



—  
Cross-border Employment  
between Hong Kong and  
Mainland China

withersworldwide  
The law firm for success

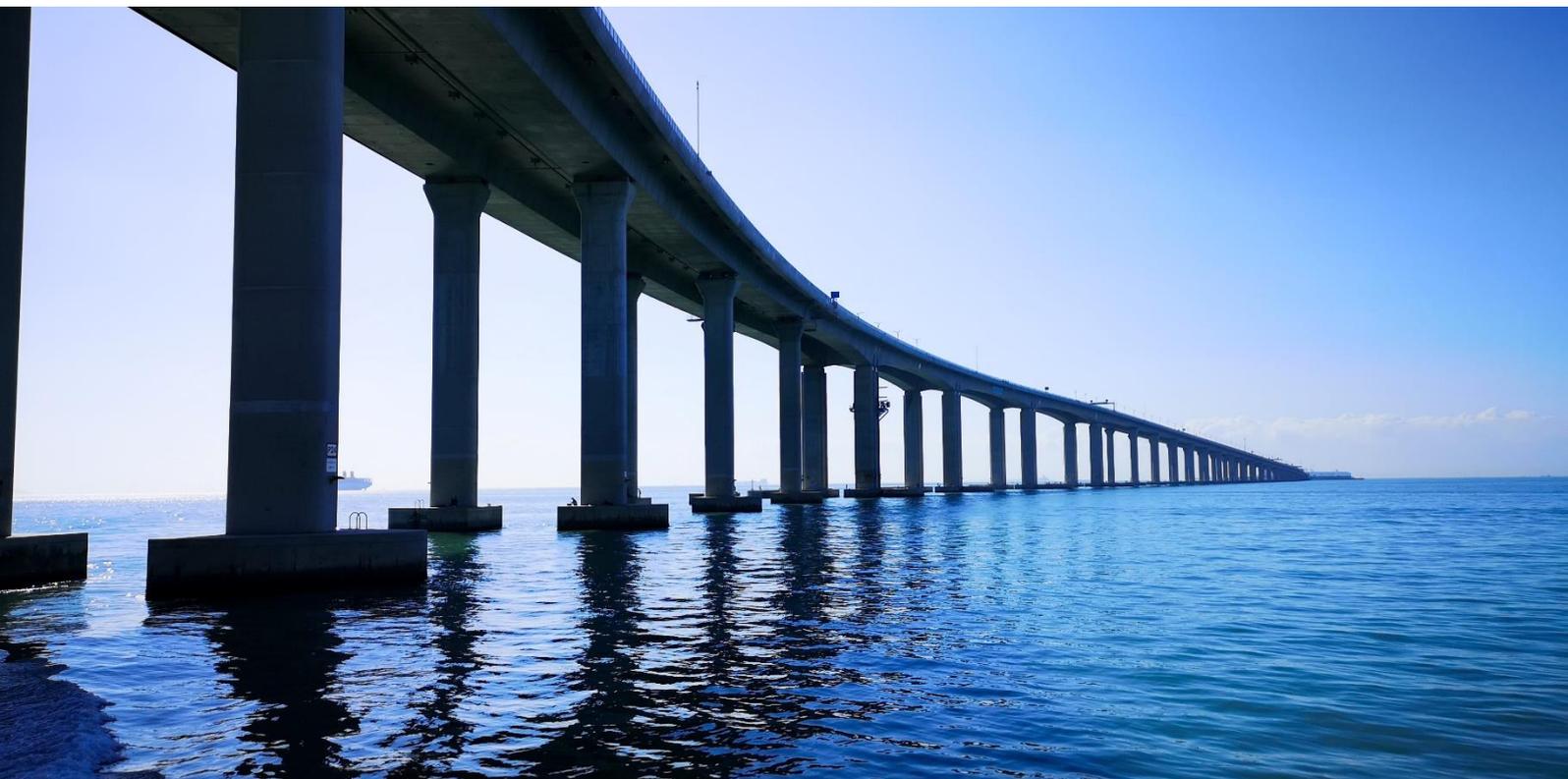
Updated on 20 July 2022

# Cross-border Employment between Hong Kong and Mainland China

The increasing economic and trade ties between Hong Kong and Mainland China have contributed to an increase in flow of talent in recent years. As of October 2017, the number of Hong Kong people habitually working in the Mainland is estimated to be 420,000, equivalent to 8% of Hong Kong's work force. At the same time, there are around 268,000 Mainland Chinese working in Hong Kong on a long-term basis since January 2003 to October 2020.

