claims received	Number of ordinary assessments of loss of earning capacity of injured employees	Number of special assessments of loss of earning capacity of injured employees	Number of review assessments of loss of earning capacity of injured employees
2013	55 168	19 696	0	3 646
2014	53 917	19 364	1	3 799
2015	51 917	19 725	0	3 874
2016	51 554	18 890	0	4 105
2017	51 108	17 675	0	3 854

<https://data.gov.hk/en-data/dataset/hk-ld-ecd-ecd-keystats/resource/98951d99-6d8a-479d-9c37-559641e298c6>

Year	Number of minor cases (cases involving sick leave of not exceeding three days) reported under the Employees' Compensation Ordinance	Number of non-fatal cases reported under the Employees' Compensation Ordinance	Number of all non-fatal cases reported under the Employees' Compensation Ordinance	Number of fatal cases reported under the Employees' Compensation Ordinance
2013	16 096	38 868	54 964	204
2014	15 531	38 173	53 704	213
2015	14 994	36 732	51 726	191
2016	15 134	36 230	51 364	190
2017	14 645	36 247	50 892	216

<https://data.gov.hk/en-data/dataset/hk-ld-ecd-ecd-keystats/resource/069c0f7e-eda2-476c-997c-c7a110484f30>

2011:

- 勞工處共接獲 56 996 宗僱員補償個案，當中包括 15 944 宗涉及不超過三天病假的輕傷個案

2012:

- 勞工處共接獲 56 763 宗僱員補償個案，當中包括 16 266 宗涉及不超過三天病假的輕傷個案
- 截至年底，在 40 497 宗涉及死亡或病假超過三天的受傷個案中

工傷

- 包括所有工作地點的職業傷亡個案數字為 39 907 宗 (較二零零三年的 42 022 宗下降 5%)
- 每千名僱員的傷亡率亦下降至 14.1(較二零零三年的 17.7 下跌 20.2%)

- 所有行業的工業意外數字為 12 547 宗 (較二零零三年的 17 249 宗, 減少 27.3%)
- 所有行業每千名工人的意外率為 21.3 (而二零零三年則為 31.3)
(Annual Report 2012 Labour Dept)

職業病

- 經證實的職業病個案有 280 宗
- 最常見的職業病是職業性失聰、矽肺病及手部或前臂腱鞘炎
- 詳細統計數字：www.labour.gov.hk/tc/osh/content10.htm

5.2 Case for Reference:

5.2.1 香港特別行政區區域法院 僱員補償案件編號 2006 年第 312 宗

申請人譚權光 及答辯人臧蘭英判案書

[I-xx] = Arguments on Contract for Service

[II-xx] = Other Arguments

日期：2008 年 10 月 10 日

1. 申請人譚先生就他指於 2005 年 4 月 26 日因工受傷, 向答辯人臧女士追討僱員補償。[I]臧女士指譚先生是自僱人士, 並非她的僱員。臧女士又指當天下午, 譚先生因工作能力不足而被辭退。但譚先生卻自行折返, 然後聲稱意外受傷。言下之意, 臧女士也爭議譚先生是否在受僱期間因工受傷。

譚先生是否僱員

3. 有關僱員的定義和界定, 終審法院於 *Poon Chau Nam v Yim Siu Cheung trading as Yat Cheung Air Conditioning & Electric Co* [2007] 2 HKC 135 (第 144D-145C 段)一案中, 參考了英國案例 *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 及樞密院案例 *Lee Ting Sang v Chung Chi Keung* [1990] 2 AC 374, 並引述以下重要段落:

"..... the fundamental test to be applied is this: 'If the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been...."

4. 大致上, [I-01]關鍵是有關人士在提供服務時是否在自負盈虧經營生意, 還是只是打工而已....

5. 沒爭議的是譚先生在意外發生的前一天即 2005 年 4 月 25 日, 才開始為臧女士在意外發生的地鋪執行裝修工作。根據譚先生的陳述書和庭上證供, 在相關的這兩天工作之前, [I-01]他向來都是替不同的僱主做裝修工作, 工資以日薪計算, 一般以現金出糧。今次他是從報章招聘廣告得悉有此裝修技工空缺。他根據廣告致電一位元先生, 雙方在電話中說好以日薪港幣 500 元僱用譚先生, 工時朝九晚六。

6. 譚先生被安排做木工。[I-02]首天及意外當天上午的工作, 皆按指派進行。當天下午, 譚先生被指派裝配吊櫃...這兩天的工作中, 其它工具材料都是由場地供應的。

8. 意外後即 2005 年 5 月 5 日, [I-03]譚先生返回該地鋪遞交病假紙。同日譚先生收取了港幣 1,000

元作為該兩天工作的工資。

9. 根據臧女士致法庭的文件及庭上證供，她指當初在電話中和譚先生交談的是她的丈夫。並指在對話中，[I-04]其丈夫已表明譚先生將會是自僱人士。另外，又提及有3天試用期，如不合要求則決不錄用；如對他工作滿意，才“正式簽約成為判工(自僱人士)”。

10. 在庭上被問及該所指3天試用期內譚先生的身份又是甚麼，[I]臧女士一方面指譚先生是散工，另一方面指不甚清楚。當本席問臧女士如何理解“自僱人士”，她則指意思是無論發生任何事包括意外的責任皆由該人士自負。

11. 另外，[I-02]臧女士不否認譚先生是按指示執行正作。[I-04]她承認工作材料由她供應。就工具方面，她指譚先生是用其它工人的工具，但指責他連應有的工具都沒有帶備。

12. 在觀察證人並衡量證供及當時客觀情況後，**本席認為譚先生的說法，較臧女士的說法可信及切合實情。**本席裁定事實上譚先生替臧女士工作該兩天是僱員的身份，並非甚麼判工或自僱人士。

14. 譚先生在...裝配吊櫃時，該鐵板突然滑開，他即失去平衡跌下。他的右手撞倒梯級受傷。其它工人告知臧女士，臧女士遂報警和召救傷車，並陪同譚先生到醫院。

15. 臧女士指，[II-01]其實譚先生是被辭退並離開後，自行折返工地，繼而報稱意外發生。在臧女士于[II-01]2005年5月11日呈交的表格2內，其實並沒有這些指稱。但她在同一天，卻想到致函勞工處處長作出所謂補充，指在當天意外之前，譚先生已請辭，並獲她的丈夫接納。其後譚先生自行折返。

18. 基於譚先生在2005年4月20日，即[II-02]開始替她工作5天前，才向勞工處申報了另一工傷。臧女士指有足夠理由懷疑譚先生企圖欺騙勞工處以獲得工傷補償。臧女士抗議譚先生明知已受傷，仍替他們工作而發生意外，是不當的行為。

19. [II-02]譚先生從來未有否認4月20日的意外。根據他和當時有關僱主呈交的表格2，他是搬運浴缸過重導致腰部受傷。但根據條例，只要僱員是在受僱期間因工受傷，即使意外可能因為僱員本身身體狀況欠佳或力有不逮而發生，僱主仍有法律責任作出補償：見 *Ying Yuk Shan v South China Morning Post Publishers Limited*, DCEC 479/2003 (2008年1月28日之判案書) 中援引(判案書第38段)英國案例 *Wilson v Chatterton* [1946] 1 KB 360, 第368頁：

“We infer that sick men and partially unfit and partly disabled men in employment were intended by Parliament to get the benefits of the Act just as much as the hale and hearty and perfectly fit men; for any intention of Parliament to exclude them must have found expression, and there is not a hint of it.”

20. 條例的確有列明例外情況，僱主無須根據條例支付補償。[II-02A]例如僱員因蓄意自傷：見第5(2)(b)條；[II-02B]或僱員曾在任何時間明知所作陳述是虛假而向僱主陳述他沒有或以往沒有受該損傷或受類似的損傷：見第5(2)(c)條。[II-02C]又或是僱員受傷可歸因於其本身犯有嚴重和故意的不當行為，或僱員蓄意加重其在受僱工作期間因工遭遇意外所致傷勢，那該傷引致的補償將不獲發給：見第5(3)條。但這些既非臧女士的指稱，本席亦不認為臧女士證明瞭有這些條例列明的例外情況。事實上，檔顯示就這較早前意外，譚先生已于2005年6月直接與當時僱主達成和解，賠償金額亦只是港幣1,760元而已。

21. 觀察和衡量雙方證供，本席認為臧女士的證供並不可靠。本席接納譚先生就這方面的證供，即意外如他所述般，是在他受僱期間並因工發生的。

譚先生的傷勢

22. 臧女士指譚先生的傷勢並不嚴重，認為只需休養十天左右便可復原。她並無任何醫學證據去支持這說法。

23. 根據 2006 年 1 月 18 日僱員補償委員會的評估證明書，譚先生因多處受傷引致右肩膊疼痛及僵硬、及右無名指結疤，永久喪失賺取收入能力是 1.5%。委員會覆檢後，於 2006 年 4 月 18 日發出證明書，將他的右肩狀況引致永久喪失賺取收入能力，調高至 3.5%。就這評估，譚先生根據條例第 18 條提出上訴。

24. 譚先生一方提交了骨科專家區家裘醫生在 2006 年 12 月 28 日所作之報告。報告有以下主要內容：

- (1) 譚先生在醫院接受了因肩膊脫位而進行的閉合重定手術，還有物理治療及職業治療。
- (2) 譚先生指右肩的側面及前面仍有間歇性痛楚，約每天 5 至 6 次，每次歷時半小時。提起右上肢亦會使他的右肩感到痛楚又酸軟。
- (3) 區醫生發覺譚先生右肩關節活動受到限制；右肩外展時稍覺酸軟；右三角肌有萎縮情況。X 光檢查顯示沒有半脫位的後遺情況。
- (4) 譚先生右手無名指傷口以保守療法治理，已完全康復。
- (5) 2006 年 7 月 29 日至 8 月 2 日期間，譚先生在醫院接受過與腰背有關的手術，其後要以輪椅代步。但這些手術與狀況，與本案意外無關。
- (6) 區醫生認為譚先生已獲得適當的治療；而進一步的治療將不會改善他的狀況。區醫生估計譚先生因右肩狀況身體受損 4%，因而喪失賺取收入能力 5%。
- (7) 區醫生認為因譚先生右肩狀況，他不適宜再從事意外前的工作，而適合做不太粗重的工作，例如清潔工人、護衛員、工作量較輕的地盤工人、或信差等。
- (8) 區醫生贊同委員會批予譚先生病假期的決定。

意外時平均月入

25. 譚先生在意外發生時，只是第二天替臧女士工作，日薪港幣 500 元。根據臧女士，她當時聘請類似譚先生的工人，日薪是港幣 400 至 500 元。根據譚先生，意外前他都是替不同僱主做類似裝修散工，日薪約港幣 500 元。他的對上一份工作，即期間發生了 2005 年 4 月 20 日意外該份，譚先生的所得日薪是港幣 550 元。這也有文件證明。

26. 雖然根據譚先生的陳述書，及所提供作為參考的 2005 年至 2007 年所有選定行業的技工平均薪酬統計，都指平均每月工作日數是 26 天。但在庭上，譚先生確認意外發生前的 12 個月，他實在每月工作 18 至 26 天。換言之，實際的平均每月工作日數中間數是 22 天。

27. 考慮過條例第 11(1)、11(1A)、及 11(2)條，及以上證據，本席認為，以日薪港幣 500 元及平均每月工作日數 22 天去計算譚先生月入應是合理的。換言之，平均月入為港幣 11,000 元。
暫時喪失工作能力方面的賠償(第 10 條)

28. 按條例第 10 條，譚先生可獲補償他病假期間所失，即 2005 年 4 月 27 日至 7 月 27 日。根據條例和潘大律師提議的公式，金額為港幣 11,000 元/30 x 92 天 x 4/5 = 港幣 26,986.67 元。永久喪失工作能力方面的賠償(第 9 條)

