

FREQUENTLY-ASKED QUESTIONS ON THE EMPLOYMENT ORDINANCE IN THE RETAIL TRADE



Labour
Department



Workplace Consultation
Promotion Division



Tripartite Committee
on Retail Trade

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FOREWORD

The retail shops are normally busy all day. As the frontline supervisors are required to undertake multitasks, they may be unable to devote much time to human resources management. To assist the frontline supervisors in handling their such work effectively, the booklet on frequently-asked questions on Employment Ordinance (EO) has been specifically prepared in a simple question-and-answer format, outlining the common employment-related issues in the retail trade, explaining the relevant provisions of the Ordinance and providing some tips on good people management practices.

The compilation of the booklet is based on the EO. All employees covered by the EO, irrespective of their hours of work, are entitled to basic protection and benefits under the Ordinance such as wage payment protection and granting of statutory holidays. An employee who has been employed under a continuous contract by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract. They are further entitled to other statutory benefits, for instance the holiday pay of statutory holidays, annual leave with pay and long service payment etc.

Employers and employees are free to negotiate and agree on the terms and conditions of employment provided that these terms do not violate the provisions of the EO. Hence, when using the booklet, one should make reference to a company's own employment contract with its employees. If the terms and conditions in the employment contract are more favourable than those stated in the EO, they should be handled in accordance with the contract terms. (Any term of an employment contract which purports to extinguish or reduce any rights, benefits or protection conferred upon the employee by the EO is void.) If in doubt, frontline supervisors are advised to communicate closely with the human resource department to ensure that both the EO and the company's system have been complied with when dealing with the related matters in their daily work.

Please refer to "A Concise Guide to the Employment Ordinance" published by the Labour Department for provisions of the EO. It should be noted that the EO itself remains the sole authority for the provisions of the law explained.

Apart from the EO, please also note other relevant ordinances such as the Minimum Wage Ordinance, Sex Discrimination Ordinance, the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance, the Race Discrimination Ordinance, the Mandatory Provident Fund Schemes Ordinance and the Personal Data (Privacy) Ordinance in handling people management matters. Enquiries can be made to the relevant organisations by referring to p.32 of the booklet if necessary.

Our acknowledgement goes to the members of the Tripartite Committee on Retail Trade for their assistance and support in the compilation and updating of the booklet.



Tripartite Committee on Retail Trade

The members of the Tripartite Committee on Retail Trade are as follows
(in alphabetical order):

Trade Unions

Commodities Promotion and Retailing Employees General Union
Hong Kong Department Stores & Commercial Staff General Union
Retail, Commerce and Clothing Industries General Union
Retail Trade Employees Association

Employer Associations / Management Associations

Hong Kong & Kowloon Electrical Appliances Merchants Association Ltd.
Hong Kong Book & Stationery Industry Association Co. Ltd.
Hong Kong General Chamber of Pharmacy Ltd.
Hong Kong Jewellers' & Goldsmiths' Association
Hong Kong Retail Management Association
The Cosmetic & Perfumery Association of Hong Kong Ltd.

Employers

AEON Stores (Hong Kong) Co. Ltd.
AJI Ichiban Co. Ltd.
ALF Retail Hong Kong Limited (Marks & Spencer)
A. S. Watson & Co. Ltd.
Belle Talent Development (HK) Limited
Bossini Enterprises Ltd.
Celestial Asia Securities Holdings Ltd.
China Resources Vanguard (Hong Kong) Co. Ltd.
Chow Sang Sang Holdings International Ltd.
City Chain Co. Ltd.
Crocodile Garments Ltd.
Dah Chong Hong Holdings Ltd.
Esprit Retail (Hong Kong) Ltd.
Fung (1937) Management Ltd.
G2000 (Apparel) Ltd.
Giordano Limited
OSIM (HK) Ltd.
Sa Sa Cosmetic Co. Ltd.
Sogo Hong Kong Co. Ltd.
Swire Resources Ltd.
The Commercial Press (H.K.) Ltd.
The Dairy Farm Company Ltd.
The Wing On Department Stores (HK) Ltd.
Yue Hwa Chinese Products Emporium Ltd.
Zung Fu Company Limited

I. Rest Days

1.1 Q: How many rest days is an employee entitled to in each week?

A: According to the EO, an employee employed under a continuous contract is entitled to not less than one rest day in every period of seven days. A rest day is defined as a continuous period of not less than 24 hours during which an employee is entitled to abstain from working for his employer.

1.2 Q: Can an employer arrange for an employee to take a rest day during a period exceeding 7 days (e.g. taking 2 rest days after working continuously for a period of 15 days)?

A: The EO stipulates that an employer shall grant an employee not less than one rest day in every period of seven days. But an employer may substitute some other rest day with the consent of the employee (please refer to 1.3 and 1.7).

