



符莎莉律師事務所
SF Lawyers

In association with KPMG Law



上海睿威律師事務所



Employment issues in the Spotlight during turbulent times



上海睿威律師事務所

© 2020 上海睿威律師事務所, a Shanghai law firm which is an independent law firm operating in PRC and which belongs to the KPMG global legal network. All rights reserved.



符莎莉律師事務所
SF Lawyers

In association with KPMG Law

© 2020 SF Lawyers, a Hong Kong law firm which provides legal services is in association with KPMG Law. They are separate legal entities. Neither SF Lawyers nor KPMG Law has any control over, or acts as an agent of, or assumes any liability for the acts or omissions of, the other. Both SF Lawyers and KPMG Law are member firms of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

Company's Greatest Assets - its People

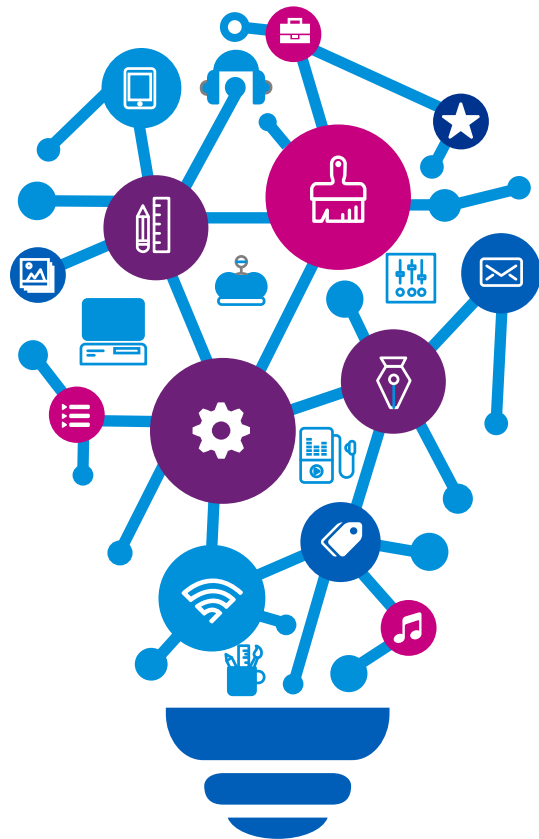







No matter the business model, geographical location or type of service/product on offer, one of the greatest assets of any business are its people. People are the core of innovations, culture, solutions and reputation. Businesses must therefore be vigilant in handling employment matters when they are dealing with a crisis event and/or business slowdown.

This pack is designed to set out some of the legal issues that businesses should bear in mind when considering the most common measures in handling employees during turbulent times.

Please bear in mind that employment solutions should always be catered as there is “no one size fits all” solution. The designing of each solution would have to take into consideration all relevant legal, employee relations, tax and immigration issues to ensure an optimal and compliant outcome. Above all, businesses are reminded to always seek professional assistance and not to make any rash decisions to avoid unnecessary dispute and/or legal consequences. Our teams are experts in employment law and have extensive experience in assisting businesses in mainland China and Hong Kong and will be happy to assist you.

Common options considered by Employers in difficult times



- 
Remote and Alternative Working Arrangements
- 
Changes to Secondment Arrangements
- 
Initiation of Unpaid or Part paid Leave
- 
Deferral of Employment and/or Payments
- 
Layoffs and Termination of Employment

Remote and Alternative Working Arrangements

Remote working arrangements are suitable during times such as an epidemic. During these times, it may not be considered safe for employees to travel to and from the office. Technologies such as email, Virtual Private Networks and cloud computing enable employees to continue servicing the businesses' clients.

For industries where remote working arrangements are not suitable, alternative working arrangements may be put in place, such as flexible working hours and shift work, to protect the employees.

PRC Legal Considerations

1. Employers (and responsible persons) remain liable for workplace safety. Employers should ensure relevant policies are in place.
2. Employees continue to be entitled to overtime pay if they work overtime. Also be mindful of the maximum overtime hours employees may lawfully be required to work.
3. Special care must be taken to ensure confidentiality of information while employees work remotely. Robust confidentiality policies and guidelines should be in place.
4. Employers continue to be liable to vicarious liability for any wrong committed by its employees.

Hong Kong Legal Considerations

1. Points 1, 3 and 4 of the PRC Legal Considerations are also applicable in Hong Kong.
2. The threshold for employee compensation claims is very low. In the event an employee is injured while on a remote or alternative arrangement, the employer will most likely be liable.
3. Requiring uncooperative employees to work from home may not be enforceable unless otherwise provided for in the contract.

Changes to Secondment Arrangements

Secondment arrangements are often implemented to cater for temporary assignments. In an epidemic or other crisis, employers or secondees may wish to make changes to the secondment arrangement to ensure the health and safety of the secondee. Please note that most secondments involve laws of at least 2 jurisdictions (i.e., the home and host jurisdictions). Care must be taken to ensure compliance with both in scenarios where the secondee wishes to return to the home jurisdiction.

PRC Legal Considerations

1. If the secondment is to be terminated, the termination clause in the secondment agreement should be followed. In many cases, terms of termination of secondment by employer or employee may be different. If the clause does not set out post-termination responsibilities (such as rental and repatriation costs) clearly, the parties should seek to negotiate and resolve these issues in the form of a settlement agreement.
2. If the request for repatriation comes from multiple secondees, care must be taken to avoid discrimination. In the PRC, 5 categories of employment discrimination are recognized, they are gender, ethnicity, disability, individuals with infectious diseases, and rural migrants.
3. Deregistration of work permit must be carried out in the event the secondee intends to leave permanently.

