

**Application for certificate of exemption**

- [EO54.02] An application for exemption must be made in the prescribed form to the Commissioner for Labour who may grant exemption to an employment agency if he is satisfied that it is non-profit making and should, in the public interest, be so exempted.

**Section 55 Withdrawal of exemption**

(1) The Commissioner may, at any time, withdraw an exemption granted under s.54 if he is satisfied that the employment agency has ceased to be non-profit making or should not be so exempted in the public interest.

(2) Without prejudice to the generality of subs.(1), the grounds on which the Commissioner may withdraw an exemption shall include mutatis mutandis the grounds contained in s.53(1) on which he may refuse to issue or renew a licence or revoke a licence.

(3) Where the Commissioner withdraws his exemption from any person under subs.(1) he shall notify such person in writing of the grounds for such withdrawal.

(4) The holder of a certificate of exemption shall, within 14 days after he is notified under subs.(3) of the withdrawal of the Commissioner's exemption, deliver the certificate of exemption, and every copy thereof, to the Commissioner.

(5) No appeal shall lie under this Part against the decision of the Commissioner to withdraw an exemption granted to an employment agency.

**COMMENTARY****Enactment history**

- [EO55.01] This section was replaced by s.2 of the Employment (Amendment) Ordinance 1973.

**Withdrawal of exemption granted under previous Section 54 of the Ordinance**

- [EO55.02] Section 55 of the Ordinance empowers the Commissioner of Labour to withdraw or revoke an exemption of requiring an agency licence previously granted if he is satisfied that the employment agency has ceased to be non-profit making or should not be so exempted in the public interest.

Section 55(4) states that the holder of a certificate of exemption must, within 14 days after the holder is notified of the withdrawal of the exemption, to return the certificate back to the Commissioner.

Section 55(5) states such revocation or withdrawal of the exemption is not appealable as that this no appeal shall lie against the decision of the Commissioner to withdraw an exemption granted to an employment agency. The penalty for failure to return certificate of exemption after withdrawal or revocation of such exemption upon conviction is a fine of HK \$10,000.00.

**Section 56 Maintenance and delivery to the Commissioner of prescribed registers, records and returns**

- (1) A licensee shall:
- (a) maintain a record of:
    - (i) all job applicants registered with his employment agency; and
    - (ii) job applicants who, at the time of registration, were not residents of Hong Kong and who were placed in employment in Hong Kong by his employment agency, containing the person's name, address, Hong Kong Identity Card number or, in the case of a non-resident, passport number and citizenship, fee and commission received, date of employment and name and address of employer; and (Replaced 28 of 1992 s.5)
  - (b) keep such records available for inspection at the place of business of the employment agency by the Commissioner, or by any public officer authorised by him in that behalf, at all reasonable times. (Amended 28 of 1992 s.5)
- (2) A licensee shall, within such time as may be prescribed, deliver to the Commissioner such returns in respect of the employment agency as may be prescribed.
- (3) The records referred to in subs.(1) shall be retained by the licensee for a period of not less than 12 months after the expiration of each accounting year of the employment agency concerned. (Amended 28 of 1992 s.5)

**COMMENTARY****Enactment history**

This section was replaced by s.2 of the Employment (Amendment) Ordinance 1973. [EO56.01]

Subsection 1(a) was replaced, and subs.1(b) and 3 were amended by s.5 of the Employment (Amendment) Ordinance 1992.

**Definition of "Public officer"**

"Public officer" is defined by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) as any person holding an office of emolument under the Government, whether such office be permanent or temporary. Furthermore, a "public servant" is deemed to be the "employee" of a public body. See *Ng Sin Chau v HKSAR* (2000) 3 HKCFAR 62. [EO56.02]

**Maintenance of Records**

Section 56 of the Ordinance states that the agency must maintain a record of the particulars of all job applicants and every person who registers with the employment agency for employment. The records kept should be retained for a period of not less than 12 months after the expiration of each accounting year of the employment agency concerned. Regardless of whether the job applicant is in Hong Kong or not, the employment agency shall maintain records in compliance with the said provision. [EO56.03]

The records kept and maintained by the employment agency should contain the person's: (i) name and all aliases; (ii) current address or place of residence; (iii) Hong Kong Identity Card number or in the case of a non-resident, passport number and citizenship; (iv) fee and commission received; (v) date of employment; and (vi) name and address of employer.