Tips on good people management practices:

An employer should make reasonable arrangements on work and rest for his employees and avoid demanding his staff to work excessively long hours so as to maintain staff efficiency and the quality of services and reduce the risk of injury caused by fatigue. Please refer to the "Guide on Rest Breaks" published by the Labour Department.

1.3 Q: Can an employer compel an employee to work on a rest day?

A: No. Except in the event of a breakdown of machinery or plant or any other unforeseen emergency, an employer must not compel an employee to work on a rest day. Under exceptional circumstances when the employee is required to work, the employer should substitute some other rest day within 30 days after the original rest day and should notify the employee of the arrangement within 48 hours after the employee is required to work.

1.4 Q: Can an employee work voluntarily on a rest day?

A: Yes. An employee, except a young person under the age of 18 employed in industry, may work voluntarily on a rest day.

1.5 Q: Is a rest day required to be a paid one?

A: Whether a rest day is paid or not is to be agreed by employers and employees.

1.6 Q: Can an employer request an employee to take his/her rest day on a statutory holiday?

A: No. Apart from statutory holidays, an employee is also entitled to enjoy rest days.

1.7 Q: Can an employer change the date of a rest day?

A: An employer may substitute some other rest day with the consent of the employee, in which case it must be within the same month before the original rest day or within 30 days after it.

Tips on good people management practices:

An employer should properly maintain a record of rest days granted to employees and details of pay given. Such information should be conveyed to the employees regularly to enhance communication between management and staff on rest day arrangements.

1.8 Q: If an employee is required to work shifts, how can the employer arrange his rest days?

A: Employees' rest days should be appointed by the employer. If an employee is required to work shifts, the employer should inform the employee of his rest days in that month orally or in writing or by displaying a roster showing the dates of his rest days before the beginning of each month.

Tips on good people management practices:

The employer should properly maintain a record of rest days granted to employees and details of pay given. Such information should be conveyed to the employees regularly to enhance communication between management and staff on rest day arrangements.

1.9 Q: Can an employee request for the granting of fixed rest days?

A: The EO provides that rest days should be appointed by an employer and he may appoint different rest days for different employees.

Tips on good people management practices:

Given the nature of business, employers in the retail industry in general may not be able to grant fixed rest days to their front-line staff. If employees are required to work shifts, the employer should specify such a requirement for employees' consideration before employing them. Moreover, as far as practicable, a roster showing employees' working shifts should be drawn up following certain pattern.

1.10 Q: If a rest day falls on a statutory holiday, what shall an employer do?

A: If the rest day falls on a statutory holiday, a holiday should be granted on the day following the statutory holiday which is not a statutory holiday or an alternative holiday or a substituted holiday or a rest day. (For the difference between a statutory holiday and an alternative holiday or a substituted holiday, please refer to 2.2.)

1.11 Q: If a rest day falls within a period of annual leave, what should an employer do?

A: Any rest day falling within a period of annual leave will be counted as annual leave and another rest day must be appointed.

1.12 Q: If a rest day falls within a period of maternity leave, what shall an employer do?

A: Any rest day that falls due during maternity leave will be counted as part of the maternity leave and would not give rise to any entitlement to an additional rest day.

II. Statutory Holidays

2.1 Q: How many statutory holidays are there in a year?

A: The EO specifies that there are 14 statutory holidays in a year as set out below:

- ◆ the first day of January
- ◆ Lunar New Year's Day
- ◆ the second day of Lunar New Year
- ◆ the third day of Lunar New Year
- ◆ Ching Ming Festival
- ◆ Labour Day
- ◆ the Birthday of the Buddha (*newly added from 2022*)
- ◆ Tuen Ng Festival
- ◆ Hong Kong Special Administrative Region Establishment Day
- ◆ the day following the Chinese Mid-Autumn Festival
- ◆ National Day
- ◆ Chung Yeung Festival
- ◆ Chinese Winter Solstice Festival or Christmas Day (at the option of the employer)
- ◆ the first weekday after Christmas Day (*newly added from 2024*)*

**Effective from 1 January 2024*

The additional statutory holidays from 2026 and thereafter are tabulated as follows:

Year	Newly added statutory holiday	Total number of statutory holidays
Starting from 2026	Easter Monday	15
Starting from 2028	Good Friday	16
Starting from 2030	The day following Good Friday	17

2.2 Q: Can an employer require an employee to work on statutory holidays?

A:

Alternative Holiday Arrangement	Prior Notice to Employee on the Date of Alternative Holiday
An alternative holiday should be arranged within 60 days before the statutory holiday; or	To be given not less than 48 hours' prior notice before the alternative holiday
An alternative holiday should be arranged within 60 days after the statutory holiday	To be given not less than 48 hours' prior notice before the statutory holiday

If the employer and employee agree, any day within 30 days before or after the statutory or alternative holiday may be taken by the employee as a substituted holiday.

