

## Insights

# UPDATES TO THE ANTI-DISCRIMINATION LAWS IN HONG KONG AND TIPS FOR EMPLOYERS

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## Introduction

The Discrimination Legislation (Miscellaneous Amendments) Ordinance ("**Ordinance**") has been gazetted on 19 June 2020 and took immediate effect from 20 June 2020. The Ordinance introduced amendments to the Sex Discrimination Ordinance (the "**SDO**"), the Disability Discrimination Ordinance (the "**DDO**"), the Family Status Discrimination Ordinance (the "**FSDO**") and the Race Discrimination Ordinance (the "**RDO**").

These amendments are aimed at providing a more comprehensive legal protection against discrimination and harassment. The main amendments are summarised below.

## Major amendments

### Breastfeeding

The Ordinance added a new section in the SDO to prohibit both direct and indirect discrimination against breastfeeding women. A person is liable for direct discrimination if they treat a breastfeeding woman less favourably than a person who is not. A person is liable for indirect discrimination if they impose an unjustifiable requirement or condition on all persons but with which breastfeeding women cannot comply and which is detrimental to breastfeeding women.

The definition of "breastfeeding" is comprehensive, and includes the act of breastfeeding, the expression of milk and the status of being a breastfeeding mother.

Tips for employers: There is no positive obligation imposed on employers to provide reasonable accommodation to breastfeeding women. However, employers are encouraged to consider providing lactation breaks for employees to express breastmilk, space with privacy and the appropriate equipment, and a refrigerator for storing breastmilk – further details can be found on the "[Employers' Guide to establishing breastfeeding friendly workplace](#)" published by the Government.

### Workplace harassment

New provisions were added to the SDO, the DDO and the RDO, providing further protection against sexual, disability and racial harassment at workplace. These provisions aim to render harassment between “workplace participants” at their common workplace unlawful, even where there is no employment relationship. The definition of “workplace participant” covers not only an employee, an employer, a contract worker, a commission agent, and a partner in a firm, but is expanded to include interns and volunteers.

Further, if a person engages an intern / volunteer, both that person and the intern / volunteer will be liable for the workplace harassment conducted by the intern / volunteer, whether or not that person has had knowledge over or has approved the act. However, it is valid defence for that person if they took reasonable practicable steps to prevent the unlawful act.

Tips for employers: Employers are encouraged to review their existing workplace harassment policies to ensure they are broad enough to cover the new definition of “workplace participants”. Employers also should provide suitable training on anti-harassment to all “workplace participants” to minimise the possibility of being found vicariously liable.

### **“Associate” and discrimination by imputation**

Under the old wording of the RDO, it was unlawful for a person to discriminate against or harass another person on the ground of the race of that person’s “near relative”. Reference to “near relative” has been repealed and replaced by the term “associate”. “Associate” has a wider definition than “near relative” and includes a spouse, co-habitant, relative, carer of the person, and a person who is in a business, sporting or recreational relationship with the person.

Further, the new provisions have widened the scope of protection to cover racial discrimination and harassment “by imputation”. Therefore, a person who discriminates against or harasses another person on the basis of a mistaken perception of the race of the other person now are subject to be held liable.

Tips for employers: When making corporate decisions, e.g. during recruitment and layoff processes, Employers need to be more sensitive and aware when dealing with an “associate” of a person who potentially might be a victim of racial discrimination.

### **Intention and damages**

Prior to the amendments, the SDO, the FSDO, and the RDO required the presence of an intention to discriminate before damages could be awarded to a victim of indirect discrimination. Under the amendments, this requirement has been removed.

Tips for employers: Given that there is an increased chance that damages might be awarded to victims of indirect discrimination, employers need to think ahead and consider whether the

application of blanket requirements or conditions to everyone in the firm would inadvertently prejudice the rights of or be detrimental to certain employees.

### **Implementation timeline**

While the Ordinance took immediate effect from 20 June 2020, amendments to the SDO relating to breastfeeding only will come into operation one year after the publication of the Ordinance in the Gazette, i.e. 19 June 2021.

### **RELATED CAPABILITIES**

- Employment & Labor
- Litigation & Dispute Resolution
- Business & Commercial Disputes

## MEET THE TEAM



### **Glenn Haley**

Co-Author, Hong Kong SAR

[glenn.haley@bclplaw.com](mailto:glenn.haley@bclplaw.com)

[+852 3143 8450](tel:+85231438450)



### **Ian Cheng**

Co-Author, Hong Kong SAR

[ian.cheng@bclplaw.com](mailto:ian.cheng@bclplaw.com)

[+852 3143 8455](tel:+85231438455)

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