29. 上述區醫生的專家意見，是譚先生因其右肩的狀況，不再適宜從事意外前的工作；而較為適合從事不太粗重的工作，例如清潔工人、信差、保安員、或較輕巧的地盤雜工。

30. 根據譚先生，他曾嘗試在意外後的 8 月份做過裝修，但因工作需要搬動很重的英泥，所以約兩天後他再不能繼續下去。9 月份，他曾做過油漆工作 1 星期，日薪港幣 600 元，後因右肩仍感疼痛，故不能繼續下去。譚先生現年 51 歲。本席接納譚先生的右肩問題令他實際上只適合從事該些不太粗重的工作。譚先生指他也有透過不同型式尋找例如搬貨、清潔、看更、酒樓樓面、或地盤雜工等，但僱主多表示已聘請他人。

31. 譚先生所受的右肩膊脫位，不屬條例附表一指明損傷。代表他的潘大律師指，條例第 9(1)(b) 條和案例 Hong Kong Paper Mills Ltd v Chan Hin Wu CACV 45/1981(及在 Lui Kwong Yan v Shu Hing Decoration Workers & Anor [1993] 1 HKLR 168 案中解釋) 的公式，適用於計算譚先生永久地部份喪失賺取收入能力方面的賠償。

32. 上述譚先生一方提供的統計，亦包括了區醫生建議譚先生現在可以應付較輕巧的某幾種工作的平均月薪。當中男性保安員平均月薪為港幣 7,277 元；男性雜工平均月薪為港幣 8,252 元；男性信差/辦公室助理平均月薪為港幣 8,172 元；一般男性清潔工平均月薪為港幣 5,325 元。

33. 本席同意應用上述公式，但較傾向採納上述平均月薪較中間的工種作計算參考。以保安員為例，平均月薪為港幣 7,277 元。按上述公式，譚先生喪失工作能力的百分比將會是(11,000 - 7,277) / 11,000，等如 34%。

34. 按條例第 9(1)(b) 條，法庭須考慮以此公式計算得出的百分比，不會超越附表一及附註所指就完全失去有關損傷身體部份時喪失賺取收入能力的百分比。同時，亦須盡可能顧及該附表及附註所指明的百分率計算比例。如上所述，附表一列出的損傷中，有關肩膊關節部份的，乃“肩關節強硬”。此狀況若出現在最自然位置的，其喪失賺取收入能力為 35%；若出現在最惡劣位置的，則達 55%。

35. 代表譚先生的潘大律師，也借參考這附表一有關肩關節強硬狀況下喪失賺取收能力的百分率，去印證肩關節對譚先生活動及賺取收入能力的重要性，及區醫生所作評估的合理性。綜合及比對後，本席認為 34%是合理的百分比。本席批准譚先生據第 18 條提出的上訴。

36. 在意外發生時，譚先生 51 歲。根據條例第 7 及 9 條，補償金額應該是港幣 11,000 x 72 x 34% 等如港幣 269,280 元。

37. 譚先生在意外受傷後，2006 年下旬因本身腰背問題進行過手術；後因併發情形再接受手術。其後需要以輪椅代步。審訊時譚先生依然需要倚賴拐杖行動。區醫生指這此皆與意外無關；譚先生在庭上亦確認這點。或可想像的，是無論本意外有否發生，譚先生的腰背問題也可能會於 2006 年令他喪失原有的工作和賺取收入能力。但鑑於條例下的賠償基制，本席認為不影響譚先生的追討：見終審案件 LKK Trans Ltd v Wong Hoi Chung, FACV 14/2005, 判案書第 37 至 47 段。另外，亦沒有指稱譚先生的腰背問題是由於其後任何意外產生的：見 LKK Trans Ltd 判案書第 49 段。

醫療費用方面的賠償(第 10A 條)

38. 譚先生確認他的醫療費用港幣 1,530 元已被豁免。

總結

39. 譚先生應得的補償是：

根據第 9 條	港幣	269,280.00 元
根據第 10 條	港幣	26,986.67 元
根據第 10A 條	無	
合共：	港幣	296,266.67 元

命令

40. 本席判譚先生申請得直。臧女士須支付譚先生僱員補償合共港幣 296,266.67 元連利息。由工傷發生當天(即 2005 年 4 月 26 日)起至今天之利息，以半判定利率計算；今天起至全數支付為止的利息則以判定利率計算。

41. 臧女士同時須支付本申請之訟費；若雙方未能協議訟費，則由法庭評定。本席並同意頒發大律師證書。譚先生本身的訟費須根據《法律援助規則》評定。此訟費命令乃暫准性質；若任何一方不在今天起計 14 天內要求法庭聆訊訟費問題，命令則自動作實。

2nd Litigations, not appeal! 同一案件在高等法院的判詞 HCPI 211/2008

C5. 賠償的數額

C5.1 痛苦、苦楚及失去生活情趣

52. 譚先生的證供是，由於他上述已裁定的傷勢，他不能繼續他喜歡的籃球、游泳、遠足及划艇等活動。

53. 臧女士並沒有在盤問譚先生時挑戰他。亦沒有任何客觀的證供令譚先生的證供應受質疑。

54. 故本席接納譚先生這證供。

55. 基於以上已裁定譚先生的傷勢及他不能如以前般繼續進行及享受籃球、游泳、遠足及划艇等活動，本席裁定合理的痛苦、苦楚及失去生活情趣賠償金額應為 HK\$150,000。 有關此裁定，本席已參考了原告大律師所提出的案例[3]。

C5.2 審前收入損失及強積金損失的賠償

56. 梁法官在 DCEC 312 /2006 一案中裁定了譚先生意外發生前的 12 個月的平均收入是 HK\$11,000。

57. 本席採納此平均月薪為計算審前收入損失的基礎。

58. 譚先生因為是次意外，獲發 3.1 月病假。(2005 年 4 月 26 日至 2005 年 7 月 27 日) 他在此期間不能工作。因此他在此期間的審前收入損失及強積金損失的賠償為：

$\$11,000 \times 3.1 \text{ 月} \times 1.05$
 $= \$35,805$

59. 病假後，他曾嘗試在 2005 年 8 月做過裝修日薪\$600，但因工作需要搬動很重的英泥。所以約兩天後他再不能繼續下去。2005 年 9 月份，他曾做過油漆工作 2 天，日薪\$600 後因右肩仍感疼痛，故不能繼續下去。

60. 他於 2006 年 7 月 29 日在明愛醫院接受腰背手術。手術後他需要坐輪椅一直到 2009 年 2 月。在此期間他不能工作。

61. 於本案中，譚先生只申索於醫生報告中所指有由本意外引起之損失，並非他因腰背痛所帶來之損失。

62. 譚先生坐輪椅時可能不能工作，這與臧女士的失責無關。但在此之前及之後，若非這次意外，都可以工作，所以臧女士應要賠償原告人這方面的損失。

63. 由於是次意外，譚先生只能從事輕巧工作如清潔工人，信差，保安員等。該類收入區域法院梁俊文裁定為約為 \$7,277。本席同樣採納此裁定。

64. 因此他在病假後至審訊日的審前收入損失及強積金的損失的賠償應為： $(11,000 - \$7,277) \times 19$ 月 (2005 年 7 月 28 日至 2006 年 7 月 29 日及 2009 年 2 月 1 日至 2009 年 9 月 1 日) $\times 1.05 - \$1,200 - \$1,200 = \$71,873.85$ 。

C5.3 未來收入損失及強積金損失的賠償

65. 由於是次意外，譚先生只能從事輕巧工作。他因此申索與之前薪金的差額。本席接納潘大律師的陳述[4]，有關的未來工齡乘數應訂定為 8。故此，他的未來收入損失及強積金損失的賠償應為： $(11,000 - \$7,277) \times 12$ 月 $\times 8 \times 1.05 = \$375,278.40$ 。

C5.4 喪失謀生能力

66. 考慮到譚先生的身體狀況，中二教育水準，及上述區醫生的評估，本席接納他於勞動市場因此受到不利因素影響。本席裁定譚先生有關的此申索的應得賠償金額應為 \$50,000。

C5.5 專項損害賠償

67. 譚先生交通費之索償為 \$70 ($\5×14 次)。本席接納並裁定譚先生可得此賠償金額。

C5.6 賠償數額總結

68. 基於以上所述的理由，譚先生可得的各項賠償可總結如下：

痛苦、苦楚及失去生活情趣	\$150,000.00
審前收入損失及強積金損失的賠償	\$107,678.85
未來收入及強積金損失的賠償	\$375,278.40
喪失謀生能力	\$50,000.00
專項損害賠償	\$70.00
	\$683,027.25
(減僱員補償金額) (\$296,266.67)	
	\$386,760.58

D. 結論

69. 本席裁定，譚先生對臧女士的申索勝訴，並作出以下裁決命令：

- (1) 臧女士須支付譚先生賠償金額總數 HK\$ 386,760.58。
- (2) 譚先生亦可得賠償金額上的利息。特別損害賠償及審訊前之損失之利息由意外當日起計，至判決當日為止，以法院判決利率的一半計算。痛苦、苦楚及失去生活情趣賠償之利息由傳訊令狀日起計，至判決當日為止，以 2% 計算。

5.2.2 TING WA 及 FKD EXPRESS CO., LIMITED DCEC 473/2014

- P 提出申索，要 D 向她支付《僱員補償條例》(「《條例》」) 第 9 條、第 10 條及第 10A 條項下的補償。
- P 於 2013 年 2 月 18 日下午 5 時多的時候，行經觀塘偉業街 154 地下時被地上的石頭絆倒，跌倒時以右手撐地受傷 (「有關意外」)。

- P 表示 2013 年 2 月 18 日，她於 D 第一天上班，在有關意外發生的時候，她是在工作中，故此她是因工遭遇有關意外，D 有責任按《條例》的規定向她支付僱員補償。
- D 表示，丁女士從來都不是他們的僱員，故此 D 沒有責任向丁女士支付僱員補償；D 也不同意丁女士所申索的補償金額。

.....

有關僱員補償金額

- 《條例》第 9 條項下的補償： -
 - (a) 委員會評定丁女士因有關意外而引致永久喪失賺取收入能力的百分比為 3%。本席檢視了本案的證據，同意這個百分比。
 - (b) 丁女士於有關意外發生時年齡為 55 歲，月薪為 HK\$8,500。
 - (c) 據此，第 9 條項下的補償為： -
 $HK\$8,500 \times 72 \times 3\% = HK\$18,360$ 。
- 《條例》第 10 條項下的補償： -
 - (a) 丁女士共獲發 487 天病假。
 - (b) 當僱員補償案中的申請人有註冊醫生證明的病假，則有一項法律上的推定，申請人在該段時間暫時完全地喪失工作能力，如要反駁，舉證責任在反駁一方（見《條例》第 10(2)條及 Tse Tsz Chong v Law Sze Man [2015] 1 HKLRD 1120 第 28 段）。
 - (c) D 並無舉證反駁這項法律推定。
 - (d) 本席裁定，丁女士因為有關意外而暫時完全地喪失工作能力的時間，為 487 天。
 - (e) 據此，《條例》第 10 條項下的補償為： -
 $HK\$8,500 \times 487/30 \times 4/5 = HK\$110,386.67$
- 《條例》第 10A 條項下的補償： -
 - (a) 丁女士在此項申索的金額為 HK\$11,602。
 - (b) 本席檢視了本案的證據，批准此項申索。

總結

- 基於上述理由。本席裁定 D 須按《僱員補償條例》的規定向丁女士支付僱員補償，金額如下： -
 - 第 9 條 HK\$18,360.00
 - 第 10 條 HK\$110,386.67
 - 第 10A 條 HK\$11,602
 - 合共：
HK\$140,348.67
- D 須付利息，利率由有關意外發生之日（即 2013 年 2 月 18 日）起到判決日為判定利率的一半，而其後至付款日為判定利率。
- 本席已聽取雙方就訟費的陳詞。一般的原則是根據訴訟的結果來決定訟費（costs follow the event），即敗訴方須支付勝訴方的訟費。本席認為沒有理由不依從這項一般原則，根據本案的結果，D 須支付丁女士的訟費。

近日發現有僱主以「新招數」逃避工傷病假補償責任 (報章報導 July 2014)

