

受僱與自僱

The employed and the self-employed

酒店及旅遊業三方小組 Tripartite Committee on the Hotel and Tourism Industry

(編按：勞工處轄下酒店及旅遊業三方小組特為本刊撰文，以淺白的文字，簡述僱員與自僱人士在法定權益和保障方面的差別。文中凡提及法例條文之處，應以有關法例的原文為依歸。)

(Editor's note: The Labour Department's Tripartite Committee on the Hotel and Tourism Industry has contributed the following article to highlight the differences in rights and protection enjoyed by employees and self-employed persons under various ordinances. It should be noted that the ordinances themselves remain the sole authority for any provisions of the law mentioned.)

行業特性

基於行業的特質，旅遊業的某些從業員可能以自僱人士的身份與業內的機構合作。由於不同的合作模式會直接影響合作雙方在有關法例下的責任與權益，本文希望向業內機構的管理人員闡明僱員與自僱人士在享有法定權益及保障方面的主要分別，並重點指出他們應注意的若干事項。

僱員與自僱人士的分別

- 僱員可根據《僱傭條例》的規定，享有各項福利和保障，例如工資保障、休息日、法定假日、有薪年假、疾病津貼、遣散費 / 長期服務金等等。
- 僱員在受僱工作期間因工遭遇意外以致受傷或死亡，可根據《僱員補償條例》獲得補償。
- 自僱人士並不享有上述的法定保障。如有需要，自僱人士應考慮為工作時發生的意外購買個人意外保險。
- 僱員與自僱人士在《強制性公積金計劃條例》下，參與計劃及供款方面的安排也有不同。
- 機構在分辨僱員與自僱人士時須考慮多個因素，包括安排工作的控制權、對業務及管理風險的承擔、生產工具的擁有及提供等等。由於個別個案的情形及所引伸的法律觀點均有不同，所以最終的詮釋，應以法院的判決為準。

Industry practices

Owing to the unique practices of the tourism industry, certain people may be engaged to work in self-employed capacities. This mode of cooperation between working people and organisations in the trade will directly affect the statutory obligations and rights of both parties. This article therefore wishes to point out major differences between an employee and a self-employed person where statutory rights and benefits are concerned, as well as highlights some important points to note for employers in the trade.

Differences between employee and self-employed person

- An employee is 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 is 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.
- Under the Mandatory Provident Fund Schemes Ordinance, there are different arrangements for an employee and a self-employed person in respect of joining the scheme and making contribution.
- There are a number of factors to be considered in distinguishing an employee from a self-employed person. They include control of work arrangement, bearing of risk over business and management decisions, ownership and provision of production tools, etc. As the circumstances of

僱傭合約樣本

本僱傭合約由 _____ (以下簡稱「僱主」) 與
 _____ * 先生 / 女士 (以下簡稱「僱員」) 於
 _____ (日期) 訂立, 雙方同意遵守下列僱傭條款及條件:

1. 受僱日期 由 _____ 起生效 -
[†] 直至任何一方終止合約為止。
[†] 定期合約, 為期 _____ * 天 / 月 / 年, 至 _____ 年 _____ 月 _____ 日止。
2. 受僱職位 / 部門 _____

3. 工作地點 _____
4. 工作時間 每星期 _____ 天及由 _____ 時至 _____ 時
5. 工資
 (a) 工資率 底薪每 * 天 / 月 \$ _____
 另加 以下津貼 -
[†] 膳食津貼每 * 天 / 月 \$ _____
[†] 交通津貼每 * 天 / 月 \$ _____
[†] 勤工獎 _____
 (金額) _____
 _____ (請詳加說明支付條件、計算方法等)
[†] 其他 (如佣金、小賬) _____
 (金額) _____
 _____ (請詳加說明支付條件、計算方法等)
- [†] (b) 超時工作工資 [†] 工資按每小時 \$ _____ 計算
[†] 工資按 * 正常工資 / 正常工資 _____ 倍計算
- (c) 支付工資 [†] 每月壹次, 於每月 _____ 日支付
[†] 每月兩次, 於每月 _____ 日及 _____ 日支付
6. 休息日 * 逢星期 _____ (天) / 輪休及 * 有 / 無薪
 (每 7 天可有不少於 1 天休息日)
7. 假期 僱員可享有 * 按《僱傭條例》規定的法定假日 / 公眾假期;
[†] 另加 -
 其他假期 (請說明) _____
8. 有薪年假 僱員可根據《僱傭條例》的規定享有有薪年假 (日數由 7 天至 14 天不等, 視乎該
 僱員受僱年期而定)。
[†] 僱員可根據公司的規定享有有薪年假 (請說明) _____
- [†] 9. 產假薪酬 [†] 僱員可根據《僱傭條例》的規定享有產假及產假薪酬。
[†] 僱員可根據公司的規定享有產假及產假薪酬 (請說明) _____
10. 疾病津貼 僱員在以下情況可享有以 * 《僱傭條例》規定 / 正常工資 計算的疾病津貼 -
 - * 放取病假最少連續 _____ 天 / 不論放取病假多少天; 及

