

Overview of the Employment of Illegal Workers contrary to the Immigration Ordinance (Cap. 115)

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Hong Kong, renowned for its vibrant economy and diverse workforce, faces significant challenges stemming from the employment of illegal workers. The hiring of individuals who do not possess the necessary legal authorization undermines the labour market and exposes employers to severe legal consequences.

Whilst there are specific employee import schemes for employers who genuinely face difficulties in hiring workers locally in Hong Kong in the construction, transport or healthcare sectors¹, employers should note that in general, there is a positive duty imposed on them to ensure that they only employ persons who have the right to work in Hong Kong.

Understanding Illegal Employment

Illegal employment occurs when an employer hires individuals who are not authorized to work in Hong Kong. This includes tourists, non-permanent residents, or individuals with visas that prohibit employment. The temptation to hire illegal workers often arises in sectors such as construction, hospitality, F&B, and domestic work, where labour demand is high. During the COVID-19 pandemic, the situation was exacerbated as businesses faced sudden disruptions due to illness of existing labour or quarantine mandates. Employers (or their staff), in urgent need of quick fill-ins, sometimes resorted to hiring illegal workers as a temporary measure. However, the compliance risks associated with such practices, with sentencing including fines and imprisonment, are substantial, punishing those who facilitate employment for individuals lacking work authorization. The rationale for this policy is to safeguard job opportunities for locals and permanent residents of Hong Kong who are ready and willing to work, rather than allowing foreign workers to occupy those roles.

The Immigration Ordinance (Cap. 115) (“**the IO**”) provides a robust legal framework to combat this issue. This article explores the implications of employing illegal workers in Hong Kong and summarizes the key legal provisions.

Legal Framework

The IO outlines specific offenses and penalties related to the employment of illegal workers. Here is a brief overview of the relevant sections, i.e. Sections 17I to 17N of the IO:

¹ The Enhanced Supplementary Labour Scheme, the Special Scheme to Import Care Workers for Residential Care Homes and the Sector-specific Labour Importation Schemes.



Section 17I: Offense to be Employer of a Person Who is Not Lawfully Employable

This section makes it an offence for any person to employ an individual who is not lawfully employable, and it is a strict liability offence meaning that the Prosecution is not required to prove that the employer had knowledge / any intention that the employee was not lawfully employable. The penalties vary based on the status of the employee:-

1. If the employee is not a prohibited employee (i.e. any person who is prohibited from taking any employment or establishing or joining in any business under section 38AA of the IO), the employer (which could include a director, a manager, a secretary or other similar officers, or partners in a partnership) can face a fine of up to HK\$350,000 and imprisonment for 3 years.
2. If the employee is a prohibited employee, the penalties increase to a fine of HK\$500,000 and imprisonment for up to 10 years.

The employee themselves may also be prosecuted (at the same time or otherwise) and are often deported promptly from Hong Kong upon conviction and/or if they are found to have breached any condition of stay.

Employers may rely on a statutory defence if they are able to prove they took all practicable steps to determine the employee's eligibility to work and that it was reasonable to conclude that the employee was lawfully employable. This does not just include inspecting the identity card of the employee, but includes other significant steps such as making oral enquiries, questioning the prospective employee about domestic circumstances, skills and previous work experience. The Court will consider on a case-by-case basis considering all the circumstances whether such a defence is established. Upon conviction, an immediate short custodial sentence will normally be imposed, even for first-time offenders.

Section 17J: Employers to Inspect Documents of New Employees

Employers are required to inspect the identity documentation of prospective employees before entering into an employment contract. This includes:

- Valid identity cards or travel documents
- Official passports and the visas obtained therein
- In the case of certain individuals, the Director's permission, certificate of exemption or any other approved document etc.

Failure to comply with these requirements can result in penalties of up to HK\$150,000 and imprisonment for 1 year.

Section 17K: Records to be Kept by Employers

Employers are mandated to keep detailed records of their employees, including full names, identity document (including the relevant number of the identity document), and types of employment documents held. This record-keeping must be up-to-date and accessible for inspection by authorized personnel.



Section 17L: Powers of Enforcement

This section grants labour inspectors in the Labour Department the authority to enter workplaces, inspect records, require employee to produce identity documents, and seize evidence of illegal employment. Immigration officers and the police also have powers to inspect employee documentation.

Section 17M: Offences

Violations of record-keeping and inspection requirements can lead to fines and, in the case of obstructing public officers during investigation, fines and imprisonment.

Section 17N: Presumption

An important section to note is section 17N, which presumes that anyone found in a place where employees are in the employment of an employer, have entered into an employment contract and that they are an employee of that employer unless evidence suggests otherwise. This shifts the burden of proof onto the individual or the employer to demonstrate an individual's lawful employability.

Implications for Employers

With 1,013 illegal workers prosecuted alongside 169 employers in 2024, these figures highlight the seriousness with which these offenses are combatted. In addition to criminal liability, employers also face reputational damage, potential loss of business licenses, and civil liabilities.

To mitigate risks, employers must implement thorough training and compliance strategies. This includes understanding immigration regulations, maintaining accurate employee records, monitoring and having in place good hiring practices, and to exercise caution when vetting potential candidates.

Employers are also reminded of the importance of seeking immediate legal advice upon being investigated. Separate legal advice may also be necessary for each director/manager and/or the employee (should there be more than one person being investigated) in order to avoid any potential conflict of interests.

Breach of condition of stay

More recently, visitors from Mainland China have been arrested in Hong Kong for breaching conditions of stay, as they had worked illegally in Hong Kong by providing freelance photography and make-up services to other Mainland tourists without the appropriate work visas and approvals, and were sentenced to immediate imprisonment upon conviction.

Visitors should be reminded that working illegally in Hong Kong is a risk, and they may face penalties under section 41 of the IO (breach of condition of stay) of a fine up to HK\$50,000 and imprisonment for up to 2 years.



Agents collaborating with these visitors who work illegally in Hong Kong may also be prosecuted for aiding and abetting of breach of condition of stay or providing employment to an individual who is not lawfully employable. Hong Kong authorities vigorously investigate cases of similar nature to uphold Hong Kong immigration laws.

Conclusion

By fostering a culture of compliance, businesses can help ensure a fair labour market while protecting their interests. As Hong Kong continues to navigate its complex labour landscape, it is vital for all businesses to properly comply with Hong Kong immigration laws, for employers to remain vigilant and proactive in their hiring practices and for visitors to Hong Kong to ensure obtaining valid employment visas or approval before working.

Feel free to contact us if you wish to discuss this topic in further detail, or require assistance in investigations and enforcement actions, including urgent raid operations by the authorities.

Contributors



Eugene H. K. Cheng

Partner

 +852 2532 5453

 echeng@fclklaw.com.hk



Holly H. L. SIU

Associate

 +852 2532 5306

 hsiu@fclklaw.com.hk

Practice Area

Litigation, Arbitration & Dispute Resolution



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