Working outside your home jurisdiction can be as simple as doing business trips, as long as the nature and length of such trips are compatible with the location's visa and tax requirements for the overseas location. Hong Kong offers visa-free entry for most foreigners for periods between 14 to 180 days, whereas Mainland Chinese may enter and stay in Hong Kong for up to 90 days for non-working-or studying purposes depending on the relevant endorsement on their Exit-entry Permit for Travelling to and from Hong Kong and Macau. On the other hand, Hong Kong residents with home return permits issued by the Mainland authorities are free to enter and stay for unlimited time periods.

When individuals seek long-term employments, whether in the case of direct local employment, being seconded between associated companies, or in the case of concurrent employments with two employers, entry permit and work visa/endorsement issues become more relevant. This article highlights the key issues for employers and employees need to know when assessing potential implications and planning employment arrangements between Hong Kong and Mainland China.





## General Overview of Key Compliance Obligations for Cross-border Employment

### Hong Kong Residents Working in Mainland China

#### *Entry Permits and Work Visas*

Hong Kong residents holding home return permits do not require additional entry permits to enter Mainland China. Since 2020, those residing in Mainland China for more than 6 months and satisfy relevant qualifying criteria may also opt for a mainland residence permit in order to enjoy the same rights and benefits as Mainland residents in respect of statutory employment contributions, education, medical treatment, public transportation and other public services.

However, foreign nationals (even if they already become permanent residents in Hong Kong) are required to obtain work permits and residence permits if they plan to work in Mainland China for more than 90 days in a calendar year.

#### *Statutory Employment Contributions*

In Mainland China, employers and employees must make monthly contributions to statutory funds for pension, medical, work-related injury, unemployment, maternity and housing benefits. The amounts of contributions are determined by reference to an employee's salary, with the contribution base being the average salary of the employee in the preceding year and the maximum contribution base being 3 times of the locality's average salary.

However, Hong Kong, Macau and Taiwan ("**HMT**") residents and foreign nationals working for Mainland employers are exempt from basic pension and unemployment insurance contributions, if (a) they contribute to the social benefits schemes in their originating jurisdiction, or (b) the foreign nationals are from countries that have totalization agreements with Mainland China, such as Germany, South Korea, Denmark, Canada, Finland, Switzerland, the Netherlands, Spain, Luxembourg and Japan.

Note that the actual implementation of contribution requirements varies from city to city. In Shanghai, non-local employees may opt out from the statutory contribution requirements even if they do not qualify for the above-mentioned exemptions.

### *Tax considerations for employers*

A Hong Kong employer can become exposed to PRC corporate income tax, if the employee's nature of work while staying in Mainland China constitutes a taxable business presence or "permanent establishment" ("**PE**") under PRC tax rules. In such a case, the Hong Kong employer becomes subject to PRC corporate income tax on profits attributable to its taxable presence, even if the employee is attached to a local subsidiary or an affiliate of the employer.

To mitigate such tax risks, the employer has to follow the PRC tax rules and the bilateral tax arrangements between Mainland China and Hong Kong to avoid creating a PE. It is advisable to maintain proper documentation, in relation to the secondment arrangement, to: first, disclaim the secondee's authority to conclude contracts on behalf of the employer; second, mandate that the host entity exercises managerial control over the secondee and assumes responsibilities and risks for the secondee's work; and finally, make it clear that the employer does not gain any financial benefits from the secondment arrangement.

### *Tax considerations for employees*

For taxation purpose, a Hong Kong resident individual means an individual who ordinarily resides in Hong Kong, or who stays in Hong Kong for more than 180 days during a year of assessment or for more than 300 days in two consecutive years of assessment (one of which is the relevant year of assessment).

