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Hong Kong Employment Law Essentials in a Changing World (Part 4)

Top Ten Takeaways - Business Protection – Misconceptions, Realities and Tips

- In the pre-hire stage, consider asking job candidates to sign a non-disclosure agreement if you are going to be sharing the company's confidential information with them.
- Consider whether you should review job candidates' current post-termination restraints prior to hiring and obtain warranties that the candidate will not be in breach of post-termination restrictions by taking up employment with your organisation.
- Employees have an implied duty of confidentiality. However, it is prudent for employment contracts to contain written confidentiality provisions that define confidential information and clearly state post-employment obligations.
- An employer cannot protect itself against mere competition. To enforce a non-compete restriction, the employer must show it has a legitimate business interest to protect and that all aspects of the restraint are reasonable.
- There is no "one-size fits all" set of restraints. The more narrowly drafted and tailored they are, the greater the prospects of enforcement.
- Review post-termination restraints whenever an employee is changing roles.
- Garden leave clauses, like restrictive covenants, have the effect of keeping employees out of the market. However, because employees can buy out their notice periods in Hong Kong, don't rely on garden leave clauses in lieu of post-termination restrictions.
- Consider notice periods when determining the overall duration of a post-termination restraint (but bear in mind the point above).
- It's not necessarily too late to agree on restrictive covenants on an employee's departure from the organisation (e.g. because the current restraints are inadequate or non-existent). Include well-drafted restrictions in your separation agreement in exchange of ex-gratia consideration.
- Consider holding back or staggering contractual payments to enforce compliance with post-termination obligations.

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