

July 2011

The Long-awaited Personal Data (Privacy) (Amendment) Bill 2011 is Introduced into the Legislative Council

The Government introduced the Personal Data (Privacy) (Amendment) Bill 2011 into the Legislative Council on July 13, 2011. The Bill seeks to implement proposals published in a Hong Kong Government report in April 2011. The proposals were formulated following a lengthy review process of the Personal Data (Privacy) Ordinance, which commenced in 2009.

The recent enforcement action taken by the Privacy Commissioner against a number of Hong Kong banks over the transfer of customers' personal data for direct marketing purposes and the Octopus Rewards incident demonstrate that the changes proposed in the Personal Data (Privacy) (Amendment) Bill 2011 are both timely and relevant.

Key Amendments in the Personal Data (Privacy) (Amendment) Bill 2011 include:

- (i) Cross marketing
There are specific provisions directed at cross marketing and selling personal data, including the requirement of confirming in writing the types of personal data being transferred, the classes of persons to which data will be transferred, and the categories of goods and services that will be cross-marketed.
- (ii) Direct marketing
There will be a requirement to inform data subjects of their right to opt out on first use of their personal data for marketing purposes and they will have the right to opt out at any time subsequently.
- (iii) New offences of disclosing personal data
It will be an offence for a person who obtains personal data from a data user without the data user's consent, and subsequently discloses the personal data with intent to obtain monetary gain or other benefits or to cause loss. A similar offence has been created where the data subject is caused psychological harm due to the disclosure of personal data. The penalties for both will be a fine of HK\$1 million and imprisonment for five years.
- (iv) Privacy Commissioner to provide legal assistance
There is a new provision which will empower the Privacy Commissioner to provide legal assistance to data subjects who intend to bring proceedings under the Personal Data (Privacy) Ordinance to seek compensation from data users.

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Points for employers to consider...

- The amendments set out at (iii) and (iv) above may be of particular interest to employers as a wide range of staff may handle the personal data. As a result, they should be appropriately trained and any existing systems to safeguard data should be reviewed and/or strengthened.
- The risk profile for any claims brought by data subjects being assisted by the Privacy Commissioner's Office may require upgrading and escalating within the employer's company for a swift resolution, as the scrutiny of the Privacy Commissioner's Office is unlikely to be desirable and may attract negative publicity.

For a comprehensive overview of the new Bill, please see the Client Alert published by our Privacy and Data Protection Group:

<http://www.bakermckenzie.com/ALChinaHandlingPersonalDataJul11/>

Addition to the HR Reading List: The Revised Code of Practice under the Disability Discrimination Ordinance is Effective!

The Equal Opportunities Commission's revised Code of Practice on Employment under the Disability Discrimination Ordinance took effect on June 3, 2011.

The purpose of the review and consequent revision of the Code of Practice was to reflect developments in both local and international jurisprudence and to provide best practice guidelines on handling common human resources issues. Although the Code of Practice is not legally binding, a failure to comply with it is admissible and will be taken into account by the Hong Kong courts when determining liability under the Disability Discrimination Ordinance.

The amendments made to the revised Code of Practice are substantive and the additional guidance is very useful. However, it is worth noting that a few issues which were identified during the public consultation process as being of concern to employers in the draft Code of Practice remain unchanged in the final version of the revised Code of Practice.

That old chestnut – the comparator issue...

For example, there are references in the revised Code of Practice (sections 4.18 - 4.20) to a comparator being someone who could be an individual "without the same disability" although the Disability Discrimination Ordinance and case law provide that the comparator must be a person without "a disability". In our view, the fact that the revised Code of Practice states that a comparator could be an individual with a different disability is problematic. This is a departure from the language in the Disability Discrimination Ordinance and recent case law on this point.

Practical steps

- Although the Code is not legally binding, the courts do take into account breaches of it. Therefore when defending an allegation that the employer has failed to follow the Code of Practice, any conflict between the Code and the Disability Discrimination Ordinance should be flagged to the court. Breaches of the Code are of evidentiary importance and of particular significance where the evidence is finely balanced.
- During pre-litigation negotiations, it is worth analysing and drawing to the attention of the opposing party any circumstances where alleged breaches of the Code do not accord with case law or the legislation as this may strengthen the employers' position.

Stay tuned for a more detailed client alert on the important changes to be aware of in respect of the revised Code of Practice.