If a Hong Kong resident provides services in both Mainland China and Hong Kong, the Hong Kong-sourced remuneration will be wholly assessable for salaries tax purpose in Hong Kong. To the extent that if the Hong Kong individual has paid PRC individual income tax ("**IIT**"), the Mainland China-Hong Kong bilateral tax arrangements will either exempt the income for which PRC taxes have been paid from being subject to Hong Kong salary tax, or the PRC taxes paid could be credited against the amount of Hong Kong salary tax payable.

On the other hand, Hong Kong residents could be subject to IIT in the PRC depending on the period they spent in Mainland China and the source of income, as follows:

- (1) those who worked in Mainland China for less than 183 days will be taxed only on their Mainland-sourced income;
- (2) those who worked in Mainland China for 183 days or more in a tax year but not more than six consecutive years will be subject to IIT on both their Mainland- and foreign-sourced income. However, as a concession, foreign-sourced income is taxed only to the extent of income paid and/or borne by a Mainland entity or individual;
- (3) those who work in Mainland China for 183 days or more per year for over six consecutive years will, starting from the seventh consecutive year, be subject to IIT on their worldwide income if they reside in the Mainland for 183 days or more during the year. But these individuals can reset the 'six-year' count to avoid being taxed on their worldwide income, if they spend less than 183 days or more than 30 consecutive days in one single trip outside of the Mainland during any tax year; and
- (4) Hong Kong residents who travel to Mainland China and are paid by an overseas/Hong Kong employer with no PE in the Mainland will be exempt from IIT, if they physically stay in the Mainland cumulatively for less than 183 days in a calendar year.

If IIT obligations are likely to be triggered, an employee should consider requesting tax equalization or other economic adjustments to the employment terms.



## Mainland Residents Working in Hong Kong

### *Entry Permits and Work Visas*

A non-permanent resident of Hong Kong must obtain an employment visa before taking up employment in Hong Kong. While newly set up companies or branches of foreign companies may be subject to additional scrutiny when applying for an employment visa, new hires from Mainland China should gather appropriate supporting documents on their academic qualifications and relevant work experience to strengthen their claim as talents who are not readily available in Hong Kong's local workforce.

### *MPF Contributions*

In Hong Kong, employees and employers must make regular contributions at the rate of 5% of the employee's relevant income to a Mandatory Provident Fund ("**MPF**") scheme, subject to the minimum and maximum levels of relevant income. For a monthly-paid employee, the minimum and maximum levels of relevant income are HK\$7,100 and HK\$30,000 per month respectively. "Relevant income" for these purposes includes salary, bonus, allowances and perquisites.

Practically, Mainland individuals will be exempted from MPF contributions if they remain enrolled in the PRC social security system after taking up an employment in Hong Kong. The exemption will not be applicable if the individual becomes a permanent resident, or if he or she enters Hong Kong using a dependent or other non-employment visa. The individual will have to be enrolled in the MPF scheme when he or she ceases to be a member of the PRC social security system.

### *Salaries Tax*

Salaries tax in Hong Kong is also based on the territorial concept, so that all employment income derived from Hong Kong is assessable irrespective of whether tax on that income has been paid in other jurisdictions. This includes entering Hong Kong for the purposes of training, attending a conference or reporting on work progress. In determining the source of employment income, the starting point is the employment contract. Other relevant factors include where the employee is paid, where the contract was negotiated and entered into and is enforceable, whether the employer is a resident in the jurisdiction, etc. Therefore, a Mainland resident working under a Hong Kong employment has to pay salaries tax in Hong Kong.

However, if the employee has spent considerable time rendering services outside Hong Kong, he or she may seek complete/partial exemption from salary tax or claim for tax credit in the tax return on a year-by-year basis, in respect of each employment.

For an employer, he/she will have to notify the Inland Revenue Department when an expat employee commences or ceases employment or is assigned to leave Hong Kong for a period longer than one month. If an expat employee is leaving Hong Kong, the employer is further required to withhold all sums payable to the employee until the Inland Revenue issues a letter of release.

In addition to paying Hong Kong salaries tax, Mainland tax residents are still subject to PRC individual income tax on their worldwide income, though they may apply for tax credits when filing tax returns in the Mainland.



