MinterEllison LLP
Legal update – July 2020

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Welcome to our latest bulletin featuring various legal and market updates

- Hong Kong Trade Marks (Amendment) Ordinance – Nature of the New Changes
- Common misunderstandings about the term of service contracts for directors of listed companies and their subsidiaries; and
- Recent employment law developments in Hong Kong.

We hope that you find this edition informative and we welcome your comments and suggestions for future topics.

If you have any questions regarding matters in this publication, please refer to the contact details of the contributing authors.

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Hong Kong Trade Marks (Amendment) Ordinance – Nature of the New Changes

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Overview

With a view to enhancing Hong Kong's intellectual property regime and bringing the same in line with international standards, the Trade Marks (Amendment) Ordinance 2020 (the "Amendment Ordinance") was gazetted on 19 June 2020, with the vast majority of the provisions contained therein taking effect the same day. In summary, the provisions of the Amendment Ordinance are to serve 3 major purposes as follows.

3 Major Purposes

To **empower the Registrar** of Trade Marks (the "Registrar") to make rules to implement the international registration system under the Madrid Protocol

The Madrid Protocol provides for a **one-stop application process** for trade mark owners looking to register a trade mark with the World Intellectual Property Organization or to extend trade mark protection in multiple jurisdictions (i.e. no individual filings in each jurisdiction are required). To date, the Madrid Protocol has 106 contracting parties worldwide, of which Hong Kong is not yet one. The Amendment Ordinance will allow the Registrar to make rules against the backdrop of the Trade Marks Ordinance (the "TMO") to prepare Hong Kong for implementing the international registration system in the future, likely in 2022-23.

To **confer powers on the Customs and Excise Department** (the "C&ED") to enforce the criminal provisions in relation to trade mark registrations under the TMO

Prior to the enactment of the Amendment Ordinance, the criminal provisions of the TMO were enforced by the Hong Kong Police Force. Meanwhile, the C&ED has always been responsible for criminal sanctions against copyright and trade mark infringements under the Copyright Ordinance and Trade Descriptions Ordinance. The Amendment Ordinance aims to enhance the efficiency and effectiveness of the enforcement of the criminal provisions by vesting such powers in one single authority – that is, the C&ED.

To make various **technical amendments** to existing provisions of the TMO

Enacted in 2003, the TMO has not seen any major amendments despite various court decisions over the years and changes in international practices. The Amendment Ordinance introduces a series of miscellaneous amendments of a technical nature, enhancing the trade mark application and registration processes. For instance, to clarify the protection afforded to well-known trade marks under the TMO, to require a corporate applicant of a trade mark to provide information as to its place of incorporation, to require the payment of filing fees as a pre-requisite for obtaining a date of filing for registration, and to clarify the conditions subject to which an amendment of an application for registration of a trade mark can be made.

Please contact us should you have any questions on how we can be of assistance in light of the new amendments to the TMO introduced by the Amendment Ordinance.

For more details of the Amendment Ordinance, please click here.

Common misunderstanding about the term of service contracts for directors of listed companies and their subsidiaries

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It is common in Hong Kong for the service contracts of directors of listed companies and listed company subsidiaries to have three-year terms, often renewable for further terms of three years each.

While for some listed companies, the three-year term is a result of a deliberate and informed decision, for many, it is simply a decision made based on a lack of understanding of Rule 13.68 under The Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited ("Rule 13.68").

Rule 13.68 provides among other things that a listed company must obtain the prior approval of its shareholders in a general meeting for any service contract between the listed company or any of its subsidiaries on the one hand and a director of the listed company or any of its subsidiaries on the other, if the service contract:

- is for a duration that may exceed three years; or
- expressly requires the listed company to give more than one year's notice or pay compensation or to make other payments equivalent to more than one year's emoluments in order to terminate the contract.