If the collection of the above personal data is for the purpose of complying with the Employment Ordinance, it would not constitute a breach of the Personal Data (Privacy) Ordinance. However, in collecting, holding, processing and using job applicants' personal data, licensee must comply with the Data Protection Principles of the Personal Data (Privacy) Ordinance.

All such records must be made available for inspection by the Commissioner of Labour or any public officer authorized by him at all times at the place of business of the employment agency.

The penalty for the failure to maintain such records upon conviction is a fine of HK\$10,000.00.

### Section 57 Prohibited acts in respect of employment agencies

A licensee shall not, directly or indirectly:

- (a) receive from any person on account of having obtained, or in connection with obtaining or seeking to obtain, employment for that person:
  - (i) any reward of any kind; or
  - (ii) any payment or other advantage in respect of expenses or otherwise, except the prescribed commission; (Replaced 87 of 1975 s.2. Amended 28 of 1992 s.6)
- (b) share with any person, other than another licensee or a bona fide partner or shareholder in his employment agency, the prescribed commission which he is permitted to charge and receive; or (Amended 87 of 1975 s.2; 28 of 1992 s.6)
- (c) enter, except with the written permission of the Commissioner, into an agreement, express or implied, with any employer whereby:
  - (i) the employer undertakes to employ only persons who seek employment through the licensee's employment agency; and
  - (ii) the licensee agrees to pay or give to the employer some form of material benefit.

### COMMENTARY

#### Enactment history

[EO57.01] This section was replaced by s.2 of the Employment (Amendment) Ordinance 1973.

Subsection 1(a) was replaced by s.2 of the Employment (Amendment) Ordinance 1975, and amended by s.6 of the Employment (Amendment) Ordinance 1992.

Subsection 1(b) was amended by both s.2 of the Employment (Amendment) Ordinance 1975 and s.6 of the Employment (Amendment) Ordinance 1992.

#### Definition of "Person"

This is stated by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) to include any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.

[EO57.02]

#### Definition of "Partner"

"Partner" is defined by s.3 of the Partnership Ordinance (Cap.38) as follows:

[EO57.03]

- (1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.
- (2) But the relation between members of any company or association which is:
  - (a) registered as a company under any Ordinance relating to the registration of joint stock companies; or
  - (b) formed or incorporated by or in pursuance of any other Ordinance, or any enactment or instrument,
 is not a partnership within the meaning of this Ordinance.

#### Prohibited acts in respect of employment agencies

An employment agency must not by any means: (i) receive from a job applicant, in connection with obtaining employment for him/her, any fees or reward (except the prescribed commission); (ii) share with any person, other than another licensee or a partner or shareholder in his/her employment agency, the prescribed commission; or (iii) enter into, except with the written permission of the Commissioner for Labour, into an agreement, express or implied, with an employer whereby the employer undertakes to employ only persons who seek employment through the licensee's employment agency; and (iv) the licensee agrees to pay or give to the employer some form of material benefit.

[EO57.04]

#### Maximum commission allowed

Section 57 of Ordinance and in conjunction with Regulation 10(2) of the Employment Agency Regulations prescribes that the maximum commission which may be received by an employment agency from a job applicant shall be an amount *not exceeding* a sum equal to *ten percent* of the first month's wages received by such person after he/she has been placed in employment by the employment agency. It is illegal for an employment agency to receive from a job applicant, in connection with obtaining employment for him/her, any reward or payment in respect of expenses or otherwise, except the prescribed commission. The employment agency can only receive commission from the job applicant only *after* they have received their first month's salary. It is illegal for any agency to receive commission before the job applicants receive their first month's salary.

[EO57.05]

Overcharging commission is a serious offence and the Commissioner of Labour does not look favorably on any agency that commits this offence. If an employment

agency is convicted of this offence, the Commissioner will refuse to renew or even revoke an agency's licence.