## Key Contractual Issues for Cross-border Employment

### Non-compete Restrictions

#### Mainland China

Currently, non-compete obligations can only be imposed on senior management, senior technicians and other employees who are subject to confidentiality obligations. The scope, territory and duration of non-compete agreements need to be agreed between the employer and employee, and its duration cannot exceed two years. Additionally, the employer is required to pay reasonable compensation to employees on a monthly basis during the post-termination non-compete period. In this regard, local legislation generally fixes the compensation as 30% to 60% of the employee's average monthly salary in the 12 months preceding the employment termination.

#### Hong Kong

To prevent a departing employee from competing with or diverting business opportunities from the employer, restrictive covenants are usually included in the employment contract, but the duration and scope of restriction must not exceed what is reasonable in the circumstances. Whether a given period of restraint is reasonable will depend on the nature of the restricted activity and the facts and circumstances surrounding the employment, e.g.:

- (a) how long such information is likely to retain its currency or value to competitors;
- (b) the time it would take to break the connection of the employee with the employer's clients and for the employee's successor to re-bond the firm's professional relationship with the clients.

In general, a period of restraint ranging from 6 months to 2 years are commonly found in employment contracts.

### Governing Law

#### Mainland China

The employment contract between a Mainland employer and an expatriate employee shall be governed by Mainland laws. While the working hours, rest days and holidays, labor safety and health and social insurance for expatriate employees are regulated by statutes, other rights and obligations related to the employment (such as termination

and liabilities for breach) can be agreed upon by the employer and expatriate employee in the employment agreement.

On the other hand, a secondment agreement between the employer and the host entity (and in some cases, the expatriate employee) can be governed by non-PRC law.

### Hong Kong

There is no expressed conflict of law provision in the Employment Ordinance. It applies to “every employee engaged under a contract of employment, to an employer or such employee and to a contract of employment between such employer and employee”. The question of whether or not the Employment Ordinance, or general Hong Kong law, applies to a particular employer, employee or contract of employment in Hong Kong is a question to be determined by reference to common law principles of the conflicts of law.

The test applicable involves a three-stage analysis:

- (a) what is the expressed intention of the parties as to the governing law in the employment contract?
- (b) when there is no expressed provision as to governing law, what is the intention of the parties to be inferred from the terms and nature of the contract, and from the general circumstances of the case; and
- (c) when the intention of the parties is not expressed, and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its *closest and most real connection*.

Thus, if an employee is based in Hong Kong, in the absence of an expressed governing law clause, the Employment Ordinance will most likely be applied. However, where an employee has been posted overseas on assignment and still retains a connection with his home employer, applying the closest and most substantial connection principle may prove more problematic. In such cases, although the nature of the contractual arrangements chosen by the parties is a relevant factor in this equation, it is by no means determinative of the issue.

In determining the “*closest and most real connection*” the courts will look at the circumstances of the particular case, such as:

- (a) place of the performance or intended performance of the contract,
- (b) the place of making or negotiating the contract,
- (c) domicile or residence of the parties; and
- (d) express choice of forum for dispute resolution, sometimes referred to as a “jurisdiction clause”.

Note also that an employer cannot contract out of the minimum employment protections under the Employment Ordinance, or circumvent other statutory equality safeguards.

### **Dispute Resolution**

How an employment-related dispute is resolved depends on the cross-border employment structure undertaken.

Generally speaking, for an expatriate employee engaged under a secondment arrangement, any employment-related dispute that is purely contractual in nature would ordinarily reside against the home jurisdiction employer rather than the host entity. However, the issue becomes more complex when a claim is based on challenging the nature of relationship between the expatriate employee and the home jurisdiction employer. For example, there are reported cases in Mainland China that an expatriate employee on secondment forms an employment relation with the Mainland host entity, so that the expatriate employee can claim severance payment pursuant to the Mainland employment law.

Under a dual contract arrangement, the expatriate employee can look to both employers for remedies in the case of any breach on their respective obligations. This is to the extent that it is difficult to establish which particular employer is responsible for the alleged breach. The expatriate employee is in a position to “forum shop” to choose to proceed against the employer in the jurisdiction that is most favourable to his case.

In a direct hire arrangement, the employee may only turn to his employer in the event of a dispute.