Tips on good people management practices:

It is advisable for an employer to record clearly the date of the alternative holiday taken by the employee if the latter is required to work on a statutory holiday. Such information should be conveyed to the employee to enhance communication between management and staff on holiday arrangements and to avoid unnecessary misunderstanding.

2.3 Q: Is a part-time employee entitled to statutory holidays?

A: All employees, irrespective of their hours of work, are entitled to statutory holidays. Please refer to 2.5 for the conditions required for the entitlement to statutory holiday pay.

2.4 Q: How long should an employee be employed before he is entitled to statutory holidays?

A: All employees, even newcomers, are entitled to statutory holidays, irrespective of their length of service. Please refer to 2.5 for the conditions required for the entitlement to statutory holiday pay.

2.5 Q: Which of the employees shall be entitled to statutory holiday pay?

A: An employee having been employed under a continuous contract for not less than three months immediately preceding a statutory holiday is entitled to the holiday pay. Holiday pay should be paid to the employee not later than the day on which he is next paid his wages after that statutory holiday.

2.6 Q: Since there is normally commission payable to employees in the retail industry (such as sales assistants), their monthly wages may vary. In what way should holiday pay be calculated?

A: Holiday pay is a sum equivalent to the average daily wages earned by an employee in the 12-month period preceding the holiday. In calculating the average daily wages, an employer should exclude (i) the periods for which an employee is not paid wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, paternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods.

2.7 Q: Normally, retail business operates on statutory holidays where manpower is relatively stringent. In order to meet business needs, is an employer allowed to pay wages to his employees in lieu of granting them statutory holidays?

A: No. An employer must not make any form of payment to an employee in lieu of granting him a holiday. An employer who contravenes such provision is liable to prosecution and, upon conviction, to a maximum fine of \$50,000. If an employer requires his employee to work on a statutory holiday, he should make alternative holiday/substituted holiday arrangement for his employee. Please refer to 2.2 for the requirements concerned.

2.8 Q: If a statutory holiday falls on a rest day, what should an employer do?

A: If the statutory holiday falls on a rest day, it should be taken on the day following the rest day which is not a statutory holiday or an alternative holiday or a substituted holiday or a rest day. (For the difference between a statutory holiday and an alternative holiday or a substituted holiday, please refer to 2.2).

2.9 Q: If a statutory holiday falls within a period of annual leave, what should an employer do?

A: Any statutory holiday falling within a period of annual leave will be counted as annual leave and another holiday must be appointed.

2.10 Q: If a statutory holiday falls due during maternity leave, what should an employer do?

A: Any statutory holiday that falls due during maternity leave should be counted as part of the maternity leave and should not give rise to any entitlement to an additional holiday or to holiday pay if the employee is paid maternity leave pay for that holiday; and where no maternity leave pay is paid to the employee for that holiday, the employee should be paid holiday pay for that holiday if she has been employed under a continuous contract for not less than three months immediately preceding that holiday.

2.11 Q: If a statutory holiday falls on a paid sickness day, what should an employer pay for that day, the holiday pay or sickness allowance?

A: Statutory holiday pay should be paid to an employee if he **has** been employed under a continuous contract for not less than 3 months preceding a statutory holiday. That sickness day should be deemed as a statutory holiday. The employer is not required to pay sickness allowance to the employee, nor should he deduct the day from the employee's sick leave entitlement.

If the employee has been employed under a continuous contract for **less than** 3 months preceding a statutory holiday, the employer is not required to pay him holiday pay. Even if the employee is eligible for sickness allowance, the employer is not required to pay it, nor should he deduct the day from the employee's sick leave entitlement.

III. Paid Annual Leave

3.1 Q: Is a part-time employee entitled to annual leave with pay?

A: According to the EO, an employee, irrespective of his job title and job nature, is entitled to annual leave with pay after having been employed under a continuous contract for 12 months.

3.2 Q: How many days of paid annual leave is an employee entitled to?

A: An employee is entitled to annual leave with pay after having been employed under a continuous contract for every 12 months. An employee's entitlement to paid annual leave increases progressively from seven days to a maximum of 14 days according to his length of service:

Years of Service	1	2	3	4	5	6	7	8	9 or above
Annual Leave Entitlements	7	7	8	9	10	11	12	13	14

3.3 Q: Who shall decide on the time of the annual leave?

A: The time of the leave should be appointed by the employer after consultation with the employee, confirmed by a written notice to the employee at least 14 days in advance, unless a shorter period has been mutually agreed.

3.4 Q: When shall an employer arrange for his employees to take the paid annual leave?

A: According to the EO, an employee shall take the paid annual leave to which he is entitled within the following period of 12 months after having been employed for every 12 months.