在一所安老院舍任職護理員六年的劉女士於去年八月在院舍內滑倒受傷，公立醫院批出為期合共一年的病假紙讓她在家休養。今年一月底，資方要求她到指定的診所驗傷，於三月初指由於診所認為她可以在輕微不適下重投工作(輕工紙)，停止向她發放病假補償，又指三月底合約屆滿時不會與她續約。劉女士向勞工處舉報，但當局指該名僱主的行為可能並不構成解僱。

5.3 Q & A

a) 工傷補償適用什麼人？

b) 為什麼要強制投保？

c) 僱主投保應該注意那些事項？

d) 怎樣才算工傷意外？

e) 有沒有情況僱主不需要為其僱員的工傷負上賠償責任？

f) 僱員上下班途中發生意外，僱主需要負責嗎？那麼往返中港兩地呢？

g) 《僱員補償條例》涵蓋幾多項職業病？

h) 工傷規定賠償的項目有那些？

i) 僱員在香港以外地方因工受傷，並須在當地接受醫治，僱主應注意什麼？

5.4 FORMS

勞工處檔案編號： _____

工傷意外通知書

本人（下稱僱員）在受僱工作期間因工遭遇意外受傷，詳情如下（附註 1）：

A. 僱員詳情

僱員姓名（請先填寫姓氏）		身分證/護照號碼	
住宅電話 / 手提電話 /		地址	
出生日期 ____年____月____日	性別 <input type="checkbox"/> 男 <input type="checkbox"/> 女	職業	學徒 <input type="checkbox"/> 是 <input type="checkbox"/> 否

B. 僱主詳情（附註 2）

僱用公司名稱/僱主姓名 （請填上僱用公司/僱主全名）	
聯絡人姓名	地址
電話號碼	

C. 總承判商詳情（附註 3）

總承判商名稱 （請填上總承判商公司全名）	
聯絡人姓名	地址
電話號碼	

D. 意外的敘述（附註 4）

意外發生日期 ____年____月____日	意外發生時間 上 / 下午____時____分
請敘述意外如何發生及損傷性質，並說明僱員當時正在進行的工作	
意外發生地點的地址 <input type="checkbox"/> 與上述僱主地址相同 <input type="checkbox"/> 與上述總承判商地址相同 <input type="checkbox"/> 其他（請註明）_____	
僱員因是次意外而獲發的病假期間 由 ____年____月____日 至 ____年____月____日	

E. 僱員接受治療的醫院/診所名稱

九龍區：	<input type="checkbox"/> 伊利沙伯醫院	<input type="checkbox"/> 廣華醫院	<input type="checkbox"/> 明愛醫院	<input type="checkbox"/> 聯合醫院
新界區：	<input type="checkbox"/> 瑪嘉烈醫院	<input type="checkbox"/> 威爾斯親王醫院	<input type="checkbox"/> 屯門醫院	<input type="checkbox"/> 北區醫院
	<input type="checkbox"/> 大埔那打素醫院	<input type="checkbox"/> 仁濟醫院	<input type="checkbox"/> 博愛醫院	<input type="checkbox"/> 將軍澳醫院
香港區：	<input type="checkbox"/> 律敦治及鄧肇堅醫院	<input type="checkbox"/> 瑪麗醫院	<input type="checkbox"/> 東區尤德夫人那打素醫院	
	<input type="checkbox"/> 其他（請註明）：_____			

請在適用方格內劃上「✓」號

請轉後頁

F. 損傷性質 (附註 5)

指出損傷性質 (請在適用方格內劃上「✓」號) —			
<input type="checkbox"/> 擦傷	<input type="checkbox"/> 撞傷及瘀傷	<input type="checkbox"/> 電擊	<input type="checkbox"/> 中毒
<input type="checkbox"/> 截斷	<input type="checkbox"/> 腦震盪	<input type="checkbox"/> 骨折	<input type="checkbox"/> 受刺激
<input type="checkbox"/> 窒息	<input type="checkbox"/> 割傷	<input type="checkbox"/> 刺傷	<input type="checkbox"/> 噁心
<input type="checkbox"/> 燙傷 (受熱)	<input type="checkbox"/> 脫臼	<input type="checkbox"/> 扭傷	<input type="checkbox"/> 多處受傷
<input type="checkbox"/> 其他類型燒傷	<input type="checkbox"/> 壓傷	<input type="checkbox"/> 凍傷	<input type="checkbox"/> 其他 (請指明)

身體的損傷部位 (請在適用方格內劃上「✓」號) —				
頭部	頸部及軀幹	上肢	下肢	
<input type="checkbox"/> 頭顱/頭皮	<input type="checkbox"/> 頸	<input type="checkbox"/> 手指	<input type="checkbox"/> 臀	<input type="checkbox"/> 多處部位 (請指明)
<input type="checkbox"/> 眼	<input type="checkbox"/> 背	<input type="checkbox"/> 手/手掌	<input type="checkbox"/> 大腿	
<input type="checkbox"/> 耳	<input type="checkbox"/> 胸	<input type="checkbox"/> 前臂	<input type="checkbox"/> 膝	
<input type="checkbox"/> 口	<input type="checkbox"/> 腹	<input type="checkbox"/> 手肘	<input type="checkbox"/> 小腿	
<input type="checkbox"/> 牙齒	<input type="checkbox"/> 軀幹	<input type="checkbox"/> 上臂	<input type="checkbox"/> 足踝	
<input type="checkbox"/> 鼻	<input type="checkbox"/> 盤骨/腹股溝	<input type="checkbox"/> 肩膀	<input type="checkbox"/> 腳	
<input type="checkbox"/> 面				

僱員簽署 _____ 日期 _____ 年 _____ 月 _____ 日

僱員須知

- 附註 1: 填寫此通知書時, 請提供準確及詳盡的資料以便本處跟進。請將此通知書正本交往勞工處僱員補償科辦事處, 副本一份交予僱主及一份交予總承判商 (如適用), 另一份由僱員保存。
- 附註 2: 填寫僱主詳情時, 可參考僱傭合約、強積金成員證書或有關文件、糧單、發薪支票、稅單、僱主之名片、信箋及信封等資料。
- 附註 3: 填寫總承判商詳情時, 可參考進入工作地點的工作准許證、張貼於工作地點的告示及總承判商之名片等資料, 或向僱主或其他僱員查詢。
- 附註 4: 敘述意外如何發生時, 請說明受傷僱員當時進行的工作以及提供意外如何發生的細節, 例如: 當時正進行的工作、意外的經過、直接和間接導致意外的因素以及如何受傷等。敘述損傷性質時, 請提供受傷的細節。
- 附註 5: 關於身體的損傷部位, 可參考醫生證明書 (即病假紙)、入院及出院文件的診斷資料。

僱主/總承判商須知

- 《僱員補償條例》第 15 條規定, 僱主在工傷意外發生後, 不論該意外是否引起任何支付補償的法律責任, 僱主必須於意外發生後 14 天內或於僱主知悉事件後 14 日內以表格 2 (適用於工傷意外導致喪失工作能力超過 3 天的個案) 或表格 2B (適用於工傷意外導致喪失工作能力不超過 3 天的個案) 向勞工處處長呈報。
- 如僱主尚未以指定表格向本處呈報此宗工傷意外, 請按意外受傷地點盡快填妥上述指定表格交往勞工處僱員補償科辦事處。
- 如僱主暫時未有充分資料填報上述指定表格, 請按現有的資料填報, 未能填寫的部份應於獲得所需資料時盡快作出補充。假若僱主對此宗意外事件有存疑而正在進行有關的調查, 亦請僱主先作出呈報, 並於調查完畢後盡快通知本處有關結果及是否願意就此個案承擔《僱員補償條例》下的補償責任。
- 呈報工傷意外的指定表格可於下列勞工處僱員補償科辦事處索取, 或於勞工處網頁下載: www.labour.gov.hk

勞工處僱員補償科辦事處地址:

香港辦事處 (香港及離島區個案) - 香港軒尼詩道 130 號修頓中心 16 字樓
九龍辦事處 (九龍區及公務員個案) - 九龍長沙灣道 303 號長沙灣政府合署 10 字樓
荃灣及葵涌辦事處 (荃灣、葵涌及新界西區個案) - 荃灣西樓角路 38 號荃灣政府合署 6 字樓
沙田辦事處 (沙田及北區個案) - 沙田上禾輦路 1 號沙田政府合署 2 字樓

(Ver. 08/13)

**FORM 2B
EMPLOYEES' COMPENSATION ORDINANCE
(CAP. 282)**

SECTION 15(1A)(b)

**NOTICE BY EMPLOYER OF AN ACCIDENT TO AN EMPLOYEE
RESULTING IN INCAPACITY FOR A PERIOD
NOT EXCEEDING 3 DAYS**

To the Commissioner for Labour

I declare that the information given in this form is, to the best of my knowledge, true and accurate.	
Name (in block letters) : _____	
Position : <input type="checkbox"/> Sole proprietor <input type="checkbox"/> Partner <input type="checkbox"/> Manager <input type="checkbox"/> Officer	
Signature : _____	Date : _____
<input type="checkbox"/> (for and on behalf of the employer)	Chop of Company

A. Particulars of employee

Name of employee (Surname first) _____		Identity Card/Passport No. _____
Tel. No. _____	Address _____	

B. Particulars of employer

Name of employing company/person _____		Business Registration Certificate No. _____
Tel. No. _____	Address _____	Industry _____
Fax No. _____		

C. Particulars of accident

Date of accident _____/_____/_____ day / month / year	Address of the place of accident _____
Total number of days of temporary incapacity : _____ day(s)	

D. Particulars of compensation

Monthly earnings of the injured employee for the purpose of calculating compensation : \$ _____	
Amount of compensation : \$ _____	<input type="checkbox"/> paid <input type="checkbox"/> to be paid on ____/____/____ <div style="text-align: right; margin-right: 50px;">day/month/year</div>

LD 478(s)

表格 2
僱員補償條例
(第 282 章)
第 15 條
僱主呈報僱員死亡或
引致僱員死亡或喪失工作能力的意外的通知

致：勞工處處長

謹此聲明，盡本人所知，在本表格內呈報的資料，全屬真實準確。

簽署： _____ (僱主代表)

姓名 (請用正楷)： _____

職位： 獨資經營人 合夥人
 經理 高級人員

日期： _____

_____ 公司蓋印 (附註 1)

A. 僱員詳情 **《第 I 部》**

僱員姓名 (請先填寫姓氏)		身分證/護照號碼	
電話號碼	傳真號碼	地址	
出生日期 ____ / ____ / ____ 年 / 月 / 日	性別 <input type="checkbox"/> 男 <input type="checkbox"/> 女	職業	學徒 <input type="checkbox"/> 是 <input type="checkbox"/> 否

B. 僱主詳情

僱用公司名稱/僱主姓名		商業登記證號碼 (附註 2)
電話號碼	地址	行業
傳真號碼		

C. 總承判商/控股公司詳情 (附註 3)

總承判商/控股公司名稱		商業登記證號碼
電話號碼	地址	行業
傳真號碼		

D. 意外的敘述

請敘述意外如何發生，並說明僱員當時正在進行的工作 (附註 4)

述明意外是否於工作期間發生 <input type="checkbox"/> 是 <input type="checkbox"/> 否	意外發生日期 ____ / ____ / ____ 年 / 月 / 日	意外發生時間 上/下午 ____ 時 ____ 分	意外結果 <input type="checkbox"/> 受傷 <input type="checkbox"/> 死亡
意外發生地點的地址		僱員接受治療的醫院/診所名稱	

E. 保險的細節 (附註 5)

意外發生時，承保的保險公司名稱及地址 (請參照保險單)	保險單號碼
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F. 僱員收入細節

每月平均工作日數 <input type="checkbox"/> 22 <input type="checkbox"/> 24 <input type="checkbox"/> 26 <input type="checkbox"/> 30 <input type="checkbox"/> 其他 _____ (請指明)	休息日 (a) <input type="checkbox"/> 無薪 <input type="checkbox"/> 有薪 (b) <input type="checkbox"/> 非固定 <input type="checkbox"/> 固定於星期 _____ (請填寫星期的那一天)
僱員在緊接意外發生日期的上一個月的每月收入細節：(附註 6)	
(a) 底薪/基本工資	每月\$ _____
(b) 伙食津貼/僱主免費供應食物的價值	每月\$ _____
(c) 其他項目： _____ (請指明)	每月\$ _____
總收入 (a) + (b) + (c)	每月\$ _____
僱員在意外發生前 12 個月內 (如不足 12 個月，則以整段受僱期間計) 的每月平均收入為 每月\$ _____	

