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Hong Kong passes Employment and Retirement Schemes Legislation (Offsetting Arrangement) (Amendment) Bill 2022

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Introduction

On 9 June 2022, the Hong Kong Legislative Council passed the Employment and Retirement Schemes Legislation (Offsetting Arrangement) (Amendment) Bill 2022 (the Bill). It is estimated that the amendments will come into effect in 2025 at the earliest, as the government plans to implement the amendments together with the Mandatory Provident Fund Schemes Authority's electronic mandatory provident fund (eMPF) platform.

The Bill seeks to abolish the statutory right of an employer to use the accrued benefits of employers' mandatory contributions under the mandatory provident fund (MPF) scheme to offset any long service pay or severance pay that is payable to an employee.

Key highlights

The Bill includes the following four key points:

- Starting from an appointed date (the transition date), employers will no longer be able to use the accrued benefits of employers' mandatory contributions under their MPF scheme to offset any long service pay or severance pay of an employee.
- Employers can continue to use their voluntary contributions, the returns derived from them and any gratuities that were paid based on the employees' length of service to offset any long service pay or severance pay.
- The Bill has no retrospective effect. If an employee's contract commences before the transition date, the employer can continue to use the accrued benefits of employer's mandatory contributions under the MPF scheme to offset the employee's long service pay or severance pay, in respect of the portion attributed to their employment before the transition date.
- The payment rate for long service pay or severance pay (ie, two-thirds of their monthly wage multiplied by their years of service), the ceiling on the monthly wages for calculation (HK$22,500) and the payment cap (HK$390,000) for monthly rated employees will remain unchanged.

"Grandfathering" arrangement

To minimise the number of employers who may dismiss employees before the transition date for the sake of avoiding their obligations under the Bill, the government will put in place a "grandfathering" arrangement that corresponds with the portion of long service pay or severance pay accrued before the transition date for employees who were hired before the transition date.

Those employees will have their long service pay or severance pay divided into two portions – namely, the pre-transition portion (ie, for the employment period before the transition date) and the post-transition portion (ie, for the employment period starting from the transition date). The long service pay or severance pay will be calculated as follows:

- the pre-transition portion (employment period before transition date) – the employee's last full month's wages immediately preceding the transition date multiplied by two-thirds of their monthly wage multiplied by their years of service before the transition date; and
- the post-transition portion (employment period after transition date) – the employee's last full month's wages before the termination of their employment multiplied by two-thirds of their monthly wage multiplied by their years of service after the transition date.

The maximum amount of the combined pre-transition and post-transition portions of any long service or severance pay under the "grandfathering" arrangement remains capped at HK$390,000.

Effect of amendments on other ordinances

The abolition of the offsetting arrangement will also apply to:

- occupational retirement schemes under the Occupational Retirement Schemes Ordinance (Chapter 426);
- the two school provident funds under the Grant Schools Provident Fund Rules (Chapter 279C) and the Subsidised Schools Provident Fund Rules (Chapter 279D); and
- overseas occupational retirement schemes of employees from outside Hong Kong, which are exempted from the MPF system.

The Bill also amends the Inland Revenue Ordinance (Chapter 112) to clarify that salaries tax is not chargeable to long service pay or severance pay paid in accordance with the Employment Ordinance (Chapter 57). However, provisions relating to the termination of contracts of employment, the eligibility for long service pay or severance pay and Part VIA regarding employment protection under the Employment Ordinance will remain unchanged under the Bill.

Measures to help employers ease transition

The government has allocated HK$33.2 billion for a 25-year subsidy scheme to help employers bear any increased operational costs due to the implementation of the Bill, especially for small and medium enterprises.

These employers will only have to pay a percentage of the long service pay or severance pay due after the transition date, which will start at 50% in the initial three years and gradually increase to 95% over 25 years. The government will subsidise the remaining amount, with the subsidised amount gradually reducing from 50% to 5% over the same period.

Under the scheme, if the long service pay or severance pay owed to the employees in any of the initial three years does not exceed HK$500,000, the employer's contribution will be capped at HK$3,000 for each employee for that year. The remaining amount will be subsidised by the government. From the 10th year onward, the government will subsidise a smaller percentage of the long service or severance pay in respect of the portion that exceeds HK$500,000.

Every employer will have to set up a designated savings account (DSA) and contribute 1% of their employees' relevant income, which will be applied to settle any long service pay or severance payment. The contribution to the DSA will be capped at 15% of the employer's annual payroll. After surpassing the 15% threshold, the employer will not be required to make further contributions.

Comment

While the Bill is estimated to be implemented in 2025, employers should take note of the upcoming changes and ensure that they put in place measures to facilitate compliance with the amendments.

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