3.5 Q: Can an employee’s annual leave be granted separately?

A: Annual leave should be granted for an unbroken period. If the employee so requests, it may be granted in the following manner:

Leave entitlement not exceeding 10 days	Up to 3 days can be granted separately; the balance should be granted consecutively
Leave entitlement exceeding 10 days	At least 7 days should be granted consecutively; the balance can be granted separately

3.6 Q: How to calculate annual leave pay?

A: The daily rate of annual leave pay is a sum equivalent to the average daily wages earned by an employee in the 12-month period preceding the annual leave. In calculating the average daily wages, an employer should exclude (i) the periods for which an employee is not paid wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, paternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods.

3.7 Q: Can an employer make payment to an employee in lieu of annual leave?

A: An employer should not include in an employment contract a term to forego all or any of his employee’s annual leave entitlement, including payment of wages in lieu of any annual leave days. However, an employee may choose to accept payment in lieu of part of his leave to which he is entitled to under the law, which exceeds 10 days.

3.8 Q: What is the penalty for an employer who fails to grant annual leave or pay annual leave pay to an employee?

A: An employer who without reasonable excuse fails to grant annual leave or an employer who fails to pay annual leave pay to an employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

3.9 Q: Is an employer required to pay pro rata annual leave pay to an employee who resigns from his job after having been employed for less than one year?

A: For an employee with three but less than 12 months' employment in a leave year and his employment contract is terminated other than for the reason of summary dismissal due to his serious misconduct, he would be entitled to pro rata annual leave pay.

3.10 Q: Can an employer arrange for an employee to take annual leave with pay during her maternity leave?

A: No. Paid annual leave is granted or required to be granted in addition to the rest days, statutory holidays and maternity leave to which an employee is entitled under the EO.

IV. Paid Sickness Days

4.1 Q: Under what circumstances is an employee entitled to sickness allowance?

A: An employee employed under a continuous contract is entitled to sickness allowance if the following conditions are fulfilled:

- (1) the sick leave taken is not less than four consecutive days (unless for any day off taken by a female employee for her pregnancy check-ups, post confinement medical treatment or miscarriage, any such day on which she is absent shall be counted as a sickness day and, subject to the following conditions, be paid sickness allowance);
- (2) the employee has accumulated sufficient number of paid sickness days (please refer to 4.2 and 4.3); and
- (3) the sick leave is supported by:
 - (i) an appropriate medical certificate (regarding an employee's medical examination in relation to her pregnancy, may also be supported by a certificate of attendance¹ apart from a medical certificate); or
 - (ii) regarding the absence from work of an employee by reason of his/her compliance with a specific anti-epidemic requirement with a movement restriction imposed under the Prevention and Control of Disease Ordinance (Cap. 599), the employee is required to produce a proof of such requirement² (please refer to 4.3).

¹ Certificate of attendance is not applicable to an employee's medical examination in relation to her pregnancy conducted before 11 December 2020.

² Applicable to sickness days taken by employees who are absent from work by reason of their compliance with a movement restriction on or after 17 June 2022. The specific anti-epidemic requirements with a movement restriction are those prescribed in Part 1, Schedule 12 of the Employment Ordinance. The proofs of the relevant requirements include hard copy or electronic form of document, or an electronic data issued by the Government. The relevant proof should show the name of the employee, or information that could identify the identity of employee, the type of movement restriction imposed and the commencement and expiry dates of such restriction.

4.2 Q: How should the paid sickness days be accumulated under the EO?

A: An employee can accumulate paid sickness days after having been employed under a continuous contract. Paid sickness days are accumulated at the rate of two paid sickness days for each completed month of the employee’s employment during the first 12 months of employment, and four paid sickness days for each completed month of employment thereafter. Paid sickness days can be accumulated throughout the whole employment period, but shall not exceed 120 days at any one time. Paid sickness days are divided into two categories: paid sickness days can first be accumulated up to 36 days in Category 1 and then 84 days in Category 2.

4.3 Q: What are the different conditions under which paid sickness days accumulated in Categories 1 and 2 are taken?

A: The conditions for taking paid sickness days in Categories 1 and 2 are as follows:

	Total number	Conditions for taking paid sickness day(s)
Category 1	36	<ul style="list-style-type: none">supported by a medical certificate¹ issued by a registered medical practitioner, a registered Chinese medicine practitioner or a registered dentistregarding an employee’s medical examination in relation to her pregnancy, may also be supported by a certificate of attendance² issued by a registered medical practitioner, a registered Chinese medicine practitioner, a registered midwife or a registered nurse, apart from a medical certificateregarding the absence from work of an employee for compliance with a specific anti-epidemic requirement with a movement restriction, the employee is required to produce proof of the relevant requirement³