Statutory Minimum Wage – Latest Developments

Statutory Minimum Wage: Industry-specific Reference Guidelines now available in English

The industry-specific reference guidelines have recently been issued in English by the Labour Department and can be accessed via this link: <http://www.labour.gov.hk/eng/news/mwo.htm>. The industries covered are as follows:

- Real Estate Agency
- Logistics
- Property Management, Security Services and Cleaning Services
- Hotel and Tourism
- Catering
- Retail

Labour Department inspections

On 15 July, 2011 the Labour Department commenced a special campaign to inspect a number of arcades and markets under The Link Management Limited to ensure that its service contractors are complying with the Minimum Wage Ordinance (“**MWO**”).

The Labour Department has confirmed that Labour Inspectors are proactively conducting inspections of establishments of various trades and are undertaking targeted enforcement campaigns for low-paying sectors.

Since May 1, 2011 when the MWO came into effect through the end of June 2011, Labour Inspectors have conducted over **6,400** workplace inspections to monitor compliance with the MWO.

The Labour Department has warned that stringent enforcement action is being taken for willful breaches.

Technical solutions to MWO compliance?

The United States Department of Labor (“**DOL**”) recently announced the launch of a new and unprecedented application for Apple’s iPhone, iPod Touch, and iPad. It is likely that the application will be available on other mobile devices in the future.

The DOL has stated that it developed an application to allow employees a simple way to record regular work hours, break times, and overtime hours. The application also allows employees to email a summary of hours worked. The DOL plans to update the application to include data such as tips, commissions, bonuses, deductions, holiday pay, pay for weekends, and shift differentials. The DOL’s application is free and available in both English and Spanish.

It is inevitable that such technology will be made available in other countries and the Hong Kong Government may be inspired to follow the DOL’s ingenuity. Such applications are an incentive to employers to revisit their record keeping methods and ensure that their systems can compete in terms of accuracy of data with such cutting edge technology.

Case Law Update

Labour Department pursues prosecution of employer for defaulting on payment of Labour Tribunal award

Take away points

- (i) Directors of limited companies should ensure that they are immediately notified of any awards made by the Labour Tribunal or the Minor Employment Claims Adjudication Board. They may be personally liable for the failure to comply with any awards, as this constitutes a breach of the Employment Ordinance. It is worth noting that upon conviction of this criminal offence the maximum penalty is a fine of up to HK\$350,000 and imprisonment for three years.
- (ii) This case demonstrates that the Labour Department is prepared to aggressively pursue employers who fail to comply with awards issued by the Labour Tribunal or the Minor Employment Claims Adjudication Board. This case sends out a strong message that non-compliance is not an option!

Background

The Labour Tribunal ordered DCDC (HK) Limited to pay an award of approximately HK\$310,000 to its employee within 14 days which DCDC (HK) Limited failed to do. The Labour Department consequently pursued a prosecution against them for breach of the Employment Ordinance.

Decision

The director of DCDC (HK) Limited was convicted of the offence of non-compliance with the award issued by the Labour Tribunal. He was sentenced to a community service order of 100 hours.

Court upholds post-termination restrictions resulting in compensation being paid to former employer

Two former employees of an estate agency were found to be in breach of their post termination obligations and their duty of confidentiality when they joined a competitor and used confidential information to procure business for their new employer.

Take away points

This decision demonstrates that well-constructed and appropriately tailored post-termination restrictions are likely to be enforced by the courts.

It is advisable to undertake regular reviews of confidentiality obligations and restrictions to ensure that they continue to be relevant and appropriate to the industry in terms of the duration of restrictions, geographical area covered and type of work restricted. In this case, the plaintiff did not seek to prevent the former employees from working as estate agents, but they were not permitted to contact the plaintiff's clients. The judge found such a clause to be reasonable in the circumstances.

Background

In the case of *Easy Property Company Limited v. So Lai Wah, Lam Kwok Wah, Wellcome Property Agency Limited, Kwok Yan Kit and Yip Ming Fai*, the Court of First Instance considered the allegations made by East Property Company Limited (the "**plaintiff**") against its two former employees, So Lai Wah ("**So**") and Lam Kwok Wah ("**Lam**") and their new employer, Wellcome Property Agency Limited ("**Wellcome**").

So and Lam resigned on 31 October 2007 providing seven days' notice and confirming in their letter of resignation that the effective date of termination was 6 November 2007. They did not return to work after 31 October 2007.