The note to Rule 13.68 provides among other things that a service contract not for a fixed period is to be regarded as running at least until the earliest date on which it can lawfully be determined by the employing company without payment of compensation (other than statutory compensation).

As the above note is not easy to understand, many listed companies opt to take the safe route of having fixed term service contracts for their directors and the directors of their subsidiaries and keeping the fixed terms to three years, to avoid the need for shareholders' approval in a general meeting. These companies will then have to keep track of when individual contract expires and to renew it in a timely manner.

It is in fact not necessary for listed companies to provide for three-year fixed term contracts and keep renewing them every three years. They can make good use of the note to Rule 13.68 and have contracts without fixed terms. To illustrate what the note to Rule 13.68 means, we use the following examples:

- If the contract does not have a fixed term but provides that the listed company can give not less than six months' notice to terminate the contract for any reason at any time after the second anniversary of the contract commencement date, then the duration of this contract for the purpose of Rule 13.68 will be two years and six months.
- If the contract does not have a fixed term but provides that the listed company can give not less than six months' notice to terminate the contract for any reason at any time, then the duration of this contract for the purpose of Rule 13.68 will be six months.

Therefore, if a service contract does not specify a fixed term and provides that the director's service will continue until the contract is terminated, it will satisfy the requirements of Rule 13.68 for dispensation with shareholders' approval so long as:

- it gives the listed company or its subsidiary the right to terminate the contract for any reason by providing notice to the director;
- the period from the commencement date of the contract to the end of the notice period for termination by the listed company or its subsidiary is not more than three years;
- the notice period for termination is not more than one year; and
- the compensation or other payment to be made by the listed company or its subsidiary to the director is not more than the director's emoluments for one year under the contract.

Of course, listed companies must still comply with the requirements under their respective articles of association / bye-laws for the retirement of directors by rotation at annual general meetings, which is a separate matter from the duration of the directors' service contracts under Rule 13.68.

Recent employment law developments in Hong Kong

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1. PART I – MATERNITY AND PATERNITY LEAVE

Overview

On 8 January 2020, the **Employment (Amendment) Bill 2019** (the "**Bill**") was introduced into the Legislative Council, and passed on 9 July 2020. The amendments in the Bill are anticipated to take effect by late 2020.

The Bill proposes three main amendments to the Employment Ordinance (the "**EO**"), and other existing maternity protections under the EO remain unchanged under the Bill.

a) Extending statutory maternity leave from 10 to 14 weeks

Currently, female employees under a continuous contract are entitled to take 10 weeks' maternity leave. If they have been employed under a continuous contract for not less than 40 weeks immediately before the commencement of their maternity leave, they are also entitled to maternity leave pay at the rate of four-fifths of their average daily wages for the relevant 10 weeks.

The Bill will increase statutory maternity leave from 10 weeks to 14 weeks. The additional four weeks' maternity leave pay will continue at the existing rate of four-fifths of the employee's average daily wages, subject to a total cap of HK$80,000.

The Government will bear the costs of the additional four weeks' statutory maternity leave and will reimburse employers by way of an administrative scheme subject to proof of payment to the employee, but details of the administrative scheme have not yet been published. However, the Government has pledged its aim to implement the reimbursement regime for the additional maternity leave pay by the end of 2021.

b) Definition of "miscarriage"

Currently, female employees are entitled to claim maternity leave only if the miscarriage or stillbirth occurs at or after 28 weeks of pregnancy.

The Bill will amend the definition of "miscarriage" from "28 weeks of pregnancy" to "24 weeks of pregnancy". This means that an employee who suffers a miscarriage or stillbirth at any time from 24 weeks after conception, will be eligible for maternity leave.

c) Entitlement to sickness allowance for employees who are able to produce a certificate of attendance in respect of a pregnancy-related medical examination

Currently, a medical certificate is required to be deemed as sufficient evidence for an employee to be entitled to claim sickness allowance for attending pre-natal examinations.