	Total number	Conditions for taking paid sickness day(s)
Category 2	84	<ul style="list-style-type: none"> • sickness days taken exceeds the number of sickness days remaining in Category 1 • If required by the employer, a medical certificate¹ issued by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist attending the employee as an out-patient or in-patient in a hospital should be produced upon the employer's request, a brief record of the investigation carried out and the treatment prescribed by the issuer of the medical certificate should also be produced • regarding an employee's medical examination in relation to her pregnancy, may also produce a certificate of attendance² issued by a registered medical practitioner, a registered Chinese medicine practitioner, a registered midwife or a registered nurse who conducts the examination for the employee as an out-patient or in-patient in a hospital, apart from a medical certificate • regarding the absence from work of an employee for compliance with a specific anti-epidemic requirement with a movement restriction, irrespective of whether the paid sickness day taken by the employee is under Category 1 or Category 2, the employee is only required to produce proof of the relevant requirement³

¹ The medical certificate should specify the number of days on which, and the nature of the sickness or injury on account of which, the employee is unfit for work.

² The certificate of attendance should state the employee's attendance for a medical examination in relation to her pregnancy and the relevant date. Certificate of attendance is not applicable to a medical examination in relation to pregnancy conducted before 11 December 2020.

³ Applicable to sickness days taken by employees who are absent from work by reason of their compliance with a movement restriction on or after 17 June 2022. The specific anti-epidemic requirements with a movement restriction are those prescribed in Part 1, Schedule 12 of the Employment Ordinance. The proofs of the relevant requirements include hard copy or electronic form of document, or an electronic data issued by the Government. The relevant proof should show the name of the employee, or information that could identify the identity of employee, the type of movement restriction imposed and the commencement and expiry dates of such restriction.

4.4 Q: Is a part-time employee entitled to sickness allowance?

A: According to the EO, an employee, irrespective of his job title or nature of employment, shall be entitled to sickness allowance as long as he is employed under a continuous contract and complies with the relevant requirements (please refer to 4.1).

4.5 Q: If an employee takes sick leave after having been employed for one month, is he entitled to sickness allowance?

A: According to the EO, an employee can accumulate paid sickness days after having been employed under a continuous contact. Paid sickness days are accumulated at the rate of two paid sickness days for each completed month of the employee's employment during the first 12 months of employment. If an employee takes 4 or more consecutive days as sickness days after having been employed for 1 month, he can receive sickness allowance for 2 sickness days on production of an appropriate medical certificate, because he has accumulated 2 paid sickness days.

4.6 Q: How to calculate sickness allowance?

A: The daily rate of sickness allowance is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the sickness day. In calculating the average daily wages, an employer should exclude (i) the periods for which an employee is not paid wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, paternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods.

4.7 Q: If the paid sickness days taken by an employee straddle two wage periods, can the employer pay sickness allowance to the employee after the entire period of sick leave has expired?

A: No. According to the EO, irrespective of the duration of paid sickness days taken by the employee, the employer must pay the sickness allowance to the employee on the normal pay day.

4.8 Q: What is the penalty for an employer who fails to pay sickness allowance to an employee?

A: An employer who without reasonable excuse fails to pay sickness allowance to an employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

4.9 Q: Under the EO, can an employer terminate the contract of employment of an employee on his paid sickness day?

A: An employer is prohibited from terminating the contract of employment of an employee on his paid sickness day, except in cases of summary dismissal due to the employee's serious misconduct. An employer who contravenes the above provision is liable to prosecution and, upon conviction, to a fine of \$100,000. Besides, the employer is also required to pay the following sums of money to the dismissed employee within 7 days after the day of termination:

- (1) wages in lieu of notice;
- (2) a further sum equivalent to seven days' wages as compensation; and
- (3) any sickness allowance to which the employee is entitled.

It is also stated in the Part on Employment Protection of the EO that for unlawful and unreasonable dismissal, the employee can claim for remedies if he meets the criteria as stipulated under the Ordinance. Remedies may include reinstatement/re-engagement or terminal payments and/or an award of compensation. For details, please refer to the chapter on employment protection of "A Concise Guide to the Employment Ordinance".

4.10 Q: Under what circumstances is an employee not entitled to sickness allowance?

- A: An employee shall not be entitled to sickness allowance under the following circumstances:
- the employee, unless he is a hospitalized resident patient, refuses without reasonable excuse to submit himself/herself to treatment by a company doctor of a medical scheme recognized by the Director of Health or disregards the advice of the doctor. Nevertheless, if the recognized medical scheme operated by the employer does not cover treatment from a certain medical discipline, the employee may choose to receive treatment from any registered medical practitioner, registered Chinese medicine practitioner or registered dentist under that particular discipline;
 - the sickness day falls on a statutory holiday on which the employee is entitled to holiday pay;
 - the unfitness for work of the employee is caused by his serious and wilful misconduct; or
 - compensation is payable under the Employees' Compensation Ordinance.