G. 死亡個案 (只須於意外引致死亡時填寫)

是否已報警 <input type="checkbox"/> 是 _____ (警署名稱) <input type="checkbox"/> 否	已故僱員的最近親姓名及地址	與已故僱員的關係
		電話號碼

H. 直接和解 (只在損傷引致暫時喪失工作能力為期不多於 7 天及並無引致永久喪失工作能力，而且僱主和僱員已選擇以直接和解方式來解決工傷個案時，始須填寫。)

病假期 由 ____ / ____ / ____ 至 ____ / ____ / ____ 年 / 月 / 日 年 / 月 / 日 由 ____ / ____ / ____ 至 ____ / ____ / ____ 年 / 月 / 日 年 / 月 / 日 病假總日數： _____ 日	補償額： \$ _____ <input type="checkbox"/> 已支付 <input type="checkbox"/> 將於 ____ / ____ / ____ 支付 年 / 月 / 日
---	--

I. 意外地點（在方格內劃上“✓”號）

這意外發生於 —（附註 7）

建築地盤	船廠	製造廠	其他
<input type="checkbox"/> 01 樓宇地盤	<input type="checkbox"/> 04 水上船隻	<input type="checkbox"/> 07 生產區	<input type="checkbox"/> 11 貨櫃場
<input type="checkbox"/> 02 土木工程地盤	<input type="checkbox"/> 05 非水上船隻	<input type="checkbox"/> 08 維修工場	<input type="checkbox"/> 12 飲食供應機構
<input type="checkbox"/> 03 現有樓宇翻新/維修	<input type="checkbox"/> 06 維修工場	<input type="checkbox"/> 09 貨物裝卸區	<input type="checkbox"/> 13 請指明
		<input type="checkbox"/> 10 貯物區	

在意外發生時現場進行的活動（附註 8）

J. 損傷性質（附註 9）

敘述損傷性質

指出損傷性質（在方格內劃上“✓”號）—

<input type="checkbox"/> 01 擦傷	<input type="checkbox"/> 06 撞傷及瘀傷	<input type="checkbox"/> 11 電擊	<input type="checkbox"/> 16 中毒
<input type="checkbox"/> 02 截斷	<input type="checkbox"/> 07 腦震盪	<input type="checkbox"/> 12 骨折	<input type="checkbox"/> 17 受刺激
<input type="checkbox"/> 03 窒息	<input type="checkbox"/> 08 割傷	<input type="checkbox"/> 13 刺傷	<input type="checkbox"/> 18 惡心
<input type="checkbox"/> 04 燙傷（受熱）	<input type="checkbox"/> 09 脫臼	<input type="checkbox"/> 14 扭傷	<input type="checkbox"/> 19 多處受傷
<input type="checkbox"/> 05 其他類型燒傷	<input type="checkbox"/> 10 壓傷	<input type="checkbox"/> 15 凍傷	<input type="checkbox"/> 20 其他 （請指明）

身體的損傷部位（在方格內劃上“✓”號）—

頭部	頸部及軀幹	上肢	下肢	
<input type="checkbox"/> 21 頭顱/頭皮	<input type="checkbox"/> 31 頸	<input type="checkbox"/> 41 手指	<input type="checkbox"/> 51 臀	<input type="checkbox"/> 61 多處部位 （請指明）
<input type="checkbox"/> 22 眼	<input type="checkbox"/> 32 背	<input type="checkbox"/> 42 手/手掌	<input type="checkbox"/> 52 大腿	
<input type="checkbox"/> 23 耳	<input type="checkbox"/> 33 胸	<input type="checkbox"/> 43 前臂	<input type="checkbox"/> 53 膝	
<input type="checkbox"/> 24 口/牙齒	<input type="checkbox"/> 34 腹	<input type="checkbox"/> 44 手肘	<input type="checkbox"/> 54 小腿	
<input type="checkbox"/> 25 鼻	<input type="checkbox"/> 35 軀幹	<input type="checkbox"/> 45 上臂	<input type="checkbox"/> 55 足踝	
<input type="checkbox"/> 26 面	<input type="checkbox"/> 36 盤骨/腹股溝	<input type="checkbox"/> 46 肩膀	<input type="checkbox"/> 56 腳	

K. 意外類別（在方格內劃上“✓”號）（附註9）

<input type="checkbox"/> 01 受困於物件之內或物件之間	<input type="checkbox"/> 05 與固定或不動的物件碰撞	<input type="checkbox"/> 10 受困於倒塌或翻側的物件	<input type="checkbox"/> 15 火警燒傷
<input type="checkbox"/> 02 提舉或搬運物件時受傷	<input type="checkbox"/> 06 與移動的物件碰撞	<input type="checkbox"/> 11 遭移動或墮下的物件撞擊	<input type="checkbox"/> 16 爆炸受傷
<input type="checkbox"/> 03 滑倒、絆倒或在同一高度跌倒	<input type="checkbox"/> 07 踏在物件上	<input type="checkbox"/> 12 遭移動中的車輛撞倒	<input type="checkbox"/> 17 其他 (請指明)
<input type="checkbox"/> 04 人體從高處墮下 * _____ 米	<input type="checkbox"/> 08 暴露於有害物質中或接觸有害物質	<input type="checkbox"/> 13 觸及開動中的機器或觸及以機器製造中的物件	_____
* 人體墮下的距離	<input type="checkbox"/> 09 觸電或接觸放出的電流	<input type="checkbox"/> 14 遇溺	

L. 引致受傷的媒介（如有的話）（在一個或多於一個方格內劃上“✓”號）（附註9）

<input type="checkbox"/> 01 吊重/運輸設備	<input type="checkbox"/> 04 處理中或貯存中的物料/產品	<input type="checkbox"/> 07 可移動的容器或任何類別的包裝物	<input type="checkbox"/> 10 供電系統、設有線路裝置的器具或設備
<input type="checkbox"/> 02 手提動力工具或手工工具	<input type="checkbox"/> 05 在梯上或高空工作	<input type="checkbox"/> 08 樓面、地面、樓梯或任何工作面	<input type="checkbox"/> 11 車輛或相聯的設備或機器
<input type="checkbox"/> 03 其他機器 請指明： 機器類別： _____	<input type="checkbox"/> 06 坑渠、沙井或其他密閉空間	<input type="checkbox"/> 09 氣體、蒸氣、塵埃或煙霧	<input type="checkbox"/> 12 其他 (請指明)
令僱員受傷的機器部分： <input type="checkbox"/> (a) 原動部分 <input type="checkbox"/> (b) 傳動部分 <input type="checkbox"/> (c) 運作部分			
簡述你如上所指的媒介（附註9） _____			

M. 草圖（如認為需要補充以上敘述不足之處）

	只供本處填寫
	工業意外/ 非工業意外 <input style="width: 150px; height: 20px;" type="text"/>
	調查 <input style="width: 150px; height: 20px;" type="text"/>
	處理 <input style="width: 150px; height: 20px;" type="text"/>

《第 I 部完》

《第 II 部》

(如意外發生在建築地盤內則須填寫此部)

N. 在意外發生時僱員所進行的工作類別 (在方格內劃上“√”號)

<input type="checkbox"/> 01 混凝土傾注	<input type="checkbox"/> 07 油漆	<input type="checkbox"/> 13 坑道工程	<input type="checkbox"/> 19 斜坡工程
<input type="checkbox"/> 02 木器工程	<input type="checkbox"/> 08 批盪	<input type="checkbox"/> 14 安裝氣體輸送管	<input type="checkbox"/> 20 其他
<input type="checkbox"/> 03 玻璃工程	<input type="checkbox"/> 09 電焊/氣焊	<input type="checkbox"/> 15 安裝水管	(請指明)
<input type="checkbox"/> 04 拗鋼筋	<input type="checkbox"/> 10 搭建板模	<input type="checkbox"/> 16 安裝電線	
<input type="checkbox"/> 05 竹棚工程	<input type="checkbox"/> 11 鋪砌磚塊	<input type="checkbox"/> 17 處理物料	
<input type="checkbox"/> 06 通架棚工程	<input type="checkbox"/> 12 沉箱工程	<input type="checkbox"/> 18 安裝升降機	

上述工作在建築地盤內何處進行

O. 涉及的機器 (如有的話) (在一個或多於一個方格內劃上“√”號) (附註 10)

<input type="checkbox"/> 01 吊斗吊重機/物料吊重機	<input type="checkbox"/> 06 液壓起重機	<input type="checkbox"/> 11 拗鋼筋機
<input type="checkbox"/> 02 載人吊重機/建築工地升降機	<input type="checkbox"/> 07 吊船	<input type="checkbox"/> 12 混凝土攪拌機
<input type="checkbox"/> 03 塔式起重機 (天秤)	<input type="checkbox"/> 08 工作吊板	<input type="checkbox"/> 13 風泵/風鼓
<input type="checkbox"/> 04 流動起重機	<input type="checkbox"/> 09 打樁機	<input type="checkbox"/> 14 其他 (請指明)
<input type="checkbox"/> 05 安裝在貨車上的起重機	<input type="checkbox"/> 10 鑽探機	

P. 涉及的運輸機器或建築機器 (如有的話) (在方格內劃上“√”號)

<input type="checkbox"/> 01 倒泥卡車	<input type="checkbox"/> 04 推土機	<input type="checkbox"/> 07 其他 (請指明)
<input type="checkbox"/> 02 搬土機	<input type="checkbox"/> 05 平土機	
<input type="checkbox"/> 03 挖土機	<input type="checkbox"/> 06 壓土機	

《第 II 部完》

表格 2A

[第 4 條]

僱員補償條例
(第 282 章)
第 15 條

僱主呈報僱員由於職業病而致死亡
或喪失工作能力的通知

重要附註

- (1) 請填寫一式兩份，並在以下限期內交回勞工處處長 ——
 - (a) 在僱員死亡後 7 天內交回；或
 - (b) 在僱員喪失工作能力後 14 天內交回；或
 - (c) 在勞工處處長規定的限期內交回。
- (2) 僱主如不按規定發出通知，或向勞工處處長提供虛假或具誤導性的資料，可被檢控。
- (3) 請在適用方格內劃上“✓”號。
- (4) 在填寫本表格前，請小心閱讀有關的指示。

表格 2A
僱員補償條例
(第 282 章)
第 15 條

**僱主呈報僱員由於職業病而致死亡
或喪失工作能力的通知**

致：勞工處處長

謹此聲明，盡本人所知，在本表格內呈報的資料，全屬真實準確。

簽署：_____ (僱主代表)

姓名(請用正楷)：_____

職位：
 獨資經營人 合夥人
 經理 高級人員

日期：_____

公司蓋印(附註 1)

A. 僱員詳情

僱員姓名(請先填寫姓氏)		身分證 / 護照號碼
電話號碼	傳真號碼	地址
出生日期 ____/____/____ 年 / 月 / 日	性別 <input type="checkbox"/> 男 <input type="checkbox"/> 女	職業
學徒 <input type="checkbox"/> 是 <input type="checkbox"/> 否	受僱期 由 _____ 至 _____	

B. 僱主詳情

僱用公司名稱/僱主姓名		商業登記證號碼 (附註 2)
電話號碼	地址	行業
傳真號碼		

C. 總承判商 / 控股公司詳情 (附註 3)

總承判商 / 控股公司名稱		商業登記證號碼
電話號碼	地址	行業
傳真號碼		

D. 所患職業病詳情

僱員接受治療的醫院或診所名稱	
開始患有職業病的日期 ____/____/____ 年 / 月 / 日	所患疾病
引起職業病的工作類別	職業病於 ____/____/____ 引致 年 / 月 / 日 <input type="checkbox"/> 暫時喪失工作能力 <input type="checkbox"/> 永久喪失工作能力 <input type="checkbox"/> 死亡