In recognising that women are sometimes issued with a certificate of attendance ("**CoA**") rather than a medical certificate when attending pregnancy-related medical examinations, the Bill accepts a CoA issued by a registered medical practitioner, registered Chinese medicine practitioner, registered midwife or registered nurse as proof in order for employees to be entitled to sickness allowance.

d) Paternity Leave Entitlements

Currently, eligible male employees are entitled to take paternity leave during the period commencing 4 weeks before the expected date of delivery of the child to 10 weeks of the actual date of delivery of the child.

The Bill extends this time period to 14 weeks of the actual date of delivery.

e) Transitional Changes

Regarding confinement, if a female employee gives notice of pregnancy and her intention to take maternity leave before the date the amendments comes into operation ("**Amendment Date**") but her confinement occurs on or after the Amendment Date, she will be entitled to maternity leave and maternity leave pay in accordance with the new provisions.

Regarding termination of employment of a pregnant employee, if her confinement occurs on or after the Amendment Date, and the termination date of her employment contract falls on or after the Amendment Date, the employer will liable to pay to the employee maternity leave pay for 14 weeks.

Regarding paternity leave, if an eligible male employee's child is born on or after the Amendment Date, the new provisions are applicable in respect to his paternity leave entitlements regardless of whether his notification to take paternity leave was given at an earlier date.

f) Impact on Hong Kong Employers

The new provisions seek to bring Hong Kong in line with the International Labour Organisation standards, which provide for a minimum 14 week maternity benefit.

Employers should ensure that they:

i. update their employee handbooks and existing internal policies to reflect the new position above; and

ii. ensure human resources and management personnel are adequately informed and trained about these amendments so they are well prepared and informed when managing female staff returning to work from maternity leave.

2. PART II – DISCRIMINATION AND HARASSMENT ORDINANCES

Overview

On 19 June 2020, the Discrimination Legislation (Miscellaneous Amendments) Bill 2018 was gazetted as the **Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020 (the "Amendment Ordinance")**. The Amendment Ordinance provides broader scope of protection against discrimination and harassment under the Sex Discrimination Ordinance ("**SDO**"), Disability Discrimination Ordinance ("**DDO**"), Family Status Discrimination Ordinance ("**FSDO**") and Race Discrimination Ordinance ("**RDO**"). As set out below, the majority of changes took effect from 19 June 2020.

This note provides a brief summary of the key areas of change and issues that employers should take note of in light of the Amendment Ordinance.

a) Breastfeeding

The Amendment Ordinance introduced express provisions in the SDO to prohibit direct and indirect discrimination on the ground of breastfeeding.

The definition of "breastfeeding" now includes the act of breastfeeding, the expression of breast milk to feed a child, and the status of being a breastfeeding women, i.e. persons feeding any child with breastmilk and not just their own child. This means that it is now unlawful to directly or indirectly (and without justification) discriminate against a woman on the grounds that she is breastfeeding as compared to a woman who is not breastfeeding.

The existing positive discrimination measures for sex, marital status and pregnant persons will also be extended to women who are breastfeeding.

These changes to the SDO on breastfeeding discrimination will only come into force on 19 June 2021.

While the Amendment Ordinance does not impose a positive obligation to offer lactation breaks or facilities, and there is currently no practical guidance in the Code of Practice which addresses this issue, employers are encouraged to examine their workplace policies and practices to ensure that they accommodate these changes to the extent possible, for example, consider allowing paid lactation breaks (two 30-minute breaks during an eight hour shift) for at least one year after childbirth, providing space with privacy and appropriate equipment such as chair, table, electrical socket, etc. to express breastmilk, and a refrigerator for storing breastmilk.

b) Harassment in the Workplace

The Amendment Ordinance added new provisions to the SDO, DDO and RDO imposing further obligations against sexual, disability and racial harassment at a workplace on "workplace participants", even when there is no employment relationship. Previously, "workplace participants" covered employees, employers, contract workers, commission agents, partners in a firm, but the definition has now been expanded to include interns and volunteers, provided the

individuals work at or attend the same workplace.