4.11 Q: What information shall an employer keep as records of sickness days?

- A: According to the EO, an employer shall keep the following records:
- the date of commencement and termination of employment of each employee;
 - all paid sickness days accumulated by each employee, including the number of paid sickness days accumulated in Categories 1 and 2;
 - paid sickness days taken by each employee and deducted from the total number of paid sickness days in either categories; and
 - sickness allowance paid and the sickness days in respect of which the sickness allowance was paid.
- The record should be signed by the employee within seven days of his return to work from paid sick leave, and the employee has the right to inspect the record.

4.12 Q: If a sickness day falls on a statutory holiday, shall an employee be entitled to sickness allowance for that day?

A: Holiday pay should be paid to an employee if he has been employed under a continuous contract for **not less than** 3 months preceding a statutory holiday. The sickness day should be deemed as a statutory holiday. The employer is not required to pay sickness allowance to the employee, nor should he deduct the sickness day from the employee's sick leave entitlement.

If an employee has been employed under a continuous contract for **less than** 3 months immediately preceding a statutory holiday, his employer is not required to pay him holiday pay. Even if the employee is eligible for sickness allowance, the employer is not required to pay it, nor should he deduct the day from the employee's sick leave entitlement.

4.13 Q: Can an employer arrange for an employee to take paid annual leave during the period of paid sickness days?

A: No. The period during which an employee suffers total incapacity due to sickness or injury should not be counted as part of his annual leave, unless such period takes place after the commencement of annual leave.

V. Maternity Leave

5.1 Q: Which of the employees shall be entitled to maternity leave?

A: Regardless of her position or nature of employment, a female employee employed under a continuous contract immediately before the commencement of her maternity leave and having given notice of pregnancy and her intention to take maternity leave to the employer, is entitled to the following periods of leave:

- a continuous period of 14¹ weeks' maternity leave;
- if confinement occurs later than the expected date of confinement, the employee may enjoy a further period equal to the number of days from the day after the expected date of confinement to the actual date of confinement;
- the employee may enjoy an additional period of leave for not more than four weeks on the grounds of illness or disability due to the pregnancy or confinement.

¹ Eligible employees whose confinement occurs before 11 December 2020 are entitled to 10 weeks' maternity leave pay.

5.2 Q: What requirements does a female employee have to comply with before she is eligible for maternity leave pay?

A: A female employee is eligible for 14 weeks' maternity leave pay if:

- she has been employed under a continuous contract for not less than 40 weeks immediately before the commencement of scheduled maternity leave²;
- she has given notice of pregnancy and her intention to take maternity leave to her employer after the pregnancy has been confirmed. For example, the presentation of a medical certificate confirming her pregnancy to the employer; and
- she has produced a medical certificate specifying the expected date of confinement if so required by her employer.

Maternity leave pay should be paid on the normal pay day of the employee.

² For scheduled maternity leave, please refer to points 1 and 2 of 5.7.

5.3 Q: How to calculate maternity leave pay?

A: The daily rate of maternity leave pay is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the first day of the maternity leave. In calculating the average daily wages, an employer should exclude (i) the periods for which an employee is not paid wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods.

5.4 Q: Shall an employee still be entitled to maternity leave after giving birth to three or more children?

A: The EO has no stipulation in this regard. Therefore, a pregnant employee, irrespective of her number of times of giving birth, is entitled to maternity leave (Please refer to 5.1) and 14 weeks' maternity leave pay (Please refer to 5.2) if she complies with the legal requirements.

5.5 Q: Can an employer refuse to grant maternity leave to a pregnant employee?

A: No. An employer who fails to grant maternity leave to a pregnant employee or fails to pay maternity leave pay to an eligible pregnant employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

5.6 Q: Should an employer pay sickness allowance to an employee who is absent from work to attend medical examination in relation to her pregnancy?

A: When the employee is absent from work to attend medical examination in relation to her pregnancy, post confinement medical treatment or miscarriage, any day on which she is sick shall be paid sickness allowance when she has an appropriate medical certificate (regarding an employee's medical examination in relation to her pregnancy, may also be supported by a certificate of attendance apart from a medical certificate) and has accumulated adequate number of paid sickness days. (see 4.1)

5.7 Q: When does a pregnant employee commence her maternity leave?

- A:
1. With the agreement of her employer, a pregnant employee may decide to commence her maternity leave from two to four weeks before the expected date of confinement.
 2. If the employee does not decide on the date, or fails to secure her employer’s agreement, the employee shall commence her maternity leave four weeks before the expected date of confinement.

Maternity leave commences on the date of confinement if it occurs before the above scheduled maternity leave.

Tips on good people management practices: Employers should have close communication with their employees to ensure that the business of the company and the employee’s needs can be taken into account

5.8 Q: Can an employer arrange for his pregnant employee to commence her maternity leave more than four weeks before the expected date of confinement because of the operational need?