As a word of caution when dealing with foreign domestic helpers and to avoid any misunderstanding, employment agencies should not get involved in the financial matters between the foreign domestic helper and overseas employment agency or loan firm, which should be dealt with by themselves directly. Also, employment agencies shall not request the employers to deduct wages from their helpers for repaying debts owed to overseas employment agencies or loan firms. An employer who makes unlawful deduction from wages of an employee commits an offence under the Ordinance is criminally liable to a maximum fine of HK \$100,000 and imprisonment for one year.

### Section 58 Inspection of places of business licensed or exempted employment agencies

The Commissioner, and any public officer authorised by him in that behalf may:

- (a) enter and inspect without a warrant at any reasonable time the place of business of an employment agency;
- (b) require the production of, inspect, examine or take copies of any record or other document relating to an employment agency; (Amended 28 of 1992 s.7)
- (c) require any person who operates, manages or assists in the management of an employment agency to furnish such information or particulars relating to the employment agency as he may specify; and
- (d) make such other enquiries from any other person connected or associated with the employment agency as he thinks fit.

#### COMMENTARY

##### Enactment history

[EO58.01] This section was replaced by s.2 of the Employment (Amendment) Ordinance 1973.

Part (b) was amended by s.7 of the Employment (Amendment) Ordinance 1992.

##### Definition of "Public officer"

[EO58.02] "Public officer" is defined by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) as any person holding an office of emolument under the Government, whether such office be permanent or temporary. Furthermore, a "public servant" is deemed to be the "employee" of a public body (*Ng Siu Chau v HKSAR* (2000) 3 HKCFAR 62).

##### Definition of "Document"

[EO58.03] "Document" is defined by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) as being any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means.

### Authority of the Commissioner for Labour

Section 58 of the Ordinance authorizes the Commissioner of Labour and any public officer authorized by him to: (i) enter and inspect or search without a warrant at any reasonable time the place of business of an employment agency; (ii) require any person associated with an employment agency to furnish information relating to the employment agency; and (iii) to seize, detain or remove any article, register, record or other document which may be evidence of an offence under this part of the Ordinance. [EO58.04]

In connection with any inquiry or inspection, no person shall furnish to the Commissioner or any public officer any information which he/she knows or reasonably ought to know to be false or misleading in any material particular.

Any contravention of this and other provisions is punishable upon conviction by a fine of HK \$50,000.00.

### Section 59 Investigation of suspected offences

(1) If the Commissioner, any public officer authorised by him in that behalf or any police officer not below the rank of inspector suspects on reasonable grounds that there is in any premises or place evidence of an offence under this Part he may:

- (a) enter and search without a warrant any such premises (other than domestic premises) at any reasonable time; and
- (b) require the production of, seize, detain and remove any article, record or other document which may be evidence of an offence under this Part. (Amended 28 of 1992 s.7)

(2) A magistrate may, if he is satisfied by information on oath that there may be found in any domestic premises any evidence of an offence under this Part, issue a warrant authorising the Commissioner, any public officer authorised in that behalf by the Commissioner or any police officer not below the rank of inspector to enter and search the domestic premises at any reasonable time.

(3) (Repealed 24 of 1988 s.2)

#### COMMENTARY

##### Enactment history

This section was replaced by s.2 of the Employment (Amendment) Ordinance 1973. [EO59.01]

Subsection 1(b) was amended by s.7 of the Employment (Amendment) Ordinance 1992.

Subsection 3 was repealed by s.2 of the Employment (Amendment) Ordinance 1998.

##### Definition of "Public officer"

"Public officer" is defined by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) as any person holding an office of emolument under the Government, whether [EO59.02]

any plant or substance kept at the premises are safe and without risk to the health of any person working on the premises, even if they are not directly employed on that premises, and so far as is reasonably practicable,<sup>10</sup> Any failure of an occupier to discharge their duty will incur the same penalty described above as applicable to employers.

Furthermore, employees have a duty to “co-operate” with their employer to ensure that any requirement imposed in the interests of safety and health is complied with, as well as the more garden-variety duty to take care for the safety and health of persons at the employee’s workplace who might be affected by the employee’s acts or omissions. Notably, the employee will be subject to similar punishments under the Ordinance as the employer or the occupier.