Companies who engage and hire interns and volunteers will now be vicariously liable for harassment carried out by them in the course of their internship or while performing volunteer work (excluding any criminal proceedings). As with vicarious liability in other contexts, it will be a defence if the company who engaged the intern or volunteer can prove they took reasonably practicable steps to prevent the intern or volunteer from engaging in the harassment.

The DDO and RDO are also amended to protect service providers from disability and racial harassment by customers. This also covers disability and racial harassment between service providers and customers where the acts of harassments occurred outside Hong Kong but on a Hong Kong registered ship or aircraft.

The DDO and SDO are also amended to protect members or applicants for membership of a club from disability and sexual harassment by the management of clubs.

The above changes took immediate effect on 19 June 2020.

Going forward, employers are encouraged to review their existing workplace harassment policies to ensure that they are updated to cover the expanded definition of "workplace participants", and that there are clear guidelines to recognise, report and handle harassment incidents. Employers should provide adequate workplace training to all workplace participants to minimise any exposure to vicarious liability. Employers should also establish an external harassment policy applicable to third parties with whom the employer is connected to or conduct business with, such as service providers and customers.

c) Race Discrimination Against "Associates"

Previously, under the RDO, it was unlawful to discriminate against or harass a person by reason of the race of his/her "near relative". The term "near relative" has now been replaced by the broader term "associate", which covers a spouse, relative[1], carer of the protected person, another person living with the protected person on a genuine domestic basis, and a person who is in a business, sporting or recreational relationship with the protected person.

Second, the definitions of "race" and "racial group" of a person under the RDO have also been widened to cover race, colour, descent or national or ethnic origin "by imputation". This means that it is now unlawful to harass or discriminate against individuals on the basis that they are assumed to be of a particular race, even when it is not necessarily their actual race.

These changes took immediate effect on 19 June 2020.

Going forward, employers are encouraged to be more sensitive and aware when dealing with an "associate" of a person who potentially might be a victim of racial discrimination, for example, during recruitment and layoff processes.

d) Intention to Indirectly Discriminate and Damages

Previously, under the SDO, FSDO and RDO, a person claiming to be a victim of indirect discrimination on the grounds of sex, race or family status was not entitled to an award of damages if the respondent could prove that there was no intention to discriminate.

However, the Amendment Ordinance removed this requirement, i.e. the lack of intention to discriminate against the claimant will no longer be a defence to a claim for damages in such cases, and the court will be able to award damages even if there is no intention of treating the claimant unfavourably.

These changes took immediate effect on 19 June 2020.

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[1] The term "relative" is not presently defined by the Amendment Ordinance or the RDO. However, "near relative" of a person is defined in the RDO as a person's spouse, parent of the person or the spouse, child of the person or the spouse of such child, brother or sister (whether of full or half blood) of the person or of the spouse or the spouse of such a brother or sister; grandparent of the person or of the spouse; or a grandchild of the person or the spouse of such a grandchild. Therefore, the term "relative" covers the aforementioned persons, and perhaps an even more extended list of persons.

Going forward, given the higher possibility that damages might be awarded to victims of indirect discrimination, employers should consider whether the application of blanket conditions to its employees may inadvertently prejudice the rights of or be detrimental to certain employees and consider imposing more stringent guidelines. In handling complaints of discrimination, employers should have in place adequate follow-up mechanisms to ensure such complaints are properly assessed and handled.

e) Going Forward

In light of the broadened scope of protection pursuant to the Amendment Ordinance, employers are strongly encouraged to undergo a comprehensive review and update of their internal policies concerning discrimination and harassment in the workplace.

Please contact us should you have any questions or if we can be of assistance in any way, in light of the amendments introduced by the Bill and the Amendment Ordinance.

