



平等機會委員會  
EQUAL OPPORTUNITIES COMMISSION

# **Anti-discrimination Laws and Staff Management**

**Hong Kong Baptist University  
28 February 2019**

**Cynthia Lam, Senior Training Officer  
Equal Opportunities Commission**

# Objectives

- ◆ To understand the key concepts under existing anti-discrimination laws
- ◆ To explore good management practices with a view to cultivate an equitable workplace



# Four Ordinances

- ◆ Sex Discrimination Ordinance (SDO)  
《性別歧視條例》 (1996)
- ◆ Disability Discrimination Ordinance (DDO)  
《殘疾歧視條例》 (1996)
- ◆ Family Status Discrimination Ordinance (FSDO)  
《家庭崗位歧視條例》 (1997)
- ◆ Race Discrimination Ordinance (RDO)  
《種族歧視條例》 (2009)



# Scope

## ◆ Employment

- Employment
- Contract workers
- Commission agents
- Vocational training
- Employment agencies
- Trade unions
- Qualifying bodies, etc.

## ◆ Non-employment

- Educational establishments
- Goods, facilities & services
- Dispose & manage premises
- Public bodies, barristers, clubs, etc.
- Government (except RDO)
- Access to premises (DDO)



# Employment

- ◆ Protection extends to those who work
  - Full-time, part-time
  - Permanent, temporary, casual
  - In and outside the workplace
  - Inside and outside Hong Kong

Must work wholly or mainly in Hong Kong



# Prohibited Grounds

## ◆ Sex

- Male, female

## ◆ Pregnancy

## ◆ Marital status

- Single, married, separated, divorced, widowed

## ◆ Family status

- Having responsibility for care of an immediate family member
- Related by blood, marriage, adoption or affinity



# Prohibited Grounds

## ◆ Disability

- Cover different types of disability
- Include present, past and future disabilities
- Include imputed disability
- Cover an associate's disability

## ◆ Race

- Race, colour, descent, national origin, ethnic origin
- Cover near relative's race



# Liabilities

- ◆ Personal liability
  
- ◆ Accessory liability
  - Pressure or instruct
  - Knowingly aid
  
- ◆ Principal's liability
  - Authorised acts done by agent
  - Authorisation: Express or implied, precedent or subsequent



# Liabilities

## ◆ Employer's liability

- Unlawful acts done by employees in the course of employment
- Whether with or without knowledge or approval

➔ Defense: Reasonably practicable steps to prevent  
e.g.

- Equal opportunities policy
- Complaint resolution procedures
- Appointed person(s) to take responsibilities
- Regular staff training



# Seeking Redress

- ◆ Complaint to Equal Opportunities Commission (within 12 months)
  
- ◆ Legal action (within 24 months)
  
- ◆ Others
  - Internal resolution procedures
  - Report to the police (if criminal in nature)



# Unlawful Acts

- ◆ Discrimination (4 ordinances)
  - Direct discrimination
  - Indirect discrimination
- ◆ Harassment
  - Sexual harassment
  - Disability harassment
  - Racial harassment
- ◆ Vilification and Serious vilification (disability, race)
- ◆ Victimisation (4 ordinances)



# Harassment

1. An unwelcome conduct, which a reasonable person, having regard to all circumstances, would have anticipated the complainant be offended, humiliated or intimidated
2. A person, alone or together with others, engages in conduct which creates a hostile or intimidating environment for the complainant



# Vilification

## ◆ Activity in public

Inciting hatred towards, serious contempt for, severe ridicule of

- Person(s) of particular racial group
- Person(s) with particular disability

## **Serious Vilification** (Criminal offence)

- Intentional
- Involves threats of physical harm or premises/property damages



# Victimisation

- ◆ Less favourable treatment on the ground of action taken regarding an unlawful act under anti-discrimination ordinances, e.g.
  - Bring a complaint or legal action
  - Act as witness/supporter in complaint procedures

Include:

Knowledge or suspect of action taken / intention to take action



# Direct Discrimination

## ◆ To treat a person

- Less favourable treatment on prohibited ground(s)
- Racial segregation

## Essential elements

- Cause of treatment
- Comparator (Comparable circumstances)
- Detriment (Objective assessment)



# Cause of Treatment

- ◆ “But For” test
  - Objective test: Determine cause of treatment  
*e.g. Would the person have received the same treatment but for (prohibited ground)?*
- ◆ Intention or motive
  - ✗ Subjective reasons of the person doing the act
  - ✗ In the best interest of the person concerned
- ◆ Act done for two or more reasons
  - One of the reasons
  - Whether or not the dominant/substantial reason



# Comparator

- ◆ Alleged treatment less favourable than treatment given to comparator
  
- ◆ Comparable circumstances
  - Same
  - Not materially different
  
- ◆ Hypothetical comparator



# Indirect Discrimination

- ◆ Impose same requirement or condition

Unfair for some groups (prohibited ground)

- Proportion of persons belonging to that group who can comply with it is considerably smaller
- To their detriment

Cannot show to be justifiable



# Justifiability

- ◆ Objective of applying the requirement or condition: Legitimate?
- ◆ Means used to achieve the objective: Reasonable?
- ◆ Balancing exercise on the principle of proportionality
  - Effect upon the employee vs Reasonable needs of the employer