- A:
- No. In accordance with the EO, maternity leave should commence from two to four weeks before the expected date of confinement. If the employer and the employee fail to reach a consensus, maternity leave should commence four weeks before the expected date of confinement. (see 5.7)

5.9 Q: Can an employer grant maternity leave to his employee in separate periods? (For example, can an employer require the employee to commence her maternity leave four weeks before the expected date of confinement but take the post-confinement ten-week leave in separate periods, i.e. taking six weeks’ leave first and resuming work for a certain period before being allowed to take the remaining four weeks’ leave?)

- A:
- No. The EO provides that maternity leave should be a continuous period of 14 weeks which should be granted consecutively.

5.10 Q: What shall an employer do if any rest day or statutory holiday falls within a period of maternity leave?

A: Any rest day or statutory holiday falling within a period of maternity leave will be counted as part of the maternity leave and shall not give rise to any entitlement to holiday pay in the case of a female employee who is paid maternity leave pay for that holiday. If the employee is not eligible for maternity leave pay but complies with the requirements for statutory holiday pay, she shall be entitled to a full day's pay for the statutory holiday.

5.11 Q: Can an employer arrange for an employee to take annual leave with pay during her maternity leave?

A: No. According to the EO, maternity leave is required to be granted in addition to the paid annual leave to which a female employee is entitled.

5.12 Q: Is an employer required under the EO to keep records of the maternity leave taken by employees?

A: Yes, the EO stipulates that the employer must keep records of the maternity leave taken by employees and the payment of maternity leave pay to them. The prescribed form of maternity leave record is as follows:

Name	Date of Commencement of Employment	Leave Taken		Payment		
		Pre-Confinement	Post-Confinement	Average Wage Month/Day	Amount	Date

*Sample Maternity Leave Record Prescribed Form can be downloaded at:

www.labour.gov.hk/eng/public/wcp/MaternityLeaveRecord.pdf

VI. Maternity Protection

6.1 Q: Is an employer allowed to dismiss a pregnant employee under the EO?

A: An employer is prohibited from dismissing a pregnant employee from the date on which she is confirmed pregnant by a medical certificate to the date on which she is due to return to work upon the expiry of her maternity leave if:

- the employee has been employed under a continuous contract; and
- she has served a notice of pregnancy to the employer.

If a pregnant employee is dismissed by her employer before she has served a notice of pregnancy, she may serve such notice immediately after being informed of her dismissal. Under such circumstances, her employer must withdraw the dismissal or the notice of dismissal.

Only under the following circumstances could an employer dismiss a pregnant employee:

- the employee is summarily dismissed due to her serious misconduct; or
- where it has been expressly agreed that the employment is on probation, the employee is dismissed for reasons other than pregnancy during the probation period of not more than 12 weeks.

Regarding the penalties for unlawful dismissal of a pregnant employee by an employer, please refer to 6.2.

6.2 Q: According to the EO, what is the penalty for an employer who unlawfully dismisses a pregnant employee?

A: According to the EO, it is an offence for an employer to dismiss a pregnant employee. The employer is liable to criminal prosecution and, upon conviction, to a fine of \$100,000. Besides, the employer is also required to pay the following sums of money to the dismissed employee within 7 days after the day of termination:

- (1) wages in lieu of notice;
- (2) a further sum equivalent to one month's wages as compensation; and
- (3) 14 weeks' maternity leave pay if, but for the dismissal, she would have been entitled to such payment.

It is also stated in the Part on Employment Protection of the EO that for unlawful and unreasonable dismissal, the employee can claim for remedies if she meets the criteria as stipulated under the Ordinance. Remedies may include reinstatement/re-engagement or terminal payments and/or an award of compensation. For details, please refer to the chapter on employment protection of "A Concise Guide to the Employment Ordinance".

6.3 Q: What are the provisions in respect of assigning heavy, hazardous or harmful work to a pregnant employee?

A: The relevant provisions of the EO include:

- If a pregnant employee produces a medical certificate with an opinion as to her unfitness to handle heavy materials, work in places where gas injurious to pregnancy is generated, or do other work injurious to pregnancy, the employer may not allocate such work to the employee. If the employee is already performing such work, the employer shall within 14 days remove her from that work.
- The employer may, at his own expense, arrange for the employee to attend another medical examination by a registered medical practitioner or registered Chinese medicine practitioner within 14 days after receiving the medical certificate of the employee.
- If the earnings of the employee is affected as a result of her transfer from heavy, hazardous or harmful work, the maternity leave pay or the payment for unlawful termination of employment shall be calculated on the basis of the average daily or monthly wages earned by the employee in the 12-month period preceding the transfer.

6.4 Q: What is the penalty for an employer who fails to comply with the requirements on prohibition of assignment of heavy, hazardous or harmful work to a pregnant employee?

A: An employer who without reasonable excuse fails to comply with the requirements is liable to prosecution and, upon conviction, to a fine of \$50,000.