铭德有限法律责任合伙律师事务所
法律动态 –2020 年 7 月

2020 年 7 月 31 日

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在欢迎阅读我们有着各样法律和市场最新情况的新一期通讯

- 香港《2020 年商标（修订）条例》 — 新改变的本质探究;
- 对上市公司及其附属公司董事之服务合约期限的常见误解; 和
- 香港雇佣法例的最新发展。

我们希望本通讯为您提供有用的资料，并欢迎您对日后的题目提出意见和建议。

如果您对本通讯有任何疑问，请参阅作者的联系方式。

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香港《2020 年商标（修订）条例》— 新改变的本质探究

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概述

为了完善香港的知识产权制度并使之与国际标准接轨，《2020 年商标（修订）条例》（「**修订条例**」）定于今天（2020 年 6 月 19 日）刊宪，其中包含的大多数条文在同一天生效。总而言之，修订条例的条文旨在达到以下三个主要目的：

三个主要目的

授权商标注册处处长（「**处长**」）订立规则以实施《马德里议定书》下的国际注册制度

《马德里议定书》为希望在世界知识产权组织注册商标或在多个司法管辖区扩展商标保护的商标所有人提供**一站式申请程序**（即无需在每一个司法管辖区单独提交申请）。迄今为止，《马德里议定书》在全球范围内有 106 个缔约方，其中尚未包括香港。修订条例将允许处长在《商标条例》的背景下订立规则，为香港未来可能于 2022-23 年实施国际注册制度做好准备。

赋予香港海关（「**海关**」）**权力**以执行《商标条例》（「**商标条例**」）中有关商标注册的刑事条款

在颁布修订条例之前，商标条例中的刑事条款是由香港警察部队执行的。此外，海关一直负责根据《版权条例》及《商品说明条例》对侵犯版权及商标的行为进行刑事制裁。修订条例旨在将此类权力归于一个单一的机构（即海关）来提高执行刑事条款的效率和效力。

对商标条例的现有条款进行各项**技术性修订**

尽管多年来法院作出了各项相关判决且国际惯例有所变化，但商标条例于 2003 年颁布至今未见任何重大修改。修订条例引入了一系列技术性的杂项修订，完善了商标的申请和注册程序。例如，为了明晰商标条例下对驰名商标的保护，要求属法团的商标申请人提供有关其成立地的信息，要求支付申请费作为获取提交日期的前置要求，并阐明了可以修改商标注册申请的条件。

如果您对根据修订条例引入的商标条例的新修订有任何疑问，请随时与我们联系。

有关修订条例的更多详情，请点击此处。

对上市公司及其附属公司董事之服务合约期限的常见误解

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在香港，上市公司和其附属公司董事的服务合约一般以三年为期且通常可再续，每次以三年为限。

尽管对某些上市公司而言，三年合约期是一项经深思熟虑后作出的决定，但对于许多公司而言，这纯粹是基于对《香港联合交易所有限公司证券上市规则》第 13.68 条 ("第 13.68 条")的理解不足而作出的决定。

第 13.68 条规定上市公司或其附属公司与上市公司或其附属公司的董事之间的任何服务合约如属下述者，必须事先在股东大会上取得股东的同意等：

- 年期超过三年；或
- 明文订明，上市公司若要终止合约，必须给予逾一年通知或支付等同一年以上酬金的赔偿或其他款项。

第 13.68 条的注释说明，未有订明期限的服务合约仍须被视为有效，直至聘用的公司可毋须给予赔偿（法定赔偿除外）而将合约合法终止之日为止等等。

由于上述的注释不易理解，因此许多上市公司选择了一种安全的方法，即对其董事及其附属公司的董事之服务合约订下固定的期限，并将该固定期限订为三年，以免要在股东大会上取得股东的同意。这些公司其后必须密切留意每份合约的到期时间并及时续期。