Hong Kong Legal Considerations

1. Points 1 and 2 of the PRC Legal Considerations are also applicable in Hong Kong. The recognized discrimination categories are as follows: sex, marital status, pregnancy, disability, family status and race.
2. If the secondee leaves Hong Kong permanently, there are reporting and potentially tax withholding requirements that employers must follow.

Initiation of Unpaid or Part paid Leave

One possible way of reducing costs during turbulent times is to put staff on unpaid or part paid leave. If used appropriately, employers can reduce costs while eliminating the need for termination and sourcing for talent once the market picks up again.

PRC Legal Considerations

1. Unpaid/part paid leave are not types of leave recognized in the PRC. It may therefore only be utilized if agreed by the employee (see point 3 and 4 below). Unilaterally imposing unpaid or part paid leave on employees can lead to serious legal consequences.
2. Be mindful to avoid discrimination when choosing employees to go on leave. See above slide for the recognized discrimination categories.
3. In some cases, even if the employee agrees to take part paid/unpaid leave, that agreement may not be enforceable if taken to court.
4. It must be borne in mind that part paid/unpaid leave is not widely used and unfamiliar to many employees.
5. In the event an employee is willing to take part paid/unpaid leave, all correspondence should be documented and the parties should enter into an agreement to avoid disputes.

Hong Kong Legal Considerations

1. When choosing employees to take part paid/unpaid leave, the employer should take care to avoid discrimination. See above slide for the recognized discrimination categories.
2. Hong Kong has a history of employers offering part paid/unpaid leave. The arrangement should be set out in a contract to avoid disputes.
3. If employees are forced into part paid/unpaid leave, employees may sue the employer for breach of employment contract and/or constructive dismissal.

Deferral of Employment and/or Payments

During turbulent times, employers generally stop expanding the workforce. However, in cases where an offer or contract has already been made, the employer may have no choice but to defer the start of employment for the new joiners. For employers who are in desperate situations, it may have no choice but to defer making payment of wages. However, as can be seen below, deferral of employment/payment is not straightforward and carries risk.

PRC Legal Considerations

1. Most offer letters contain a commencement date. Once such offer letter is signed by both parties, it will be extremely difficult for the employer to defer the commencement of employment. Unilaterally imposing a deferral may result in a claim by the employee.
2. Late payment of wages is a violation of the labour laws. Employees may be entitled to unilaterally terminate the employment contract on late payment of wages.
3. Employees may potentially agree to late payment of wages, but it does not absolve the liability of the employer.

Hong Kong Legal Considerations

1. Point 2 of the PRC Legal Considerations is also applicable in Hong Kong.
2. Deferral of employment in Hong Kong is quite common during difficult times. Employees however are free to reject the request for deferral of employment.
3. If employee agrees to late payment of wages, the parties should enter into an agreement to avoid future disputes.

Layoffs and Termination of Employees

As a last resort, employers may consider layoffs and termination of employees. This is generally not a recommended option due to the implications it may have on the rest of the business. From an employee relations perspective, it also hurts morale and creates uncertainties for those who remain. This is also not an easy option from an employment law perspective, as can be seen below.

PRC Legal Considerations

1. An epidemic or other factors leading to downturn of business is not a reason for layoffs and termination.
2. Mass layoffs require prior notice to the labour bureau and the opinions of the labour bureau shall be duly considered.
3. Terminations in the PRC generally must be with cause. Wrongly dismissing an employee may result in the employee being reinstated or severance payments to be made.
4. Just because an employee is on probation, it does not mean the employer can freely terminate the employee. Reasons must be provided as to why the employee does not pass probation.

Hong Kong Legal Considerations

1. Termination of employees must be carried out in accordance with the termination clause in the employment contract.
2. For senior employees, always enter into settlement agreements to avoid disputes. Disputes usually surround enforceability of restrictive covenants.
3. While employers may terminate employees in Hong Kong without cause, employers need to be mindful of unlawful terminations.
4. Severance payments may be payable for qualifying employees who are made redundant. Employers cannot avoid payment of severance payment by labelling a redundancy as termination without cause.

Contact Us



Shirley Fu
Partner, M&A and Corporate
shirley.fu@kpmglegal.com.cn

SF Lawyers
In Association with KPMG Law
1125-1127 Prince's Building
10 Chater Road
Central, Hong Kong



Paula Yu
Senior Partner, M&A and Corporate
paula.yu@kpmglegal.com.cn

上海睿威律师事务所
Room 604-606, Plaza 66
1266 Nanjing West Road
Shanghai 200040, China



Alex Ma
Senior Associate, Employment
ac.ma@kpmglegal.com.cn

SF Lawyers
In Association with KPMG Law
1125-1127 Prince's Building
10 Chater Road
Central, Hong Kong



符莎莉律師事務所
SF Lawyers
In association with KPMG Law



上海睿威律師事務所

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2020 SF Lawyers, a Hong Kong law firm which provides legal services is in association with KPMG Law. They are separate legal entities. Neither SF Lawyers nor KPMG Law has any control over, or acts as an agent of, or assumes any liability for the acts or omissions of, the other. Both SF Lawyers and KPMG Law are member firms of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International. The names SF Lawyers and KPMG Law and their respective logos are registered trademarks.

© 2020 上海睿威律師事務所, a Shanghai law firm which is an independent law firm operating in PRC and which belongs to the KPMG global legal network. All rights reserved.