

Statutory Paternity Leave Introduced in Hong Kong

On 24 December 2014, the Employment Ordinance (“EO”) was amended to introduce three days’ paid paternity leave for working fathers (and fathers-to-be). The statutory paternity leave provisions will come into operation on 27 February 2015.

1. When is an employee entitled to paternity leave?

A male employee will be entitled to paternity leave in respect of the birth of a child if (a) he is the child’s father, (b) he has been employed under a “continuous contract” (i.e., satisfies the “418” rule) immediately before taking the leave, and (c) has complied with the specified “notification requirements”.

There are 2 ways in which an employee can comply with the “notification requirements” referred to above.

Option 1 - he must notify his employer of his intention to take paternity leave at least 3 months before the expected date of the delivery of the child. He must then tell his employer of the intended date of his leave before the taking of the leave (the original Bill required 2 days notice, but that has been removed).

Option 2 - if he does not give the 3 months’ notice as per Option 1 above then he must notify his employer of each intended date of his leave at least 5 days before that date.

Further, if the employer requires, the employee must also give the employer a written statement signed by the employee stating he is the child’s father, the name of the child’s mother and the expected date of delivery or (if the child has already been born) the actual date of delivery.

The three days of paternity leave can be taken consecutively or separately in the period beginning 4 weeks before the expected date of delivery of the child and ending 10 weeks after the actual birth of the child.

2. When is an employee entitled to paternity leave pay?

An employee will be entitled to paternity leave pay if:

- a. he has been employed under a “continuous contract” for not less than 40 weeks immediately before taking the paternity leave; and
- b. he provides to his employer the specified documents (the “**requisite document**”).

For a birth in Hong Kong the requisite document is a birth certificate of the child issued under the *Births and Deaths Registration Ordinance* with the employee’s name entered as the father. A similar requirement applies in respect of a child born overseas except that if the place overseas does not issue birth certificates, then the employee must produce any other document issued by the authorities in the place overseas that can reasonably be taken as proof that the employee is the child’s father.

There are certain other requisite documents that need to be provided in respect of a child who is born dead or dies after birth and a birth certificate is unavailable.

The employee must provide the requisite document to the employer within 12 months after the first day on which the employee takes paternity leave, or if the employee has ceased employment during these 12 months, then within 6 months after the cessation of employment (whichever period expires first).

3. What is the rate of paternity leave pay?

The daily rate of paternity leave pay is four-fifths of the daily average wages of the employee in the 12 months (or actual period of employment if shorter) before (a) the first day of paternity leave (if it is taken consecutively) or (b) (if it is not taken consecutively) the day paternity leave is taken.

In calculating daily average wages any period (and wages paid during that period) where the employee was not paid wages or full wages because of essentially being on authorised leave, are to be excluded.

4. When must paternity leave pay be paid?

Paternity leave pay must be paid:

- a. if the requisite document is provided on or before the leave day, then not later than (i) the day on which he is next paid his wages after the leave day or (ii) if he ceases employment before then, not later than 7 days after the cessation of employment; or
- b. if the employee provides the requisite document after the leave day, then (i) not later than the day on which he is next paid his wages after the document is provided or (ii) if he ceases employment, not later than 7 days after the document is provided.

5. When can an employer claw back overpaid paternity leave pay?

Where an employer has paid the employee paternity leave pay before the requisite document is provided, the employer may deduct from the employee's wages an amount equivalent to the paternity leave pay if:

- a. the employee fails to provide the requisite document within 3 months after the first day on which the paternity leave is taken, or
- b. the employee has ceased to be employed by the employer and fails to provide the requisite document before the cessation of employment.

However, if after making the deduction, the employee provides the requisite document within the timeframe mentioned in 2 above, then the employer must pay paternity leave pay not later than the day on which he is next paid his wages after the requisite document is provided or if he has ceased employment, not later than 7 days after the requisite document is provided.

6. What is the penalty for breach?

An employer who without reasonable excuse fails to grant statutory paternity leave or pay statutory paternity leave pay commits an offence and is liable on conviction to a fine at level 5, currently, HK\$50,000.

7. What should employers do?

Employers should consider what policies and procedures they have in place for Paternity Leave. In particular, the policy should include a requirement that the employee provide a written statement (in a prescribed form) signed by the employee stating he is the child's father, the name of the child's mother and the expected date of delivery or (if the child has already been born) the actual date of delivery (see 1 above).

For employers who already provide a form of Paternity Leave, they should ensure that what they offer does not fall below the statutory minimum.

Contact Us

For inquiries related to this Legal Update, please contact the following persons or your usual contacts at our firm.

Duncan Abate

Partner

T: +852 2843 2203

E: duncan.abate@mayerbrownjism.com

Hong Tran

Partner

T: +852 2843 4233

E: hong.tran@mayerbrownjism.com

Mayer Brown JSM is part of Mayer Brown, a global legal services organisation, advising many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, Washington DC
ASIA: Bangkok, Beijing, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai, Singapore
EUROPE: Brussels, Düsseldorf, Frankfurt, London, Paris
TAUIL&CHEQUER ADVOGADOS in association with Mayer Brown LLP: São Paulo, Rio de Janeiro

Please visit www.mayerbrownjism.com for comprehensive contact information for all our offices.

This publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is intended to provide a general guide to the subject matter and is not intended to provide legal advice or be a substitute for specific advice concerning individual situations. Readers should seek legal advice before taking any action with respect to the matters discussed herein. Please also read the Mayer Brown JSM legal publications [Disclaimer](#). A list of the partners of Mayer Brown JSM may be inspected on our website www.mayerbrownjism.com or provided to you on request.

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated legal practices in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. Mayer Brown Consulting (Singapore) Pte. Ltd and its subsidiary, which are affiliated with Mayer Brown, provide customs and trade advisory and consultancy services, not legal services. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.