其实上市公司不必订立为期三年的定期合约并每三年续期一次。它们可以好好利用第 13.68 条的注释签订没有固定期限的合约。我们谨以下面的例子阐明第 13.68 条的注释的含义：

- 如果合约没有固定期限，但规定上市公司可以在合约生效日的两周年后随时通过发出不少于六个月的通知以任何理由终止合约，则就第 13.68 的注释而言，该合约的期限为两年零六个月。
- 如果合约没有固定期限，但规定上市公司可以随时通过发出不少于六个月的通知以任何理由终止合约，则就第 13.68 的注释而言，该合约的期限为六个月。

因此，如服务合约没有订明固定的期限，并规定董事的服务将一直维持，直到合约终止，则只要符合以下的条件，该合约就满足第 13.68 条的规定，可免除其下要取得股东同意的要求：

- 在该合约下上市公司或其附属公司有权通过向该董事发出通知以任何理由终止合约;
- 由合约开始之日起至上市公司或其附属公司就终止合约的通知期结束之日止不超过三年;
- 终止合约的通知期不超过一年；及
- 上市公司或其附属公司向其董事支付的补偿金或其他款项不超过董事在合约下一年的酬金。

当然，上市公司仍必须遵守在其各自的章程细则下，董事们要在周年股东大会上轮换退任的要求，这与第 13.68 条规定的董事服务合约的期限为两个截然不同的问题。

香港雇佣法例的最新发展

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1. 第 1 部分 - 产假和陪产假

概观

《 2019 年雇佣（修订）条例草案》（**“雇佣修订条例”**）于 2020 年 1 月 8 日提交立法会，并于 2020 年 7 月 9 日获得通过。该《雇佣修订条例》的修订有望于 2020 年年末生效。

《雇佣修订条例》建议对《雇佣条例》（**“雇佣条例”**）进行三项主要修订，而雇佣条例下其他现行的生育保障均维持不变。

a) 法定产假由 10 个星期延长至 14 个星期

现时，按连续性合同受雇的女雇员可享有 10 个星期的有薪产假。如果在紧接产假开始前已经按照连续性合同受雇不少于 40 个星期，女雇员亦有权获得产假薪酬，其薪酬为相关 10 个星期平均日薪的五分之四。

《雇佣修订条例》将法定产假由 10 个星期延长至 14 个星期。额外的四星期产假薪酬将继续维持为雇员现行法定产假薪酬五分之四的比率，上限为八万港元。

政府将会以报销形式承担雇主须支付并已支付的额外四个星期的产假薪酬，有关发还安排将以行政措施处理。该行政措施细节尚未公布，但政府已承诺希望于 2021 年年底前实施新增产假薪酬的发还款项制度。

b) “流产”的定义

现时，只有在怀孕 28 个星期或之后产下不能存活婴儿的女雇员才有权获得产假。

《雇佣修订条例》将“流产”的定义从由“怀孕 28 个星期内”更新为“怀孕 24 个星期内”，意味着怀孕 24 个星期或以后产下不能存活婴儿的女雇员有权获得产假。

c) 接受产前检查的雇员如能出示（医生证明书以外的）到诊证明书有权获得疾病津贴

现时，女雇员如接受产前检查而缺勤，需出示适当的医生证明书，才有权获得疾病津贴。

意识到近年不时有女雇员在产前检查后只获发到诊证明书而非医生证明书的情况，《雇佣修订条例》将接纳由注册医生、注册中医、注册助产士或注册护士所签发的到诊证明书为合资格雇员就接受产前检查当日有权获得疾病津贴的证明文件。

d) 侍产假

现时，符合条件的男雇员可在婴儿的预计出生日期前 4 个星期至确实出生日期当日起计的 10 个星期内的任何日子放取侍产假。

《雇佣修订条例》将该时期延长至确实出生日期当日起计的 14 个星期。

e) 过渡期的相关事宜

有关分娩，假若女雇员在《雇佣修订条例》生效之日（**“修订日期”**）前就其怀孕及拟放产假事宜给予通知，而该雇员在修订日期后分娩，《雇佣修订条例》将适用于其为该婴儿出生而享有的产假及产假薪酬。