Note also that “occupational safety officers” are appointed by the Chief Executive under s.19 to administer and enforce the Ordinance (as well as the Factories and Industrial Undertakings Ordinance (Cap.59)). These officers have the power to enter premises where a workplace is located,<sup>11</sup> and to seize articles, run tests, take photographs and samples, and to request information having entered the workplace.<sup>12</sup> It is an offence to obstruct an occupational safety officer in the performance of his duties.

If a “workplace” is found to be in contravention of either this Ordinance or the Factories and Industrial Undertakings Ordinance (Cap.59), the Commissioner for Labour may issue improvement notices<sup>13</sup> and suspension notices<sup>14</sup> against activity that may create an imminent hazard to employees. Failure to comply with an improvement notice constitutes an offence that is punishable by a fine of \$200,000 and imprisonment for up to 12 months.<sup>15</sup> Failure to comply with a suspension notice constitutes an offence that is punishable by a fine of \$500,000 and imprisonment for up to 12 months.<sup>16</sup>

## PART I PRELIMINARY

### Section 1: Short title

(1) This Ordinance may be cited as the Occupational Safety and Health Ordinance.

(2) (Omitted as spent).

<sup>10</sup> See *HKSAR v China Overseas Building Construction Ltd* [2007] 2 HKLRD 216, CFI, where the court differentiated between the responsibilities which it would assign to the employer who owns the premises where the employees are working, and an employer who is just the occupier of that building.

<sup>11</sup> Occupational Safety and Health Ordinance (Cap.509) s.22.

<sup>12</sup> Occupational Safety and Health Ordinance (Cap.509) ss.23 and 24.

<sup>13</sup> Occupational Safety and Health Ordinance (Cap.509) s.9.

<sup>14</sup> Occupational Safety and Health Ordinance (Cap.509) s.10.

<sup>15</sup> Occupational Safety and Health Ordinance (Cap.509) s.9(5).

<sup>16</sup> Occupational Safety and Health Ordinance (Cap.509) s.10(6).

## COMMENTARY

### Enactment history

This section was originally enacted by the Occupational Safety and Health Ordinance (Cap.509) (39 of 1997), coming into force on 23 May 1997. [OSHO1.01]

### Summary of the Ordinance

The Occupational Safety and Health Ordinance (OSHO) provides for the safety and health protection to all employees in workplaces, both industrial and non-industrial. It is basically an enabling ordinance setting out requirements in general terms. [OSHO1.02]

This ordinance covers almost all workplaces - places where employees work. In addition to factories, construction sites and catering establishments, other places, such as offices, laboratories, shopping arcades, educational institutions also come under the ambit of the law. However, there are a few *exceptions*, which include: (i) an aircraft or vessel in a public place; (ii) the place occupied by the driver of a land transport vehicle when it is in a public place (but other employees working in the vehicle are covered); (iii) domestic premises at which only domestic servants are employed; and (iv) places where only self-employed persons work.

### Section 2: Purposes of Ordinance

The purposes of this Ordinance are as follows:

- (a) to ensure the safety and health of employees when they are at work;
- (b) to prescribe measures that will contribute to making the workplaces of employees safer and healthier for them;
- (c) to improve the safety and health standards applicable to certain hazardous processes, plant and substances used or kept in workplaces;
- (d) generally to improve the safety and health aspects of working environments of employees.

## COMMENTARY

### Enactment history

This section was enacted by the Occupational Safety and Health Ordinance 1997. [OSHO2.01]

### Purpose of Ordinance to encourage occupational safety

Safety at work is a major concern in Hong Kong. Work related fatalities and injuries occur at an alarming rate, despite various campaigns and programmes operated by the Labour Department. The principal statutory mechanisms intended to achieve safety at the workplace are the Occupational Safety and Health Ordinance (OSHO), which applies to workplaces generally, and the Factories and Industrial [OSHO2.02]

Undertakings Ordinance (FIUO), which has more specific application to industrial undertakings such as construction sites. Extensive regulations have been made under each, providing industry-specific standards in a wide range of undertakings. These ordinances and the regulations are enforced primarily by criminal sanction, while a breach of their provisions will generally give rise to a range of civil remedies. The Labour Department is responsible for enforcement, through inspections and prosecutions in addition to educational programmes, and has extensive powers under the legislation to monitor, inspect and require cooperation of those responsible for the workplace.