### Mainland China

Under PRC laws, either party may submit employment dispute for arbitration by a government-affiliated labor dispute arbitration commission in the locality where the employment contract is performed or where the employer is

registered. If either party is not satisfied with the result of arbitration, that party may then initiate an action in the People's Court.

For disputes related to secondment, either party can initiate arbitration or litigation (exclusive to each other) in pursuant to the secondment agreement.

### Hong Kong

In Hong Kong, the Labour Tribunal has exclusive jurisdiction to inquire into, hear and determine any claim for a sum of money, in relation to (i) breach of employment contract, or (ii) the failure of a person to comply with the statutory employment provisions. However, the Labour Tribunal does not have jurisdiction in relation to claims for non-monetary relief or tortious claim, such as declaratory relief, injunctive relief, breach of statutory duty, causing loss by unlawful means, misrepresentation claim, breach of confidence, or mixed claims. If in doubt, the Labour Tribunal has the discretion to decline jurisdiction and transfer the claim to the District Court or the Court of First Instance, and the test is a subjective one.

In cross-border employments, doubts over jurisdiction can easily arise and in fact, this is one of the factors based on which the Labour Tribunal may decline jurisdiction. While there have been conflicting case laws, more recent cases suggest that the Labour Tribunal will exercise jurisdiction in cases where performance of the contract of employment takes place outside of Hong Kong as long as the employer and employee remained "substantially connected" to Hong Kong.





## Incentives for Hong Kong Employees in the Greater Bay Area

With the full planning and firm support of the central government, the Guangdong-Hong Kong-Macao Greater Bay Area ("GBA") has become a rising destination, attracting both capital and talents. This section covers the current incentives available that encourages the flow of talents within GBA.

### Favorable Policies for Hong Kong Talents

The municipal governments of Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen, and Zhaoqing in the GBA offer fiscal subsidies to qualified foreign high-end talents and urgently-needed talents working in these cities.

The subsidy is a rebate of the difference between the paid IIT on eligible income and 15% of taxable eligible income, and is determined as follows:

$$\text{Subsidy amount} = \text{Amount of IIT paid on eligible income} - \text{taxable value of eligible income} \times 15\%.$$

The subsidy is paid once a year and exempt from IIT, thus effectively bringing the qualified individuals' tax burdens in line with the salaries tax in Hong Kong.

In addition, in order to promote exchanges of education and scientific research between Mainland China and Hong Kong and the development of GBA, eligible teachers and researchers will be exempted from paying IIT for up to three years.

### Long-Term Residence Permit for Foreigners Holding Hong Kong Permanent ID Card

Foreigners holding Hong Kong Permanent ID Cards can apply to the relevant Mainland authorities for a visa or residence permit with a validity of up to 2 to 5 years.

### Reciprocal Recognition of Professional and Technical Qualifications

There are measures to support professional services which involve the mutual recognition of legal, construction and insurance qualifications.

# Contacts



Mabel Lui  
Head of Greater China Commercial

+852 3711 1638  
[Mabel.Lui@withersworldwide.com](mailto:Mabel.Lui@withersworldwide.com)



Daniel Tang  
Partner | Corporate M&A

+852 3711 1668  
[Daniel.Tang@withersworldwide.com](mailto:Daniel.Tang@withersworldwide.com)



Mike Suen  
Partner | Capital Markets

+852 3711 1686  
[Mike.Suen@withersworldwide.com](mailto:Mike.Suen@withersworldwide.com)



Joyce He  
Senior Legal and Tax Manager | Corporate Tax

+852 3711 1655  
[Joyce.He@withersworldwide.com](mailto:Joyce.He@withersworldwide.com)



Winnie Weng  
Senior Associate | Corporate M&A

+852 3711 1750  
[Winnie.Weng@withersworldwide.com](mailto:Winnie.Weng@withersworldwide.com)

## Office Locations

New York | New Haven | Greenwich | Los Angeles | Rancho Santa Fe | San Diego | San Francisco | British Virgin Islands  
London | Cambridge | Geneva | Milan | Padua | Hong Kong | Singapore | Tokyo | Boston | Texas

withersworldwide

The law firm for success