E. 保險的細節 (附註 4)

在僱員喪失工作能力或死亡時承保的保險公司名稱及地址 (請參照保險單)	保險單號碼
---------------------------------------	-------

F. 僱員收入細節

每月平均工作日數 <input type="checkbox"/> 22 <input type="checkbox"/> 24 <input type="checkbox"/> 26 <input type="checkbox"/> 30 <input type="checkbox"/> 其他 _____ (請指明)	休息日 (a) <input type="checkbox"/> 無薪 <input type="checkbox"/> 有新 (b) <input type="checkbox"/> 非固定 <input type="checkbox"/> 固定於星期 _____ (請填寫星期的那一天)
僱員在緊接其喪失工作能力或死亡日期的上一個月的每月收入細節：(附註 5)	
(a) 底薪 / 基本工資	每月\$ _____
(b) 伙食津貼 / 僱主免費供應食物的價值	每月\$ _____
(c) 其他項目： _____ (請指明)	每月\$ _____
總收入 (a) + (b) + (c)	每月\$ _____
僱員在其喪失工作能力或死亡前 12 個月內(如不足 12 個月，則以整段受僱期間計)的每月平均收入為 每月\$ _____	

G. 死亡個案 (只須於職業病引致死亡時填寫)

是否已報警 <input type="checkbox"/> 是 _____ (警署名稱) <input type="checkbox"/> 否	已故僱員的最近親姓名及地址	與已故僱員的關係 電話號碼
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H. 直接和解(只在職業病引致暫時喪失工作能力為期不多於 7 天及並無引致永久喪失工作能力，而且僱主和僱員已選擇以直接和解方式來解決工傷個案時，始須填寫。)

病假期 由 ____ / ____ / ____ 至 ____ / ____ / ____ 年 / 月 / 日 年 / 月 / 日 由 ____ / ____ / ____ 至 ____ / ____ / ____ 年 / 月 / 日 年 / 月 / 日 病假總日數： _____ 日	補償額： \$ _____ <input type="checkbox"/> 已支付 <input type="checkbox"/> 將於 ____ / ____ / ____ 支付 年 / 月 / 日
---	--

註釋

- 附註 1： 在兩份向勞工處處長呈交的表格 2A 上的簽署及公司蓋印須為正本。
- 附註 2： 如沒有商業登記證號碼，應填上僱主的身分證號碼。
- 附註 3： 載有總承判商/控股公司詳情的 C 條，只有在以下情況始須填寫 ——
- (a) 僱主為次承判商；或
 - (b) 僱主為〈公司條例〉(第 32 章)所指的控股公司的附屬公司，而該附屬公司是由其所屬的公司集團投購的保險單所涵蓋和指明的。
- 附註 4： 請依保險單上的資料填寫承保人的姓名或名稱及地址，但請勿填寫經紀或代理人的姓名或名稱及地址。
- 附註 5： 收入包括 ——
- (a) 現金工資；
 - (b) 任何可以現金評定的特惠或利益的價值，例如：因僱員遭受意外以致喪失享有由僱主提供僱員的食物、燃料或宿舍；
 - (c) 屬經常性質的超時工作酬金或因工作而獲得的其他特別酬金，不論是否以花紅、津貼或其他形式而獲得的；及
 - (d) 習慣性的小賬。
- 但間歇性超時工作的酬金、非經常性的偶然付款賞金、交通津貼或特惠的價值以及僱主所作出的公積金供款並不包括在收入之內。



補償金額的計算方法

(甲) 按期付款（即俗稱「工傷病假錢」，須在正常發薪日支付）

$$\begin{aligned} \text{按期付款} = & A \times \text{意外發生後首 12 個月內的病假日數} \times 4/5 + \\ & B \times \text{意外發生後第 13 個月至 24 個月內的病假日數} \times 4/5 + \\ & C \times \text{意外發生後第 25 個月至 36 個月內的病假日數} \times 4/5 \end{aligned}$$

註：

- A：僱員在受傷前一個月的每日收入或受傷前 12 個月的每日平均收入「以較高者為準」
 B：第一次（即工傷日期起計 12 個月後）經調整的每日收入
 C：第二次（即工傷日期起計 24 個月後）經調整的每日收入
 # 僱員除非獲得法院根據僱員補償條例第 10(5)條批准延長有關期限，否則僱主並沒有責任支付 24 個月後的按期付款。

(乙) 永久地喪失工作能力的補償金額（注意：僱主除了支付按期付款外，亦須向被評定為永久地完全或部分喪失工作能力僱員作出是項補償）

若僱員因工受傷引致永久地完全喪失工作能力，補償金額須按僱員受傷時的年齡及每月收入來計算：

僱員在受傷時的年齡	金額
40 歲以下	96 個月的收入 ⁽¹⁾ 或最低補償金額 ⁽²⁾ ，兩者以較高的金額為準
40 歲至 56 歲以下	72 個月的收入 ⁽¹⁾ 或最低補償金額 ⁽²⁾ ，兩者以較高的金額為準
56 歲或以上	48 個月的收入 ⁽¹⁾ 或最低補償金額 ⁽²⁾ ，兩者以較高的金額為準

若僱員因工受傷引致永久地部份喪失工作能力，補償金額須視乎僱員喪失賺取收入能力的程度，並參照永久地完全喪失工作能力的補償金額，按比例計算：

永久地完全喪失 工作能力的補償金額	X	永久地 喪失 賺取收入能力百分率
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註：

- (1) 用以計算永久地完全喪失工作能力的補償金額的每月收入設有一個最高限額：
- 於 2010 年 8 月 1 日當日或以後遭遇工傷意外或患上指定職業病的人士：\$21,500
 - 於 2010 年 8 月 1 日以前遭遇工傷意外或患上指定職業病的人士：\$21,000
- (2) 僱員就永久地完全喪失工作能力可獲的最低補償金額：
- 於 2010 年 8 月 1 日當日或以後遭遇工傷意外或患上指定職業病的人士：\$352,000
 - 於 2010 年 8 月 1 日以前遭遇工傷意外或患上指定職業病的人士：\$344,000

FORM 7 表格 7
EMPLOYEES' COMPENSATION ORDINANCE (CHAPTER 282)
僱員補償條例 (香港法例第 282 章)
SECTION 16F 第 16F 條
EMPLOYEES' COMPENSATION (ORDINARY ASSESSMENT) BOARD
僱員補償 (普通評估) 委員會

Certificate No.
證明書號碼 OB1 - 09-2009

Date of Issue
簽發日期 23

CERTIFICATE OF ASSESSMENT
評估證明書

This is to certify that [REDACTED] (Identity Card/Passport No. [REDACTED])
茲證明 [REDACTED] (身份證/護照號碼: [REDACTED])

was assessed by the Employees' Compensation (Ordinary Assessment) Board under Section 16B(5).
經由僱員補償 (普通評估) 委員會根據第 16B(5) 條規定進行評估。

Details of the assessment are as follows:

評估詳情如下:

(a) Date(s) of assessment: 13/05/2010 09/06/2010

評估日期:

(b) Injury: LOW BACK INJURY RESULTING IN PAIN

受傷情況: 下腰背受傷引致疼痛

(重要聲明: 這是【受傷情況】原文的中譯本, 祇供參考用途)

Form
表格
7

(c) Period(s) of absence from duty necessary as a result of the injury:

由於受傷而須缺勤的期間:

from 由

to 至

from 由

to 至

Please Refer to Annex 請參閱附件

(d) Loss of earning capacity permanently caused by the injury:

由於受傷而引致永久喪失賺取收入能力:

**0.5%

Remark: XXXXXXXX

備註:

[REDACTED]
[REDACTED]
[REDACTED]
for Employees' Compensation (Ordinary Assessment) Board
僱員補償 (普通評估) 委員會 [REDACTED] 代行)

IMPORTANT NOTE 重要事項:

- (i) Under Section 16C(1), an objection to this assessment may be made by the employer or the employee to the Commissioner for Labour in writing within 14 days after the date of issue of this Certificate and with a copy of the objection to be sent to the other party; or
- (ii) Under Section 18(1) and (2), an appeal against this assessment may be made to the District Court within 6 months from the date of issue of this Certificate.
- (i) 第 16C(1) 條規定如反對以上評估, 可於本證明書簽發日期後 14 天內以書面向勞工處處長提出並將該反對書的副本送交另一方當事人; 或
- (ii) 第 18(1) 及 (2) 條規定如不滿以上評估, 可於本證明書簽發日期起 6 個月內向區域法院提出上訴。

5.5 《僱員補償條例》（香港法例第 282 章） Employee Compensation Ordinance

5.5.1 適用範圍

a) 一般適用範圍

- 香港《僱員補償條例》（香港法例第 282 章）監管大部分因工受傷及其補償事項
- 適用：所有根據僱傭合約或學徒訓練合約受僱的
 - a. 全職
 - b. 或兼職僱員；

包括，家務助理、農業僱員、在香港註冊船隻上工作的僱員

- 僱主責任：根據法例，如僱員因工及在僱用期間遭遇意外而致受傷，或患上《僱員補償條例》所指定的職業病，均有責任支付補償
- 在外地工作受傷的情況：條例也適用於由香港僱主在香港僱用，而在外地工作時因工受傷的僱員
- 香港的司法管轄權：如僱主為一名在香港以外之人士，或其僱員是一艘外國輪船之船員，只要僱主同意接受香港的司法管轄權所管轄，條例仍然適用《僱員補償條例》

b) 僱主亦需要為其僱員在工作地方以外（或香港境外）之受傷負上賠償責任

b.1 S.5(4)(d)to(g), ECO: 下列情況受傷，視為因工及在僱用期間遭遇意外而受傷，僱主亦需負上賠償責任：

- (1) 僱員以乘客的身分乘搭其僱主操控或安排的交通工具，往返工作地方（如該僱員為公共交通工具之乘客則例外）
- (2) 僱員因工作關係，駕駛或操作由僱主安排或提供的交通工具，由直接路線在往返其居所及工作地點途中
- (3) Typhoon Arrangement：在八號或以上颱風訊號或紅色 / 黑色暴雨警告生效期間，僱員在該日的工作時間開始前四小時內，以直接路線由其居所前往其工作地點途中，或在該日的工作時間終止後四小時內，由其工作地點前往其居所途中，
**《僱員補償條例》第 5 條：僱主就意外引致僱員死亡或喪失工作能力而支付補償的法律責任

(f) 如僱員遭遇意外時，僱員於烈風警告或暴雨警告期間內，作符合下述規定的作為，則僱員遭遇的意外，須當作是在受僱工作期間因工遭遇的意外—（由 2000 年第 24 號第 2 條修訂）

(i) 在其居所與其工作地點之間，並在該日其工作時間開始前 4 小時內，採用直接路綫前往其工作地點，或在其居所與其工作地點之間，並在該日其工作時間終止後 4 小時內，前往其居所（視屬何情況而定）；或

(ii) 在法院認為合理的情況下，正在其居所與其工作地點之間的路途上，而就本段而言—（由 2000 年第 24 號第 2 條修訂）

(A) “烈風警告”(gale warning) 指表示香港或香港附近出現熱帶氣旋的警告，而該警告是藉使用香港天文台台長發出的表示通常稱為 8 號西北、8 號西南、8 號東北、8 號東南、9 號或 10 號的熱帶氣旋警告訊號正在生效的熱帶氣旋警告訊號而作出的；

(B) “暴雨警告”(rainstorm warning) 指表示香港或香港附近有暴雨的警告，而該警告是藉使用香港天文台台長發出的表示通常稱為紅色、或黑色暴雨警告訊號正在生效的暴雨警告訊號而作出的；（由 2000 年第 24 號第 2 條補）

For example:

(a) An employee whose working hours ended at 5:30 p.m. He meets with an accident and is injured at 8:00 p.m. when he is travelling back home from his workplace. T8 is in force at the time of the accident

=> the employer will be liable to pay compensation under the Employees' Compensation Ordinance

(b) I am requested by my supervisor to report for duty during T3 while my other colleagues are not required to do so, am I covered by the employees' compensation if I encounter accident and is injured during on my way to work? No.