As such, the Ordinance provides for the safety and health of employees. Its purposes are very broadly defined: (i) to ensure the safety and health of employees when they are at work; (ii) to prescribe measures that will contribute to making the workplaces of employees safer and healthier for them; (iii) to improve the safety and health standards applicable to certain hazardous processes, plant and substances used or kept in workplaces; and (iv) to generally improve the safety and health aspects of working environments of employees.

The Ordinance imposes these general duties on employers, occupiers of premises, and employees regarding workplace safety. The regulations made under the Ordinance provide for detailed requirements in relation to accident prevention, fire prevention, working environment, workplace hygiene, first aid, manual handling operation, and use of display screen equipment

### Section 3: Interpretation

#### Remarks:

Adaptation amendments retroactively made—see 54 of 2000 s.3

(1) In this Ordinance, unless the context otherwise requires: “activity” (活動) includes operation and process;

“Appeal Board” (上訴委員會) means the Administrative Appeals Board established under s.5 of the Administrative Appeals Board Ordinance (Cap.442);

“bodily injury” (身體傷害) includes injury to health;

“Commissioner” (處長) means the Commissioner for Labour;

“court” (法庭) includes a magistrate;

“dangerous occurrence” (危險事故) means an occurrence of a kind specified in Sch.1;

“domestic premises” (住宅處所) means premises occupied as a private dwelling;

“domestic servant” (家庭傭工) has the same meaning as in the Employment Ordinance (Cap.57);

“employee” (僱員) means a natural person who works under a contract of employment or apprenticeship, but does not include a domestic servant;

“employer” (僱主) means a person who employs natural persons under contracts of employment or apprenticeship;

“function” (職能) includes a power and a duty;

“identity card” (身分證) means an identity card issued under the Registration of Persons Ordinance (Cap.177);

“improvement notice” (敦促改善通知書) means a notice served under s.9;

“occupational safety officer” (職業安全主任) means a public officer designated as such under s.20 or a person taken to be so designated because of that section;

“occupier” (佔用人), in relation to any premises or workplace, includes a person who has any degree of control over the premises or workplace and, in particular, includes a person to whom subs.(5) or (6) applies;

“offence of strict liability” (嚴格法律責任罪行) means an offence in relation to the prosecution of which it is not necessary for the prosecutor to prove:

- (a) that the defendant did the act or omission constituting the offence intentionally, knowingly or recklessly; or
- (b) that the defendant had knowledge of any specific ingredient of the offence;

“person responsible” (負責人), in relation to a workplace, has the meaning given by subs.(2);

“plant” (作業裝置) includes machinery, equipment, appliances, furniture, furnishings and fittings;

“premises” (處所) includes any vehicle and any public place, and also includes a part of particular premises;

“public analyst” (公職分析員) means the Government Chemist, the Government Pathologist or any analyst appointed in writing by the Chief Executive for the purposes of this Ordinance; (Amended 54 of 2000 s.3)

“public place” (公眾地方) means:

- (a) any public street, pier or public garden; or
- (b) the permanent way of a railway; or
- (c) any part of the territorial sea or any publicly navigable waterway; or
- (d) any part of the airspace above Hong Kong; or
- (e) any other place to which people are entitled to have access whether with or without payment;

“record” (紀錄) includes information recorded in electronic form;

“regulation” (規例) means a regulation under this Ordinance;

“serious bodily injury” (嚴重身體傷害), in relation to a person, includes any bodily injury that results in the person’s admission at a hospital or clinic for treatment or observation;

“substance” (物質) means a natural or artificial substance, whether in the form of a solid, liquid, gas or vapour;

“suspension notice” (暫時停工通知書) means a notice served under s.10;