VII. Paternity Leave

7.1 Q: Who is eligible for paternity leave?

A: A male employee is entitled to 5 days' paternity leave for each confinement of his spouse/partner if he meets the following requirements:

- (a) he is the father of a new-born child or a father-to-be;
- (b) he has been employed under a continuous contract; and
- (c) he has notified his employer in accordance with the law.

7.2 Q: Who is eligible for paternity leave?

A: The employee must notify his employer of:

- (a) his intention to take paternity leave at least 3 months before the expected date of delivery of the child (exact date of leave not required at this stage); and
- (b) the date of his paternity leave before taking the leave.

If the employee fails to give the abovementioned 3 months' advance notice to the employer, he must notify the employer of the date of his paternity leave at least 5 days before that date.

If the employer so requests, the employee must provide his employer with a written statement signed by him stating the name of the child's mother, the expected/actual date of delivery of the child, and that he is the child's father.

*Relevant sample written statement:

www.labour.gov.hk/eng/public/wcp/ConciseGuide/07.pdf

7.3 Q: When may paternity leave be taken?

A: An eligible male employee may take paternity leave at any time during the period from 4 weeks before the expected date of delivery of his child to 14¹ weeks beginning on the actual date of delivery of his child. He may take all 5 days of paternity leave in one go or on separate days.

Tips on good people management practices: Employers should have close communication with their employees to ensure that the business of the company and the employee's needs can be taken into account when deciding on the date of paternity leave.

¹ If the child is born before 11 December 2020, it is up to 10 weeks beginning on the actual date of delivery of the child.

7.4 Q: What is the rate of paternity leave pay?

A: The daily rate of paternity leave pay is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the day of paternity leave. If an employee takes more than one day of paternity leave consecutively, the daily rate of paternity leave pay is a sum equivalent to four-fifths of the average daily wages earned by the employee in the 12-month period preceding the first day of paternity leave. In calculating the average daily wages, an employer should exclude:

(i) the periods for which an employee is not paid wages or full wages, including rest day, statutory holiday, annual leave, sickness day, paternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods.

7.5 Q: Who is eligible for paternity leave pay?

A: A male employee is entitled to paternity leave pay if he:

- (a) has been employed under a continuous contract for not less than 40 weeks immediately before the day of paternity leave; and
- (b) has provided the birth certificate of his child, on which his name is entered as the child's father, to the employer within the stipulated period (Please refer to Question 7.7 for details).

7.6 Q: Is the employee entitled to paternity leave pay if the child is born dead or dies after birth and no birth certificate has been issued in respect of the child?

A: If the child is born dead or dies after birth and no birth certificate has been issued in respect of the child, the employee is also entitled to paternity leave pay if he can produce a medical certificate certifying the delivery of the child and, if required by the employer, a relevant written statement.

* Relevant sample written statement if the child is born dead or dies after birth:

www.labour.gov.hk/eng/public/wcp/ConciseGuide/07.pdf#page=4

7.7 Q: When should the employee provide the required document to the employer?

A: The employee must provide the required document to the employer within the following period (whichever period expires first):

- (a) 12 months after the first day of paternity leave taken; or
- (b) if he ceases to be employed, within 6 months after cessation of employment.

7.8 Q: When should paternity leave pay be paid to the employee? If the employee takes his paternity leave on separate days, should paternity leave pay be calculated at the same rate?

A: Paternity leave pay should be paid to the employee after the employee has taken paternity leave and has provided the required document to the employer. If the employee provides the required document to the employer after he has taken paternity leave, paternity leave pay should be paid when the employee is next paid his wages after the document is provided. If the employee has provided the required document to the employer before taking paternity leave, paternity leave pay should be paid to the employee when the employee is next paid his wages after the day of paternity leave. As the 5 days of paternity leave may be taken on separate days, paternity leave pay should be paid having regard to when the employee takes his paternity leave and when he provides the required document.

The daily rate of paternity leave pay is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the "specified dates". If an employee's paternity leave is taken in different wage periods, the paternity leave pay for individual days of paternity leave should be calculated in accordance with the above principle and may not be of the same rate.

The "specified dates" of the paternity leave pay are:

Day(s) of Paternity Leave	Specified Dates
1 day	Day of the paternity leave
More than 1 consecutive day	First day of the paternity leave

ENQUIRIES



Labour Department

- Enquiry Hotline: 2717 1771 (This hotline is handled by the “1823”)
- Homepage Address: www.labour.gov.hk
- Addresses of the offices of the Labour Relations Division:
www.labour.gov.hk/eng/tele/lr1.htm

Other Organisations

Equal Opportunities Commission

Tel.: 2511 8211
Fax: 2511 8142

Office of the Privacy Commissioner for Personal Data

Tel.: 2827 2827
Fax: 2877 7026

Mandatory Provident Fund Schemes Authority

Tel.: 2918 0102
Fax: 2259 8806

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