; 或

(4) 僱員在僱主許可下，為了其受僱從事的工作，並在與此工作有關的情況下，以乘客身分乘搭任何交通工具，在往返香港與香港以外地方途中，或往返任何香港以外地方與任何其他地方途中

(5) 如僱員在香港以外於受僱工作期間因工遭遇意外以致身體受傷或死亡，而其僱傭合約是在香港與僱主訂立，以及有關僱主是在香港經營業務的人，則該僱主亦須負起《僱員補償條例》的賠償責任

b.2 僱員在香港以外地方工作時受傷，受《僱員補償條例》的保障

- 由香港僱主在本港僱用而在本港以外地方工作時受傷的僱員

(1) 僱員在僱主許可下，為了從事受僱的工作，並在與此工作有關的情況下

(2) 乘用任何交通工具往返香港與香港以外地方途中，或

(3) 往返任何香港以外地方與任何其他地方途中遭遇意外受傷或死亡

亦被視作在受僱工作期間因工遭遇意外

b.3 Compensation for government employees injured or killed while on duty

- The Government does not take out employees' compensation insurance for civil servants. In case of injury or death of a civil servant arisen out of employment, the Government will make compensation under the Employees' Compensation Ordinance (Cap. 282) or the relevant Hong Kong pensions legislation.

- If a civil servant is injured or killed while on duty: Employees' Compensation Ordinance (ECO) (Cap. 282) or the relevant pensions legislation (Cap. 89 or 99) are applicable

- The compensation includes:

(1) Full-pay sick leave

- certified by a registered medical practitioner, a registered Chinese medicine practitioner, a registered dentist or the Employees' Compensation Assessment Board (ECAB) to be temporarily incapacitated by duty-related injury and absence from duty is necessary

- entitled to full-pay sick leave for a maximum period of 24 months + further full-pay sick leave of up to 12 months by the Court / approved by his/her Head of Department/Grade who is satisfied with the medical evidence and grounds provided

- The Secretary for the Civil Service may approve further full-pay sick leave on a case-by-case and exceptional basis, having regard to the medical evidence and the circumstances of the case.

(2) Compensation for medical expenses

- free medical service provided by the Government and the Hospital Authority (HA)
- in addition to or in lieu of the free medical service provided by the Government and the HA, the civil servant opts for treatment by registered Chinese medicine practitioners or registered private healthcare professionals, he or she may apply for reimbursement of the medical expenses incurred under the relevant arrangements.

(3) Compensation for permanent incapacity

- sick leave >7 days or if it is expected that he or she will suffer from permanent incapacity as a result of the injury, the civil servant should, upon expiry of the sick leave, attend an examination by the Labour Department or receive an assessment by the statutory ECAB to determine whether there is any loss of earning capacity
- loss of earning capacity, the Government will pay compensation with reference to the civil servant's age and monthly earnings at the time of injury and the percentage of loss of earning capacity in accordance with the ECO
- If an injured civil servant is appointed on pensionable terms or on agreement terms before June 1, 2000, he or she may opt to receive either the aforementioned compensation payment under the ECO, or an "additional pension" under the pensions legislation applicable to him or her which is payable each month upon retirement. If he or she chooses the latter, the "additional pension" amount will be calculated with reference to his or her monthly earnings at the time of injury and the percentage of loss of earning capacity.

(4) Compensation for duty-related death

- under the ECO, the amount of compensation payable, depending on the age of the civil servant, will be equivalent to 36 to 84 months of his or her earnings (monthly earnings are subject to a ceiling of \$21,000). The minimum amount of compensation is \$303,000.
- If a civil servant appointed on pensionable terms or on agreement terms before June 1, 2000 dies on duty, his or her eligible dependents may opt to receive a dependent pension under the relevant pensions legislation, which will be released in the form of a one-off payment or a monthly pension.
- If a civil servant appointed on new terms on or after June 1, 2000 dies on duty, on top of the statutory compensation payable under the ECO, a death payment equal to 36 months of his or her final substantive salary will also be payable to his or her dependents or estate.

5.5.2 強制投保

a) 基本法例 - 《僱員補償條例》：

- a.1 S.40, ECO: 《僱員補償條例》第 40 條: 所有僱主必須投保僱員補償保險, 以承擔僱主在:
- a. 條例及
 - b. 普通法方面的法律責任 (in most cases, negligence) ;

否則:

不得僱用僱員*從事任何工作

***僱員指：不論其合約期或工作時數長短、全職或兼職**

a.2 最低投保金額：

- c. 僱員數目不超過 200 人：以每宗事故計算的投保金額不少於港幣 1 億元
- d. 僱員數目超過 200 人：“ ” 不少於港幣 2 億元

a.3 違法罰則：不依法例投購僱員補償保險，即屬違例，最高可被判罰款港幣十萬元及監禁兩年

a.4 承保僱員補償保險的保險人名單：向香港保險業聯會查詢：
<http://www.hkfi.org.hk/#!/about-the-hkfi/member-list>

b) 其他法例 - 《僱員補償援助條例》 Employees Compensation Assistance Ordinance (Chapter 365), effective 1991, 及僱員補償援助基金

b.1 受傷僱員或其他合資格人士，如已用盡一切法律及財政上可行的方式，仍無法向僱主或其保險人追討到應得的補償或損害賠償，可向基金申請援助

b.2 根據《僱員補償援助條例》，僱主如違反強制僱員補償保險的規定，便須向僱員補償援助基金管理局支付附加費

b.3 s.36A, Cap 365 《僱員補償援助條例》 附加費 版本日期：01/07/2002

- (1) 僱主如違反《僱員補償條例》(第 282 章)第 40(1)條，即有法律責任按照本條向管理局支付附加費
- (2) 如僱主根據第(1)款須支付附加費，而該附加費所關乎的在該款中提述的違反事項因獲承保而終止，則除第(3)及(4)款另有規定外，該附加費的數額須為根據《僱員補償保險徵款條例》(第 411 章)按就有關保險單繳付的保費而須向管理局繳付的徵款的 3 倍

c) 實務：僱主投保應注意事項

c.1 必須展示“Notice of Insurance”

Section: 41 Notice of insurance

(1)...an employer to whom a policy of insurance is issued for the purposes of this Part shall **display**, in a conspicuous place on each of his premises where any employee is employed by him, a notice, in such form as may be specified by the Commissioner, showing in both the English and Chinese languages-

(a) the name of the employer;

(b) the name of the insurer;

(c) the policy number;

(d) the date of issue of the policy;

(e) the dates of commencement and expiry of the period of insurance; (Amended 47 of 1995 s. 6)

(f) the number of employees insured under the policy at the time of issue thereof; and (Amended 66 of

1993 s. 10; 47 of 1995 s. 6)

(g) the amount of the liability insured under the policy. (Added 47 of 1995 s. 6)

.... (3) An employer who without reasonable excuse contravenes subsection (1) commits an offence and is liable to a fine at level 3. (Amended 52 of 2000 s. 20)

c.2 法例規定最低投保金額

- 但條例規定的最低投保金額，並不代表在《僱員補償條例》及普通法方面須承擔的法律責任上限
- 僱主應小心評估並尋求承保人的專業意見，以決定是否有需要投保比法定要求較高的金額

c.3 投保時，應注意下列事項：

- 不得從僱員的收入扣除所需費用
- 保障範圍包括所有僱員，當僱員的數目變更時，應盡快通知保險承保人
- 向保險提供詳盡的資料：
 - a. 僱員的收入及其工作的職責
 - b. 列明僱員的一般工作地點
 - c. 指明那些僱員須因工往香港以外的地方工作或公幹
 - d. 指明有否將工作分判給次承判商，及保單是否需要保障次承判商的僱員
 - e. 提早辦理續保手續，以免因僱員補償保險中斷而喪失保障和觸犯法例

5.6 工傷賠償責任

5.6.1 因工及在僱用期間遭遇意外（簡稱工傷意外）

An accident arising out of and in the course of employment

《僱員補償條例》第 5(4)(b)條：

- (1) 只要僱員是為了僱主的行業或業務之目的並在與該行業或業務有關下作出該作為
 - (2) 即使在意外發生時該僱員作出的作為是違反適用於其工作的任何法定規例或其他規例的
 - (3) 或是違反僱主或僱主代表所發出的命令
 - (4) 或其作為是在沒有僱主的指示下作出
- 該僱員所遭遇的意外，亦須當作是僱員在受僱工作期間因工遭遇的意外

5.6.2 《僱員補償條例》是一個「不問過失」的制度 (no-fault scheme aimed)

(工傷索償的相關法例條文是《僱員補償條例》(第 282 章) (「該條例」) 第 9、10 及 10A 條)

Case: *LKK Trans Ltd v Wong Hoi Chung, FACV 14/2005*

1. 指出僱員之工傷索償，不會因為其原有的疾病而受影響
2. 即是“僱員舊痛新傷 僱主有責”
3. P 為貨車的送貨工人，1997 年他從貨車上跌下來後造成左邊臀部受創
4. 而他先前已患有臀部缺血性壞死症，是因為另一次意外而受傷骨折，左邊股骨及臀部受創
5. 在經過治療三年之後，他回到工作崗位，但很快被解僱，因為他連做輕度勞動的工作也不能
6. 他的健康再繼續惡化，他的缺血性壞死症也許可以經的移植手術得以改善
7. 另外；在 01 年一次 X 光檢查顯示左邊的臀部缺血性壞死症已經擴散到右邊臀部，並有整個股骨頂部毀壞的可能。僱員補償估計委員會的評估，受害人已經永久性失去 60%的工作能力
8. 但法官認為這可能已經不相關，一來手術費用昂貴，費用可能並不包括在〈僱員補償條例〉之內
9. D 為僱主面對受害人的申索的主要答辯理據，是構成傷害的因果關係 (causation) 有問題
10. D 依靠的醫學報告指出：受害者的情況雖與三年前因工受傷有關，但完全失去工作能力則與受傷前已存在的傷患，即第一次受傷的事件有關 (第一次意外與 D 無關)，雖然傷勢的惡化與第二次的受傷有關，於是僱主的責任理應減輕

11. HC 法官拒絕了僱主這一論述，考慮到若不進行新的手術，僱員將會面對 100%失去工作能力情況，故法庭以假設受害人失去 90%工作能力計算，賠償金額為一百一十四萬左右，並有利息
12. **CFA 裁定，《僱員補償條例》是一個「不問過失」的制度，旨在迅速向因工傷而喪失工作能力的僱員提供財務濟助**
- 這個制度容許僱員按其喪失工作能力的程度向僱主索償，而不論僱主是否有任何過失，亦不論工傷意外是在甚麼情況下發生的，所以不應因傷者的既存狀況而容許扣減，否則會對舒緩受傷僱員的困境造成延誤及不明朗的情況。
 - 即使受害人有某些既存狀況，他應得的補償也不一定減少 (vs 普通法疏忽索償中，法院會審視證據，以確定受害人的既存狀況是否會令他日後有類似的損傷，如果會，則相應地扣減損害賠償)
 - 爭論點：如一名僱員因工受傷，而其永久傷殘是由於工傷及本身原有的疾病而造成，那麼法庭在計算有關賠償金額時，是否需要扣除傷者受原有疾病影響而受損害的那個數額？終審法院五位元法官一致裁定是不需要的。
13. CFA 5 名大法官一致指出，僱員因工受傷的申索：
- 不會因為其原有疾病而受任何影響，期間不會有按比例分擔的空間 (No Room for Apportionment) 法庭在計算有關工傷的賠償金額時
 - 只需考慮受傷是否因工作而引起，不需考慮其他因素，亦無需扣除傷者受原有 (如果有的話) 傷患疾病受損害而引致金額增大的那一部份
 - 終審法院特別指出，所謂分擔賠償 (apportionment) 的引用，是不適用於致命的受傷 (fatal case)、永久性受傷 (permanent case) 或永久性失去工作能力 (incapacity) 的案件