“vessel” (船隻) has the same meaning as in s.2 of the Shipping and Port Control Ordinance (Cap.313);

“work” (工作) means work as an employee;

“workplace” (工作地點) means any place where employees work, but does not include any of the following:

- (a) an aircraft or vessel when located in a public place;
- (b) when a vehicle that is designed or used for the carriage of people, animals or goods is located in a public place, the seat or position normally occupied by the driver of the vehicle;
- (c) domestic premises at which the only employees are domestic servants;
- (d) a place at which only self-employed persons work;
- (e) any other place of a kind prescribed by a regulation for the purposes of this paragraph;

“workplace code of practice” (工作地點工作守則) means a code of practice issued under s.40(1) and, if such a code has been amended, means the code as amended.

(2) For the purposes of this Ordinance, the person responsible for a workplace is the employer of the employees who are employed to carry out work there, or if the employer does not exercise any degree of control over the relevant part or aspect of the workplace, means the occupier of the workplace.

(3) For the purposes of this Ordinance, risks arising out of the activities of persons at work are taken to include risks attributable to the manner of conducting an undertaking, risks attributable to the plant or substances used in connection with an undertaking and risks attributable to the condition of premises so used.

(4) For the purposes of this Ordinance, a person is at work only during the time when the person is actually at a workplace. However, a person is not to be regarded as being at work at a workplace for those purposes when the person is being conveyed as a passenger in a vehicle referred to in para (b) of the definition of “workplace” in circumstances no different from those applicable to persons being so conveyed who are not at work at a workplace.

- (5) A person who, under a lease or contract, has an obligation for:
- (a) the maintenance or repair of premises; or
  - (b) the safety of, or the absence of risks to health arising from the condition or use of, any plant or substance located on premises, is taken to be an occupier of the premises for the purposes of this Ordinance.

(6) A person who, under a lease or contract, has an obligation to provide, maintain or repair a means of access to, or egress from, premises is taken to be an occupier of the premises for the purposes of this Ordinance.

(7) Subsections (5) and (6) do not apply to persons in their capacity as occupiers of domestic premises.

#### COMMENTARY

##### Enactment history

[OSHO3.01] This section was enacted by the Occupational Safety and Health Ordinance 1997, and it was amended by s.3 of the Adaptation of Laws (No. 7) Ordinance 2000.

Section 5 of the “Administrative Appeals Board (Cap.442)” as referenced in the definition of an “Appeal Board” reads as follows:

- (1) There shall be a board called the Administrative Appeals Board. [OSHO3.02]
- (2) The functions of the Board are to hear and determine any appeal duly made to the Board.
- (3) For the purpose of hearing any appeal the members of the Board shall comprise:
  - (a) the Chairman or a Deputy Chairman who shall preside; and
  - (b) 2 of the persons from the panel referred to in s.6(2) as the Secretary may appoint for that purpose.

##### Definition of “Ordinance”

“Ordinance” is defined by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) as meaning: [OSHO3.03]

- (a) any Ordinance enacted by the Legislative Council;
- (b) any Ordinance adopted by virtue of art.160 of the Basic Law as a law of the Hong Kong Special Administrative Region;
- (c) any subsidiary legislation made under any such Ordinance except any such subsidiary legislation which has pursuant to art.160 of the Basic Law been declared to be in contravention of the Basic Law; and
- (d) any provision or provisions of any such Ordinance or subsidiary legislation.

##### Definition of “Employee” under this Ordinance

In terms of this particular Ordinance, an “employee” means a natural person who works under a contract of employment or apprenticeship, but does not include a domestic servant. [OSHO3.04]

The difficulty for a universal definition of employee lies in the different interpretations as listed in the related employment and labour ordinances of Hong Kong.

According to Section 2(1) of the Employment Ordinance, an employee simply means “an employee to whom, by virtue of s.4, this Ordinance applies”. Section 4 then stipulates that “this Ordinance applies to every employee engaged under a contract of employment ...”

