

‘Employees’ and ‘Self-employed persons’ of the Tourism Industry

Industry Practices

Owing to its unique trade practices, certain practitioners in the Tourism Industry may be engaged to work in the capacity of ‘self-employed persons’. This leaflet is produced by the Labour Department’s Tripartite Committee on Hotel and Tourism Industry*. It serves to point out major differences between an ‘employee’ and a ‘self-employed person’ where statutory rights and protection are concerned, illustrates major considerations in differentiating these two identities, as well as highlights some important points to note for practitioners in the trade.

Some Differences in the Rights and Benefits Between An ‘Employee’ and A ‘Self-employed Person’

- An ‘employee’ would be entitled to benefits and protection in accordance with the provisions of the Employment Ordinance like wage protection, rest days, statutory holidays, paid annual leave, sickness allowance, severance payment/long service payment, etc.
- An ‘employee’ who sustains an injury or dies as a result of an accident arising out of and in the course of employment would be entitled to compensation in accordance with the Employees’ Compensation Ordinance. A ‘self-employed person’, however, is not entitled to the above statutory protection. If necessary, he should consider insuring himself against personal accidents at work.
- Under the Mandatory Provident Fund Schemes Ordinance, there are different arrangements for an ‘employee’ and a ‘self-employed person’ in respect of joining the schemes and making contributions. An employer has to make contributions for his employee in a Mandatory Provident Fund scheme, while a ‘self-employed person’ should participate the scheme and make contributions on his own.

How to Distinguish An 'Employee' from A 'Self-employed Person'

- There is no one single conclusive test to distinguish an 'employee' from a 'self-employed person'. In differentiating these two identities, all relevant factors of the case should be taken into account. Moreover, there is no hard and fast rule as to how important a particular factor should be. The common important factors include:
 - calculation of remuneration and scope of work
 - control over work procedures
 - ownership and provision of production tools and materials
 - whether the person can hire other helpers
 - bearing of financial risk over business (e.g. prospect of profit or risk of loss)
 - responsibilities in insurance and tax
 - traditional structure and practices of the trade or profession concerned

Since the actual circumstances in each case are different, the final interpretation will rest with the court in case of a dispute.

Important Points to Note

- To avoid unnecessary misunderstanding and dispute, a practitioner should, before being engaged, understand the content of the contract that he is entering into, define the mode of cooperation between himself and the other party according to their intentions, and make sure that he is clear about his own identity.
- If a contract of employment is in writing, the employer should give a copy of the written contract to the employee for retention and reference after it is signed or after its validation procedure is completed.
- An employee may, in accordance with the Employment Ordinance, make a written request to the employer for written information on conditions of employment before the commencement of employment.
- An employer could not unilaterally change the status of his employee to a 'self-employed person'. Otherwise, the employee may lodge a claim for remedies against his employer on the ground of unreasonable variation of the terms of the employment contract under the Employment Ordinance. Moreover, the employee may also make a claim for termination compensation against his employer on the ground of constructive dismissal under common law.
- An employee must cautiously assess the pros and cons involved if he intends to change his status to a 'self-employed person', including the employment rights and benefits that he may lose in such a change.
- If in essence there exists an employer-employee relationship, the employer is still required to fulfil his responsibilities under the relevant legislation even though his worker is called or has labeled himself as a 'self-employed person' in the contract.

***Members of Tripartite Committee on Hotel and Tourism Industry (in alphabetical order):**

Employer Associations

Hong Kong Association of China Travel Organizers Ltd.
Hong Kong Association of Travel Agents Ltd.
Hong Kong Hotels Association
Hong Kong Outbound Tour Operators' Association Ltd.
Hongkong Japanese Tour Operators Association Ltd.
Hongkong Taiwan Tourist Operators Association Ltd.
International Chinese Tourist Association Ltd.
The Federation of Hong Kong Chinese Travel Agents Ltd.
The Federation of Hong Kong Hotel Owners
Travel Industry Council of Hong Kong

Trade Unions

Hong Kong & Kowloon European Hotel & Restaurant Workers Union
Hong Kong Professional Tourist Guides General Union
Hong Kong Tour Guides General Union
Hong Kong Tourist Industry Employees' General Union
Hotels, Food & Beverage Employees Association

This leaflet highlights the differences in rights and protection enjoyed by 'employees' and 'self-employed persons' under various ordinances. It should be noted that the respective ordinances themselves remain the sole authority for the provisions the law mentioned.

Enquiries

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Homepage Address: <http://www.labour.gov.hk>

Enquiry in person to Offices of the Labour Relations Division:
<http://www.labour.gov.hk/eng/tele/lr1.htm>