It was alleged that So and Lam were in breach of contract and the Plaintiff relied upon five transactions which they conducted to evidence its claim. Two of the five transactions took place between 31 October and 6 November 2007 whilst So and Lam were still employed by the Plaintiff.

The specific allegations were as follows:

- (i) They contacted clients of the Plaintiff within 180 days of the date of termination;
- (ii) They copied information and data from the Plaintiff's database and used this information and data during their new employment with Wellcome; and
- (ii) They failed to return the information and data to the Plaintiff when their employment ceased and gained a benefit from the use of the data.

The Plaintiff also alleged that Wellcome had procured So and Lam to breach their employment contract.

Decision

The Judge found in favour of the Plaintiff as follows:

- (i) Breach of implied duty of good faith and fidelity
So and Lam were found to be in breach of the implied duty of good faith, loyalty and fidelity in respect of the two transactions that were made after they had left work but prior to the effective date of termination (between October 31 and November 6, 2007).
- (ii) Reasonableness of restraint of trade clause
The judge considered that the restriction not to contact clients within a period of 180 days was reasonable given the competition within the estate agency industry.
The judge also found that even though it was alleged that clients had contacted Lam, he was in breach for allowing such contact and conducting business with them within the restricted period.
- (iii) Failure to return documents, misappropriating and copying confidential information
The judge ruled that So and Lam had misappropriated and copied confidential information which belonged to the Plaintiff. He rejected So and Lam's arguments that they had obtained this information from other sources such as newspapers and magazines and considered upon analysis that such detailed information would not be available through such sources.
- (iv) Wellcome procuring a breach of So and Lam's employment contracts with the Plaintiff
The judge held that the Plaintiff had not demonstrated that it was Wellcome's intention to procure breaches by So and Lam. On the facts the judge found that it was the ultimate intention of Wellcome to render more business and the breaches of the employment contracts were neither an end desired by Wellcome nor a means of achieving that end.

The Plaintiff was awarded a total of HK\$350,522.08.

To find out more about how our Employment Law Group can add value to your business, please contact:

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Court of Appeal rules that overpayment of sick leave cannot be offset under Employees' Compensation Ordinance

Summary

The Hong Kong Court of Appeal's decision in *Kan Wai Ming v Hong Kong Airport Services Limited* confirmed the fact that overpayment for sick leave made under section 10 of the Employees' Compensation Ordinance cannot be used to set off compensation under other sections of the Employees' Compensation Ordinance.

The Court of Appeal held that the Applicant's entitlement to compensation under section 9 and section 10 were separate and distinct and therefore if the employee was entitled to both then they could not be set off against each other as a result of the construction of section 10(4) of the Employees Compensation Ordinance.

Take away points

The judge acknowledged that the risk of overpayments rests with the employer and made two suggestions for employers to mitigate against this risk:

- (i) If the employee is receiving periodical payments the employer could exercise its right to require the employee to undergo a medical examination. If the employee refuses to do so then this will suspend his right to compensation.
- (ii) The employer can institute proceedings under the Employees' Compensation Ordinance to assess compensation and thereby seek confirmation from the court of the period for which periodical payments would fall to be made by obtaining a final assessment under section 10.

In Other News

Potential dates for the diary – Government proposal to increase relevant income levels for the Mandatory Provident Fund

The Government has made a proposal to the Legislative Council to increase both the monthly minimum relevant income level and the monthly maximum relevant income level for Mandatory Provident Fund contributions.

It is proposed that the minimum relevant income level be raised from HK\$5,000 to HK\$6,500 with effect from November 1, 2011, and the monthly maximum relevant income level be increased from HK\$20,000 to HK\$25,000 with effect from June 1, 2012.

New Bill will provide employees with additional wage protection if employers become insolvent

The Protection of Wages on Insolvency (Amendment) Bill 2011 was introduced into the Legislative Council on July 13, 2011. Its purpose is to expand the scope of the Protection of Wages on Insolvency Fund to cover pay for untaken annual leave and untaken statutory holidays under the Employment Ordinance.

The government proposes that the Protection of Wages on Insolvency Fund covers the following new items:

- Pay for untaken annual leave under the Employment Ordinance, not exceeding the employee's full statutory entitlement for the last leave year; and
- Pay for untaken statutory holidays under the Employment Ordinance within four months before the employee's last day of service.

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