5.6.3 僱主不需要為其僱員的工傷負上賠償責任的規定

S.5(2), ECO: 在下列情況下，僱主不需要負上補償的責任：

- (1) 有關的傷害並不導致永久喪失工作能力，亦不阻礙該僱員在正常的工作中賺取全數工資；
- (2) 有關傷害是僱員自己故意做成；
- (3) 有關死亡或喪失工作能力源自的傷害 (包括《僱員補償條例》中所訂明的職業病)，僱員向其僱主作出虛假聲明，指稱自己從未有受該等傷害；或有關傷害是直接歸咎於僱員對毒品或酒精上癮，而該傷害並不導致僱員死亡或嚴重和永久喪失工作能力

S.5(3), ECO: 另外，能證明該僱員所承受的傷害是歸咎於其嚴重及故意行為失當，或者該僱員故意加劇因工及在僱用期間遭遇意外而致的傷害，任何就該傷害之賠償申索將會被拒絕。除有關傷害導致死亡或嚴重喪失工作能力，法庭在考慮所有因素後可能根據該條例或法庭認為合適的某部分而頒令賠償。

5.7 職業病「可獲補償的職業病」"Compensable Occupational Disease"

5.7.1 職業病在香港的定義

- 如果患病是由於在訂明期間內從事某類工作，並因該工作性質而引致患上指定的職業病
- 因為特定的職業病而喪失工作能力，與因工受傷一樣獲得同樣的賠償
- 《僱員補償條例》涵蓋 48 項職業病，附表二 – 職業病類別：

A. 物理因素所致

A1 因電磁輻射(輻射熱除外)或電離粒子引致....10 年

A2 熱內障：任何涉及經常或長期暴露於鎔融或熾熱物質發出的光線的職業....3 年

- A3 氣壓病，包括減壓症、氣壓傷及骨壞死...1年；如患關節炎...則為5年。
- A4 因重複動作引致手或前臂痙攣...任何涉及長期用手書寫、打字或需手指、手或臂作重複動作的職業...1年
- A5 手皮下蜂窩織炎(手癆)....所涉及的體力勞動導致手受嚴重或長期的磨擦或壓力的任何職業...1年
- A6 因膝或周圍部分受嚴重或長期的外來磨擦或壓力而引起膝或周圍部分患粘液囊炎或皮下蜂窩織炎(膝癆)....1年。
- A7 因手肘或周圍部分受嚴重或長期的外來磨擦或壓力而引起手肘或周圍部分患粘液囊炎
- A8 手或前臂
- A9 腕管綜合症 任何涉及重複使用內部部件震動的

B. 生物因素所致

- B1 炭疽
- B2 馬鼻疽
- B3 受鉤端螺旋體傳染 任何涉及下列情況的職業- 3個月。
 - (a) 在受到或可能受到老鼠、田鼠或野鼠，或其他哺乳類小動物侵擾的地方工作；
 - (b) 在狗房工作，或照料或處理狗隻；
 - (c) 接觸牛科動物或牛肉產品，或豬隻或豬肉產品。
- B4 因吸入發黴乾草或其他發黴蔬菜產品的塵埃引致肺病...
- B5 受布魯氏菌屬生物傳染 任何涉及接觸下列物體的職業...
- B6 結核病 任何因下列的受僱工作而涉及緊...
- B7 非經腸道而患上的病毒性肝炎...
- B9 飼鳥病/鸚鵡熱 任何涉及接觸受鸚鵡熱/飼鳥病...
- B10 退伍軍人病 任何涉及修理、保養或整理...
- B11 嚴重急性呼吸系統綜合症 任何涉及因為受僱從事以下...
- B12 甲型禽流感 任何涉及因為受僱從事以下

C. 化學因素所致

- C1 鉛或鉛化合物中毒 任何涉及使用或處理鉛、鉛化合...
- C2 錳或錳化合物中毒 任何涉及使用或處理錳、錳化合...
- C3 磷或磷無機化合物中毒，或因磷有機化合物的抗膽素酯酶...
- C4 砷或砷化合物中毒 任何涉及使用或處理砷、砷化合...
- C5 汞或汞化合物中毒 任何涉及使用或處理汞、汞化合...
- C6 二硫化炭中毒 任何涉及使用或處理二硫化炭、...
- C7 苯或苯同系物中毒 任何涉及使用或處理苯、苯化合...
- C8 苯或苯同系物的硝基、氨基或
- C9 二硝基苯酚或其同系物中毒，
- C10 脂肪系碳氫化合物的鹵素衍生
- C11 二氧化二乙烯(二噁烷)中毒 任何涉及使用或處理二氧化二乙
- C12 氯化萘中毒 任何涉及使用或處理氯化萘，或
- C13 氮氧化物中毒 任何涉及使用或處理氮氧化物，
- C14 鈹或鈹化合物中毒 任何涉及使用或處理鈹、鈹化合
- C15 鎘中毒 任何涉及使用或處理鎘，或暴露
- C16 眼角膜營養障礙(包括角膜表面

- C17 上皮癌初期 任何涉及使用或處理砷、焦油、10 年。
- C18 鉻潰瘍，包括鼻中隔穿破 任何涉及使用或處理鉻酸，或
- C19 泌尿道(腎盂、輸尿管、膀胱及
- C20 多發性外周神經炎 任何涉及生產、使用或處理或暴
- C21 局部皮膚瘤、乳頭狀或角化性 任何涉及使用或處理砷、焦油、
- C22 職業性白斑病 任何涉及使用或處理對特丁基苯

D. 其他因素所致

- D1 因塵埃、液體或蒸氣引致皮膚任何涉及暴露於足以刺激皮膚的 1 年。
- D2 因塵埃、液體或蒸氣引致上呼
- D3 鼻腔或相關氣竇的癌癥(鼻癌) 任何涉及製造或修理木製成品或
- D4 棉屑沉著病 任何涉及暴露於原棉屑的職業。
- D5 職業性哮喘病 任何涉及使用或處理可刺激或敏

5.7.2 處理職業病程式

1. 僱員如懷疑自己患上條例附表 2 指明的職業病，應盡快求診作出診斷
2. 表格 LD483：如果主診醫生確認或有理由相信僱員的病患屬條例附表 2 所指明的職業病，醫生必須盡快填寫表格向勞工處處長呈報僱員的情況
3. 僱員應遵從主診醫生指示接受治療，僱員也應盡快將有關的確診文件連同病假證明書正本交給僱主
4. 僱主都必須在獲悉僱員患上該職業病的 14 天內以指定表格(表格 2A)向勞工處處長呈報

5.8 賠償項目

5.8.1 取工傷病假

- 由暫時喪失工作能力的日期起，收取按期付款達 24 個月 =
(發生意外時的每月收入 減 在意外後的每月收入) x 4/5
- 可向法院申請延長，但延長期限不可超過 12 個月

ECO: (1) When the period of temporary incapacity meets with Statutory Holidays? Full pay

(2) When the period of temporary incapacity meets rest day?

a) if rest day is paid, pay 4/5

b) if rest day is not paid

i) if rest day is not fixed, if scheduled rest day falls in the sick leave, pay 4/5

ii) if rest day is fixed, not pay

5.8.2 醫療費

醫療費的最高金額如下：

- 每天身在醫院住院進行醫治的費用 = 港幣 300 元(before 2018/2/9 = 200)
- 每天身非醫院住院進行醫治的費用 = 港幣 300 元(before 2018/2/9 = 200)
- 在同一天醫院住院及非醫院住院進行醫治的費用= 港幣 370 元(before 2018/2/9 = 280)

5.8.3 永久喪失工作能力的補償金額

- 補償金額須按僱員受傷時的年齡及每月收入來計算：
40 歲以下 96 個月的收入* 或最低補償金額 **，以較高的金額為準
40 歲至 56 歲以下 72 個月的收入 * 或最低補償金額 **，以較高的金額為準
56 歲或以上 48 個月的收入* 或最低補償金額 **，以較高的金額為準

*補償金額的每月收入設有一個最高限額：

- 2010 年 8 月 1 日當日至 2012 年 7 月 20 日當日期間遭遇工傷意外或患上指明職業病的人士：
\$21,500
- 2012 年 7 月 21 日當日或以後遭遇工傷意外或患上指明職業病的人士：**\$23,580**

**最低補償金額：

- 2010 年 8 月 1 日當日至 2012 年 7 月 20 日當日期間遭遇工傷意外或患上指明職業病的人士：
\$352,000
- 2012 年 7 月 21 日當日或以後遭遇工傷意外或患上指明職業病的人士：**\$386,110**

5.8.4 永久地部份喪失工作能力

永久地完全喪失工作能力的補償金額 × 永久喪失賺取收入能力百分率

5.8.5 死亡補償金額

- 按照已故僱員的年齡
40 歲以下 84 個月的收入 * 或最低補償金額 **，以較高的金額為準
40 歲至 56 歲以下 60 個月的收入 * 或最低補償金額 **，以較高的金額為準
56 歲或以上 36 個月的收入 * 或最低補償金額 **，以較高的金額為準

- 致命個案的殯殮費和醫護費：由僱主付還費用的數額以 70,000 元***為限。

*補償金額的每月收入設有一個最高限額：

- 2010 年 8 月 1 日當日至 2012 年 7 月 20 日當日期間遭遇工傷意外或患上指明職業病的人士：
\$21,500
- 2012 年 7 月 21 日當日或以後遭遇工傷意外或患上指明職業病的人士：**\$23,580**

** 死亡的最低補償金額：

- 2010 年 8 月 1 日當日至 2012 年 7 月 20 日當日期間遭遇工傷意外或患上指明職業病的人士：
\$310,000
- 2012 年 7 月 21 日當日或以後遭遇工傷意外或患上指明職業病的人士：**\$340,040**

*** 2012 年 7 月 21 日以前遭遇工傷意外或患上職業病而死亡的，已故僱員的殯殮費和醫護費的費用上限為**\$35,000**

5.8.6 解決工傷的途徑

- 工傷個案可循下列途徑解決：
 - a. 直接支付補償
 - b. 按法例藉協議決定補償
 - c. 以簽發證明書方式解決
 - d. 由法院裁決

5.8.7 Table on Revision of the Level of Compensation

- The Legislative Council passed three resolutions on 4 February 2015 to increase the amounts of a total of 18 compensation items under ECO, PMCO and ODCO. The revised levels of compensation have taken effect from 5 March 2015
- Below table is Updated, for updated information:
http://www.labour.gov.hk/eng/news/ECO_PMCO_ODCO_Amendment_2015.htm

Revised Levels of Compensation under the Employees' Compensation Ordinance with effect from 21 July 2012
 經調整後《僱員補償條例》的補償金額（由 2012 年 7 月 21 日起生效）

Item under Employees' Compensation Ordinance 《僱員補償條例》的項目	Existing Level (HKD) 現行的金額（港元）	Revised Level with effect from 21 July 2012 (HKD) 由 2012 年 7 月 21 日起生效的金額（港元）
1. Ceiling of monthly earnings for calculating compensation for death and permanent total incapacity 每月收入上限(用作計算死亡及永久完全喪失工作能力的補償)	21,500	23,580
2. Minimum compensation for death 死亡的最低補償	310,000	340,040
3. Minimum compensation for permanent total incapacity 永久完全喪失工作能力的最低補償	352,000	386,110
4. Compensation for employees requiring attention 給予需要別人照顧的僱員的補償	422,000	462,890
5. Minimum amount of surcharge on late payment of compensation 過期支付補償的附加費最低金額		
▶ Initial surcharge 初次附加費	500	550
▶ Further surcharge 進一步附加費	1,000	1,100
6. Maximum amount of funeral expenses 殯殮費上限	35,000	70,000
7. Cost for supplying and fitting of a prosthesis or surgical appliance 供應和裝配義製人體器官或外科器具的費用	33,000	33,460
8. Cost of repair and renewal of a prosthesis or surgical appliance 維修和更換義製人體器官或外科器具的費用	100,000	101,390