有关终止怀孕女雇员的雇佣合约，假若该女雇员于修订日期当日或之后的分娩，而该雇员的合约终止日期是在修订日期当日或之后，雇主需向该雇员支付 14 个星期的产假薪酬。

有关侍产假，假若符合条件的男雇员的婴儿于修订日期当日或之后出生，不论他就其婴儿出生而放取侍产假事宜通知是否提前发出，《雇佣修订条例》将适用于其享受之侍产假。

f) 对香港雇主的影响

《雇佣修订条例》的目的是将香港和国际劳工组织的标准（规定最少 14 个星期的生育保障）维持一致。

雇主应确保他们:

i. 更新员工手则和现有的内部政策，以反映上述新修订的条例；及

ii. 为人力资源部门和管理层提供有关上述修订的资询和充分的培训，以便他们能适当地应付由产假重返工作岗位的雇员。

2. 第二部分 - 歧视与骚扰条例

概观

2020 年 6 月 19 日，《2018 年歧视法例（杂项修订）条例草案》刊宪为《2020 年歧视法例（杂项修订）条例》（**“歧视修订条例”**）。《歧视修订条例》扩大了《性别歧视条例》、《残疾歧视条例》、《家庭岗位歧视条例》及《种族歧视条例》所提供的免受歧视和骚扰保障。 如下所述，大部分修订已于 2020 年 6 月 19 日生效。

本通讯简述《歧视修订条例》的主要修订及雇主应就其修订而注意的问题。

a) 喂哺母乳

《歧视修订条例》在《性别歧视条例》中明确地禁止基于喂哺母乳的直接和间接歧视。

“喂哺母乳”的新定义包括喂哺母乳的行为，向儿童喂哺母乳的作为，以及集乳和授乳妇女的身分，即任何向儿童喂哺母乳的人士，而不仅是其的孩子。这意味着，相比非喂哺母乳人士，直接或间接（没有理由支持下）歧视一名喂哺母乳的女性现时即属违法。

现有针对性别，婚姻状况和孕妇的歧视措施也将扩大至包括喂哺母乳的妇女。

有关《性别歧视条例》歧视喂哺母乳的修例将于 2021 年 6 月 19 日生效。

虽然《歧视修订条例》没有对雇主施加正面的责任，或要求他们为授乳妇女提供授乳时段或设施，而实务守则亦没有提供任何实质的引导，不过雇主应审视其工作场所的政策和守则以确保其能尽量迎合《歧视修订条例》的修订。例如，考虑在分娩后至少一年内允许有薪授乳时段（八个小时的轮班中给予两次 30 分钟的授乳时段），提供私人空间及适当集乳的设备，如椅子，桌子，电源插座等和储存母乳的冰箱。

b) 工作场所的骚扰

《歧视修订条例》对《性别歧视条例》，《残疾歧视条例》和《种族歧视条例》增订了禁止在共同工作场所内即使没有雇佣关系的“场所使用者”的性骚扰、残疾骚扰及种族骚扰的条文。之前，“场所使用者”只涵盖雇员、雇主、合约工作者、佣金经纪人和合伙人；但该定义已扩阔到包括任何使用工作场所或置身工作场所的场所使用者，例如实习人员及义工。

《歧视修订条例》下，聘用和雇用实习人员和义工的公司将为该实习人员或义工在实习期间或在执行义务工作期间所作出的骚扰承担转承责任（不包括任何刑事诉讼）。与其他情况下的转承责任一样，如果聘用实习人员或义工的公司能够证明他们已采取合理切实可行的措施防止其实习人员或义工进行骚扰，即可用此为免责辩护。