# Major Exceptions: SDO

- ◆ Genuine occupational qualification
  - Essential nature – Authenticity
  - Decency and privacy
  - Working or living in someone's house
  - Nature of establishment (no separate facilities)
  - Special establishments
  - Provide personal welfare or education service
  - Duties outside HK (local law restricts such duties)
  - Job is one of two to be held by a married couple



# Major Exceptions: FSDO

- ◆ Have significant likelihood of collusion
  - Immediate family member of
    - Employee of same employer
    - Employee of another employer
  - After making reasonable enquiries
  - Would result in damage to business for employer



# Major Exceptions: RDO

- ◆ Genuine occupational qualification
  - Authenticity
  - Providing personal services
- ◆ Training for skills to be used outside HK
- ◆ Employment of persons with special skills, knowledge or experience from overseas
- ◆ Existing local/overseas terms of employment
- ◆ Performing domestic duties on premises employer or near relative resides



# Major Exceptions: DDO

- ◆ Genuine occupational qualification
  - Physiology / authenticity
  - Absence of suitable live-in accommodation
- ◆ Unable to perform the inherent requirements of the job
- ◆ Accommodation required would impose an unjustifiable hardship on employers
- ◆ Infectious diseases

# Inherent Requirements of the Job

- ◆ ESSENTIAL or INTRINSIC to the job
- ◆ Not equal to all the job duties
- ◆ May include health and safety factors
- ◆ Relevant factors may be considered
  - Work required to be performed in practice
  - Circumstances in which the work is performed
  - Result to be achieved, rather than the means
  - Additional duties in emergencies or times of high workload
  - Mandatory requirements or qualifications, etc.





# Accommodation

- ◆ Services or facilities to help persons with disabilities perform the inherent requirements of the job or use of services

## Examples

- Premises modification
- Provision or modification of equipment
- Modification of recruitment procedures and arrangements
- Modification of work schedule and practices



# Unjustifiable Hardship

- ◆ All relevant circumstances be considered include
  - Reasonableness of any accommodation to be make available
  - Nature of benefit or detriment likely to accrue or be suffered by any persons concerned
  - Effect of the disability of a person concerned
  - Financial circumstances, estimated amount of expenditure



# Infectious Diseases

## ◆ Infectious diseases

- Prevention and Control of Disease Ordinance (Cap. 599)
- Specified by the Director of Health in the Gazette
- Discriminatory act is reasonably necessary to protect public health
- Not apply to HIV/AIDS



# Good Management Practices

- ◆ Codes of Practice on Employment (Issued by EOC)
  - Purpose
    - To give practical guidance on how to prevent discrimination in employment situation
  - Status
    - No binding legal effect
    - Will be taken into account by courts



# Good Management Practices

- ◆ Consistent selection criteria
  - Help promote fairness and minimise unconscious bias
  - Used as the basis for making all employment-related decisions
  - Consistently applied (Applicants and employees)
- ◆ Collecting information (e.g. medical nature)
  - Consider: Needs, purposes and the scope, etc.
  - In accordance to set policies and practices
  - Respect privacy

# Good Management Practices

- ◆ Recruitment and selection processes, consider:
  - Means to inviting applications
  - Content of job advertisements
  - Selection methods and interviewing questions
  - Terms and conditions of offer
  
- ◆ Managing absence and sick leave
  - Identify the needs for absence
  - Early intervention
  - Consider plans to help perform the duties
  - Clear sick leave policy (Objectives: Staff well-being and effective operation)

# Good Management Practices

## ◆ Performance assessment

- Beware of any assumptions when allocating duties
- Check if standards may constitute discrimination
- On-going monitoring of performance
- Considerations for personal circumstances arising during appraisal period
- Unsatisfactory performance: Give supervision, training and opportunity to improve



# Good Management Practices

- ◆ Decisions to take disciplinary actions, promotion, transfer, etc.
  - In accordance with set policies and practices
  - Review decisions to avoid bias
  - Explain the decision and the rationale
  
- ◆ Termination of employment
  - May include dismissal, contract non-renewal, redundancy, etc.
  - Check
    - When was the decision made?
    - Criteria for making such decision?



# Good Management Practices

- ◆ Keep record: 24 months
  
- ◆ Consider proactive actions to promote equal opportunities, e.g.
  - Recruitment targeting disadvantaged groups
  - Family-friendly employment policies
  - Special measures



# Key Messages

- ◆ Organisation should take measures to prevent discrimination in the workplace
  - Adopt and reinforce good management practices across all levels
  - Take all reasonably practical steps including:
    - Maintain and implement updated policies
    - Set up and apply appropriate procedures and steps to deal with complaints
    - Designate person(s) to take responsibilities
    - Regular staff training



# Key Messages

- ◆ Managers should apply consistent criteria in staff management
  - Ensure
    - No discriminatory practices in daily management of staff
    - Staff not subject to harassment or bullying in any forms at work
  - Be prepared to discuss with staff on any decisions made or special needs
  - Check own assumptions to minimise decisions based on stereotypical notions



# Equal Opportunities Commission

Tel: 2511 8211

Website: [www.eoc.org.hk](http://www.eoc.org.hk)

Add: 16/F, 41 Heung Yip Road, Wong Chuk Hang, Hong Kong

## DISCLAIMER

All the materials used in this training are for the participants' reference only, and they are no substitute for legal advice. If you have any enquiries or you need further information, please contact the EOC.

## COPYRIGHT

This work is copyright © EOC. Apart from any use as permitted under the Copyright Ordinance, Cap. 528, no part may be reproduced by any process without prior written permission from the EOC.