- † - 僱員提交適當的醫生證明書；以及
- † - 僱員累積了足夠的有薪病假日數。

- † 11. 試用期 _____ *天 / 月
12. 終止僱傭合約 通知期為 _____ *天 / 月 或相等於通知期限的工資
 試用期內: -
 - 第壹個月內：無須給予通知或代通知金
 - 第壹個月以後：通知期為 _____ *天 / 月 或相等於通知期限的工資
- † 13. 年終酬金 僱員每服務滿壹*公 / 農 曆年，可領取*一筆酬金 \$ _____
 或 _____ 個月底薪 / 正常工資。
 支付日期為 *公 / 農 曆新年前 _____ 天內。
- † 14. 強制性公積金計劃 僱員根據《強制性公積金計劃條例》的規定參與強制性公積金計劃。僱主及僱員依照《強制性公積金計劃條例》的規定向計劃供款。
 僱主在強制性供款之上會向強制性公積金計劃提供自願性供款，*每月的供款為 _____ 元 / 僱員月薪的 _____ %。
 僱員在強制性供款之上會向強制性公積金計劃提供自願性供款，*每月的供款為 _____ 元 / 僱員月薪的 _____ %。
15. 颱風時當值 當八號或以上風球懸掛時，僱員須要上班並可獲發 *颱風當值津貼 / 交通津貼 \$ _____ 或 _____ 倍正常工資。
 當八號或以上風球懸掛時，僱員無須上班，工資不會被扣減。當八號或以上風球於下班前不少於 _____ 小時前除下，僱員須要上班。
16. 黑色暴雨警告時當值 當黑色暴雨警告生效期間，僱員須要上班並可獲發 *暴雨當值津貼 / 交通津貼 \$ _____ 或 _____ 倍正常工資。
 † 當黑色暴雨警告生效期間，僱員無須上班，工資不會被扣減。當黑色暴雨警告於下班前不少於 _____ 小時前除下，僱員須要上班。
17. 其他 僱員可根據《僱傭條例》、《僱員補償條例》或其他有關條例的條文享有其他權利、利益或保障。
 † 根據 *公司手冊 / _____ 公布的其他規則和規章、權利、利益或保障也成為本合約的一部分。

僱主及僱員雙方均清楚明白上述各項內容，並同意簽字作實。
 雙方均須保存一份合約文本作日後參考。

僱員簽名

僱主或代表簽名

姓名： _____
 香港身份證號碼： _____
 日期： _____

姓名： _____
 職位： _____
 日期： _____

_____ 公司印鑑

- * 將不適用者刪去
- † 將不適用的條款刪去

僱主須注意事項

- 為避免不必要的誤會及爭議，僱主在聘用從業員前，必須遵照雙方的意願釐定彼此合作的性質，以及訂明僱傭或合作條款。
- 書面僱傭合約的好處在於清楚列明僱主與僱員的權益，提醒雙方履行合約上的責任，有助避免勞資糾紛。業內的僱主和僱員在訂立書面僱傭合約時，可參考第六至七頁的僱傭合約樣本。
- 如僱傭合約為書面合約，僱主須在合約簽署或生效程序完成後，將合約的副本交予僱員參考並保管。
- 僱主不可單方面將現職僱員轉為自僱人士，否則僱員可視之為變相解僱，並有權追討解僱補償。
- 即使僱主聲稱僱員為自僱人士，若雙方實質上存在僱傭關係，僱主仍須履行在法例下的責任。☞

酒店及旅遊業三方小組

勞工處於二零零零年五月成立三方小組，目的是透過業內商會、工會和政府三方的合作，探討勞資雙方關注的問題，並尋求解決辦法，從而促進和諧的勞資關係。小組有下列成員(按英文名稱排序)：

商會

香港中國旅遊協會、香港旅行社協會、香港酒店業協會、香港外遊旅行團代理商協會、香港日本人旅客手配業社協會、港台旅行社同業商會、國際華商觀光協會、香港華商旅遊協會、香港酒店業主聯會、香港旅遊業議會

工會

香港旅遊業僱員總會、港九西商酒店酒樓工會、香港導遊協會、酒店及餐飲從業員協會

Tripartite Committee on Hotel and Tourism Industry

Set up by the Labour Department in May 2000, the Committee discusses and works out solutions for labour relations issues through tripartite cooperation of trade associations, unions and the Government, thereby fostering harmonious employer-employee relations. Committee members are as follows (in alphabetical order):

Employer Associations

The Hong Kong Association of China Travel Organisers, the Hong Kong Association of Travel Agents, the Hong Kong Hotels Association, the Hong Kong Outbound Tour Operators' Association, the Hongkong Japanese Tour Operators Association, the Hongkong Taiwan Tourist Operators Association, the International Chinese Tourist Association, The Federation of Hong Kong Chinese Travel Agents, The Federation of Hong Kong Hotel Owners, and the Travel Industry Council of Hong Kong

Trade Unions

The Hong Kong Tourism Industry Employees' General Union, the Hong Kong & Kowloon European Hotel & Restaurant Workers Union, the Hong Kong Tourist Guides Association, and the Hotels, Food & Beverage Employees Association

each case and its relevant legal points differ, the final decision on which type of relationship actually existed will rest with the court.

Important points to note for employers

- To avoid unnecessary misunderstanding and dispute, employers should, before recruiting any person, define the mode of cooperation between both parties according to their intentions, and spell out clearly the terms of employment or cooperation.
- A written employment contract, which sets out clearly the rights and benefits of employers and employees, reminds both parties of their obligations and therefore helps avoid labour disputes. Employers and employees in the trade may visit the Labour Department's website (www.labour.gov.hk/eng/public/wcp/KeepRecord.pdf) for a sample employment contract when they are entering into written employment contracts.
- If a contract of employment is made in writing, the employer should give a copy of the written contract to the employee for his retention and reference after it is signed or after its validation procedure is completed.
- An employer could not unilaterally change the status of his employee to that of a self-employed person. Such a change may amount to constructive dismissal and the aggrieved employee may claim termination compensation against his employer.
- If there exists in essence an employer-employee relationship, an employer is still required to fulfil his responsibilities under the law even though his worker is labelled as a self-employed person. ☞