《残疾歧视条例》和《种族歧视条例》亦修改至保障服务提供商免受顾客的残疾骚扰和种族骚扰。该包括任何在香港注册的飞机和船舶上服务提供商或顾客之间作出的残疾骚扰和种族骚扰，即使其骚扰于香港境外发生。

《残疾歧视条例》和《性别歧视条例》亦修改至保障会社成员或申请成为会社成员的人免受管理层的残疾骚扰和性骚扰。

上述修例已于 2020 年 6 月 19 日即时生效。

今后，雇主应检讨其现有的工作场所骚扰政策以确保该政策更新至涵盖扩阔了的“场所使用者”定义，和拥有明确的准则来识别，呈报及处理任何骚扰事端。雇主应向所有场所使用者提供充分的工作场所培训，以减少承担转承责任的风险。雇主亦应制定适用于与雇主有联系或与其有业务上交往的第三者，例如服务提供商和客户的对外骚扰政策。

c) 对“有联系者”的种族歧视

之前，根据《性别歧视条例》，因某人“近亲”的种族而对其作出歧视或骚扰性的行为即属违法。现时，“近亲”已被更广的词汇“有联系者”取代，其词包括受保护者的配偶、亲属 [1]、照料者、与该人在真正的家庭基础上共同生活的另一人、以及与该人在业务、体育或消闲关系的另一人。

[1] “亲屬”一词目前未由《歧視修订条例》或《性别歧视条例》界定。 但《性别歧视条例》中将某人的“近亲”被定义为该人的配偶，该人或其配偶的父母，该人的子女或其子女的配偶，该人的或其配偶的兄弟姊妹（不论是全血亲或半血亲）或该兄弟姊妹的配偶，该人的或其配偶的祖父母或外祖父母，该人的孙、孙女、外孙或外孙女或该孙、孙女、外孙或外孙女的配偶。因此，“亲屬”一词不单止包含上述人士，亦可能包含其他人士。

第二，《性别歧视条例》所提及的“种族”和“种族群体”的定义扩阔至包含他人认定归于某人的种族、肤色、世系、民族或人种。

这意味着，若他人假定某人属于某个特定种族而作出骚扰或歧视的行为，即使该人根本不属于被假定的种族，其骚扰或歧视行为已即属违法。

上述修例已于 2020 年 6 月 19 日即时生效。

今后，雇主与可能成为种族歧视受害者的“有联系者”接触时，例如在招聘和裁员过程中，应更加敏感和谨慎。

d) 意图间接歧视和损害赔偿

之前，根据《性别歧视条例》、《家庭岗位歧视条例》和《种族歧视条例》，如间接歧视案中答辩人能证明他没有歧视的意图，声称自己受到间接性别、种族或家庭岗位歧视的索赔人无权获得损害赔偿。

现时，《歧视修订条例》废除了此条文。换言之，缺乏歧视的意图不再是免责辩护，而即使答辩人没有意图对索赔人作出不利的对待，法庭亦可以向索赔人判给损害赔偿。

上述修例已于 2020 年 6 月 19 日即时生效。

然言，鉴于被间接歧视的受害者更有可能得到损害赔偿，雇主应考虑施加一视同仁的要求或条件会否无意损害某些雇员的权利或对其造成损害，并考虑实施更严格的规则。在处理歧视投诉时，雇主应设立适当的跟进机制，以确保能适当地评估和处理这些投诉。

e) 展望未来

鉴于《歧视修订条例》扩阔了对雇员的各种保障，雇主应其工作场所的歧视和骚扰的内部政策进行彻底和全面的检阅和更新。

如您就《雇佣修订条例》和《歧视修订条例》有任何疑问，或我们可以就其修正案能够提供任何帮助，请与我们联系。

铭德及有关办事处：

阿德莱德 奥克兰 北京 布里斯班 堪培拉 达尔文 黄金海岸 香港 伦敦 墨尔本 珀斯 上海 悉尼 乌兰巴托 惠灵顿