5.8.8 Compensation and Tax

- All work injury related compensation is not taxable

5.8.9 解僱受傷僱員 Offence

《僱員補償條例》第 48 條規定，在未得到勞工處處長的同意，僱主在下列情況下解僱受傷僱員，或發出通知終止其僱傭合約，均屬違例，最高可被判罰款十萬元：

1. 當僱員受傷引致暫時喪失工作能力不超過 3 天時，在工傷病假完畢及僱主付清補償款項前。
2. 當僱員受傷引致暫時喪失工作能力超過 3 天，或引致永久喪失工作能力時：
 - i. 在勞工處處長簽發「補償評估證明書」(表格 5) 前；或
 - ii. 僱主已根據第 16CA(1)條與受傷僱員訂立協議前；或
 - iii. 在僱員補償評估委員會簽發「評估證明書」(表格 7 或 8) 或「覆檢評估證明書」(表格 9 或 1 前，以上三種情況以最早發生者為準。

5.9 外地受傷

5.9.1 僱主處理僱員在香港以外地方因工受傷，並須在當地接受醫治的應注意事項

- 必須向勞工處處長呈報外
- 亦須按保險承保人指定的時間及方法（書面或指定表格）通知保險承保人
- 應妥善保存：
 - a. 向受傷僱員支付按期付款（即工傷病假錢）的紀錄
 - b. 由勞工處發出的「補償評估證明書」（表格 5）及「評估證明書」（表格 7）
 - c. 病假紙和醫療費單據的正本等
- 提醒僱員無論傷勢是否嚴重，應立即通知僱主
 - a. 盡快將病假紙及醫療費收據正本呈交僱主
 - b. 在香港以外地方接受醫治時，應向醫護人員清楚說明受傷原因及經過，並備存所有相關的醫療紀錄：
 - i. 到診紙、覆診紙、轉介信、病假證明書、入院紀錄及醫療報告等
 - c. 如有需要，僱員也應在香港接受註冊醫生、註冊中醫或註冊牙醫的診治，並提供有關醫療紀錄予僱主及勞工處

5.9.2 在香港以外地方工作受傷獲得的補償處理

- 基本上與在香港內受傷沒有分別，注意事項：
 - a. **外地補償**：就同一損傷，如根據該地方法律獲得補償，須扣除有關的外地補償
 - b. **工傷病假**：在香港以外接受醫治而獲發病假，有關暫時喪失工作能力的期間，最後須由僱員補償評估委員會評估
(Ref: 暫時喪失工作能力的期間是指經香港註冊醫生、註冊中醫、註冊牙醫或僱員補償評估委員會證明必須缺勤的期間)
 - c. **醫療費**：須支付有關的醫療費，金額與本地支付醫療費的最高金額相同。須為當地容許執業行醫或容許從事外科、牙醫、脊骨療法、物理治療或職業治療工作的人所進行的或在其監督下進行的醫治
 - d. **義製人體器官或外科器具費用**：若供應及裝配有關義製人體器官或外科器具的費用得到「義製人體器官及外科器具委員會」的批准，則僱主必須負責支付

5.10 呈報工傷意外事故須知

5.10.1 怎樣向勞工處處長呈報

- 僱員
 - a. 應盡快向僱主報告，以免妨礙及延誤僱員補償事
 - b. 報告可以口頭方式或以書面向僱主或主管提交
 - c. 若死亡地點是在僱主的處所，則僱主將被視為已接獲通知
 - d. 若懷疑僱主並沒有就其工傷意外或指明職業病向勞工處處長呈報，可直接通知有關的勞工處僱員補償科分區辦事處
 - e. 辦事處若確定還未收到僱主的呈報，會以書面要求僱主按《僱員補償條例》的規定呈報有關工傷意外或指明職業病
- 僱主
 - a. 《僱員補償條例》第 15 條規定，**不論**該意外或職業病是否引起任何支付補償的法律責任，僱主**必須**以表格 2、2A 或 2B 向勞工處處長呈報
 - b. 工傷個案須於 **14 天內呈報**，死亡個案須於 **7 天內呈報**
 - c. 如沒有合理原因而逾期或未有向勞工處處長呈報僱員工傷事件，或提供虛假或具誤導性的資料，即屬違例，最高可被判罰款五萬元

5.11 Offence

ECO, Section: 48 **Contract of service not to be terminated during incapacity** 30/06/1997

(1) An employer shall not, without the consent of the Commissioner—

(a) terminate the contract of service or apprenticeship of an employee who has suffered incapacity in circumstances which entitle him to compensation under this Ordinance; or

(b) give notice to the employee of such termination, before—

(i) the Commissioner has issued a certificate under section 16A(2), to the employer and the employee; or

(ii) the employer has entered into an agreement under section 16CA(1), with the injured employee; or

(iii) an Ordinary Assessment Board or a Special Assessment Board, as the case may be, has issued a certificate under section 16F or 16G(3), to the employee, the employer and the Commissioner, whichever occurs first. (Replaced 1 of 1995 s. 15)

(1A) Further to subsection (1), an employer shall not, without the consent of the Commissioner—

(a) terminate the contract of service or apprenticeship of an employee who has suffered temporary incapacity for a period not exceeding 3 days in circumstances which entitle him to compensation under this Ordinance; or

(b) give notice to the employee of such termination, before—

(i) the period of temporary incapacity has expired; and

(ii) the compensation has been paid under section 10 to the employee or to the Court. (Added 67 of 1996

s. 7)

(2) Any employer who contravenes any of the provisions of subsection (1) or (1A) shall be guilty of an offence

and shall be liable on conviction to a fine at level 6. (Added 55 of 1969 s. 26. Amended 44 of 1980 s. 15; 76 of 1982 s. 30; 63 of 1992 s. 17; 36 of 1996 s. 25; 67 of 1996 s. 7)

5.12 懷疑雇員濫用工傷制度

a) 處理程序

1. 委派專責人員：適當 + 受訓
2. 儘快面見雇員及證人：收集資料 + 保留會面記錄 + 保留證據
3. 要求雇員書面交待實發經過 + 提供曾發生以外的證據
4. 安排指明醫生驗傷：7 天內 (s.16, ECO)
5. 在雇員收取工傷病假工資期間，繼續安排指定醫生治療：(s.16 (4) 如僱員沒有按根據本條所作要求接受身體檢查，其獲得補償的權利須暫時中止，直至上述檢查作出為止...)
6. 向醫生索取肇事報告
7. 如未能確定是否職業病，儘快安排雇員往職業健康診所接受評估、治療
8. 如情況及證據明顯值得懷疑，雇主可拒絕承認個案
9. 繼續緊密與各方跟進，保留書面記錄
10. 如雇員拖延銷假、判傷，雇主可單方面進行書面銷假
11. 如搜集到雇員欺詐證據，交保險公司、勞工處及警方跟進

b) 聲明書 (Sample)

本人_____，員工編號 _____，為
_____公司 _____(職位)，
於 _____年_____月_____日 已向公司填交公司工傷報告。本人明白根據香港雇員補償條例，本人須遵守下列規則，否則，本人之工傷補償申請可能**受影響及取消**，本人並可能觸犯有關法律或保險條例，而可能負上刑事責任或民事**檢控**。

本人現聲明：

1. 本人受傷是由於為_____工作而引致；
2. 本人並無故意自傷；
3. 本人並不曾及不會故意以任何方式或任何不作為而加重傷勢；
4. 本人在工傷當日之工傷非因為吸毒或喝酒所引起的；
5. 本人在工傷當日之工傷非由於本人自身病引起的，而本人現在向公司聲明未嘗染有該類病；
6. 本人在工傷當日之工傷非由於本人嚴重及故意行為不檢所導致；
7. 本人不曾及不會故意誇大傷勢；
8. 於領取補償期間，本人不能為其他雇主工作不論工作是否暫時性、兼職或全職，包括雇主是本人或本人之親友；
9. 除非有法定適當理由，本人必須接受公司指定醫生免費檢查；
10. 本人願意隨時回答及最遲不超過 48 小時回答公司任何有關工傷申請的問題，包括，補充工傷原因及過程資料、工傷進度、醫療報告等...公司通知本人的方式為：

以電話或 SMS 通知。本人的電話號碼： _____

或掛號信函到本人地址： _____

11. 本人若因為任何理由，需要長時間離開香港，必須向雇主言明及向法院申請。

本人現謹此聲明，本人清楚明白並願意遵從以上各項條文。本人亦瞭解，如本人未有遵守以上任何條文，公司有權採取適當之法律行動。

本人 _____ (簽署)

身份證號： _____ 日期： _____

6. Appendix

6.1 Chapter: 221 Title: CRIMINAL PROCEDURE ORDINANCE

Gazette Number:

Schedule: 8 Heading: LEVEL OF FINES FOR OFFENCES

Version Date: 30/06/1997

[section 113B]

Level 1 \$2000

Level 2 \$5000

Level 3 \$10000

Level 4 \$25000

Level 5 \$50000

Level 6 \$100000

(Added 58 of 1994 s. 3)

Appendix 2: Judgment Interest Rate fixed by the Chief Justice pursuant to section 50 of the District Court Ordinance (Cap. 336) are published by notice in the Gazette:

Effective Date Annual Rate

1 April 2009 8.000%

1 January 2009 8.192%

1 October 2008 8.250%

1 July 2008 8.353%

1 April 2008 9.398%

1 January 2008 10.420%.....

6.2 HKID Symbol & Description

Symbol / Description

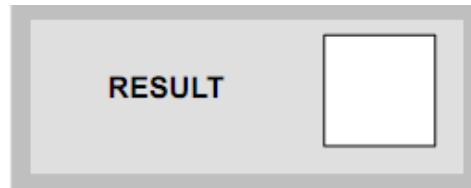
- *** / The holder is aged 18 or over and is eligible for a HKSAR Re-entry Permit
- * / The holder is aged between 11 and 17 and is eligible for a HKSAR Re-entry Permit
- A / The holder has the right of abode in the HKSAR
- C / The holder's stay in the HKSAR is limited by the Director of Immigration at the time of registration of the card
- R / The holder has the right to land in the HKSAR
- U / The holder's stay in the HKSAR is not limited by the Director of Immigration at the time of registration of the card
- Z / The holder's reported place of birth is Hong Kong
- X / The holder's reported place of birth is the Mainland
- W / The holder's reported place of birth is Macau
- O / The holder's reported place of birth is in other country or region
- B / The holder's reported date of birth or place of birth has been changed since first registration
- N / The holder's reported name has been changed since first registration.

Above is just for information, for accurate and updated information, please check with immigration hotline and also visit this website:

<http://www.immd.gov.hk/eng/services/hkid/smartid.html>

作業封面

Cover Sheet of the Assignment



Course Title: Certificate Course on Employment Ordinance and Human Resource Management
科目名稱

Course Code: HRLA-001

科目編號

Submission Date: _____

交卷日期

Assessment Title:

作業標題:

In the case of SECRETARY FOR JUSTICE v SING PAO NEWSPAPER MANAGEMENT LIMITED, CAAR 2/2007, please discuss mitigating factors (可減輕處罰的因素) that the court might take into account.

(Ref 01: 僱主拖欠工資判罰 2017 年 08 月 10 日

雅仕國際有限公司拖欠僱員工資，違反《僱傭條例》，今日在觀塘裁判法院承認控罪，被判罰款 54,000 元。勞工處表示，該公司在工資期屆滿後七日內，未向六名僱員支付工資，款額約 24 萬元。勞工處強調，不會容忍欠薪行為，將繼續嚴厲打擊。

http://www.news.gov.hk/tc/categories/school_work/html/2017/08/20170810_171851.shtml)

(Ref 02: http://orientaldaily.on.cc/cnt/news/20170507/00176_038.html)

(Ref 03: https://hk.on.cc/hk/bkn/cnt/news/20200123/bkn-20200123171259799-0123_00822_001.html)

...去年 10 月至 12 月，分別有 129 宗、123 宗及 28 宗，大多數傳票都是罰款數千元，最輕判罰 1000 港元，判罰最重是監禁 2 個月，緩刑 2 年。...被西九文化區管理局終止建造工程合約的新昌營造廠有限公司，共得 58 張傳票...，每張傳票罰款 3000 港元，共 17.4 萬港元。另有 1 名僱主沒有在工資期屆滿後 7 天內支付工資，以及未有按照勞審處或小額薪酬索償仲裁處的判令，在去年 10 月被判 240 小時社會服務令。)

Student Name: _____

學生姓名

Lecturer's signature: Lawrence SK Li

導師簽署

免責聲明：

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Leonardo Da Vinci



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