Section 2(1) of the Employment Ordinance defines a contract of employment as “any agreement ... whereby one person agrees to employ another and that other agrees to serve his employer as an employee ...” None of these definitions helps clarify the distinction between employees and independent contractors. Neither can assistance be found in other important legislation for which the distinction is crucial, such as the Employees Compensation Ordinance (Cap.282) where an “employee” is defined in its s.2 as “any person who has ... entered into or works under a contract of service ...”. The term “contract of service” is not defined in the Ordinance. Similarly, Section 3 of this Ordinance defines an employee as “a natural person who works under a contract of employment ...”

Since the legal concept of “employee” is not adequately defined in any of the legislation, one must turn to case law for guidance. Although the distinction is relevant in a wide

range of contexts, the principles for making the distinction are the same. The dilemma in this regard is that the Ordinance only applies to "employees" as defined in this Ordinance and in the related employment and labour ordinances.

With that said, for a person to be defined as an "employee" as applied in this Ordinance, there must be some degree of employment continuity as required under the Employment Ordinance and if there has been a break in the employment, proof of mutuality of obligation may be necessary in addition to the other considerations. See *Poon Chan Nam v Yim Siu Cheung* [2007] 1 HKLRD 951; see also *Wong Ki v Shun Tak Electrical Mechanical and Air Conditioning Engineering (Hong Kong) Co Ltd* (unrep., DCEC 835/2007, 74/2008, [2009] HKEC 595).

#### Definition of "domestic servant"

[OSHO3.05] A "domestic servant" is defined by s.2 of the Employment Ordinance (Cap.57) as including a garden servant, chauffeur and boat-boy and any other personal servant of a like class. A domestic servant is not considered an employee under the Employment Ordinance and this Ordinance.

#### Definition of "Magistrate"

[OSHO3.06] "Magistrate" is stated by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) to mean any person appointed to be a permanent or special magistrate under the Magistrates Ordinance (Cap.227).

#### Definition of "work"

[OSHO3.07] "Work" is defined by s.2 of the Employment Ordinance (Cap.57) as 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:

- (a) the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;
- (b) any contribution paid by the employer on his own account to any retirement scheme;
- (c) any commission which is of a gratuitous nature or which is payable only at the discretion of the employer;
- (ca) any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer;
- (cb) any travelling allowance which is of a non-recurrent nature;
- (cc) any travelling allowance payable to the employee to defray actual expenses incurred by him by the nature of his employment;
- (cd) the value of any travelling concession;
- (d) any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;
- (da) any end of year payment, or any proportion thereof, which is payable under Part IIA;

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

#### Definition of "workplace"

"Workplace" is defined, with certain exceptions, as any place where employees work". These exceptions to what a "workplace" is defined to be include: (i) an aircraft or vessel in a public place; (ii) the place occupied by the driver of a land transport vehicle when it is in a public place (but other employees working in the vehicle are covered); (iii) domestic premises at which only domestic servants are employed; or (iv) places where only self-employed persons work.

[OSHO3.08]

#### Definition of "Public officer"

This is defined by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) as any person holding an office of emolument under the Government, whether such office be permanent or temporary.

[OSHO3.09]

#### Definition of "Person"

This term is also defined by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) and is said to include any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.

[OSHO3.10]

#### Definition of "Offence"

"Offence" is stated by s.3 of the Interpretation and General Clauses Ordinance (Cap.1) to include any crime and any contravention or other breach of, or failure to comply with, any provision of any law, for which a penalty is provided.

[OSHO3.11]

#### Definition of "Government"

According to s.3 of the Interpretation and General Clauses Ordinance (Cap.1) states that "government" means the Government of the Hong Kong Special Administrative Region.

[OSHO3.12]

#### Definition of "Chief Executive"

According to s.3 of the Interpretation and General Clauses Ordinance (Cap.1) states that "Chief Executive" means:

[OSHO3.13]

- (a) the Chief Executive of the Hong Kong Special Administrative Region;
- (b) a person for the time being assuming the duties of the Chief Executive according to the provisions of art.53 of the Basic Law.

#### Definition of "Hong Kong"

"Hong Kong" means the Hong Kong Special Administrative Region pursuant to s.3 of the Interpretation and General Clauses Ordinance (Cap.1).

[OSHO3.14]