

ESS Update

We speak with Adam Hugill, Partner, Hugill & Ip to get the lowdown on the Governments' new HK\$81 billion Employment Support Scheme (ESS), which has been approved by the Legislative Council Finance Committee and is due to roll out any day now.

Please note, with the limited information that is currently available, the answers are provided for guidance only and are based on the information available as on 6 May 2020. It should be noted that things may change after the Government announces further details of its formal rules and regulations concerning the ESS.



What should a company do if there is a resignation or retirement, but no replacement is made, i.e., the total number of employees would be less than the number submitted in the application, would this cause problems?

As currently expressed, the focus of the ESS scheme is maintaining headcount. Therefore, if an employee departs due to resignation or retirement during the operation of the scheme, that employee would need to be replaced – probably within the same month as the departure to ensure that the overall 'headcount' for that month is not reduced. The unemployment rate in Hong Kong is the highest it has been in the last decade. It is, therefore, expected that it should be reasonably easy to hire replacement staff. While this might be true for more junior level positions, senior employees are often subject to fairly lengthy notice periods and even post-termination non-competition restrictions making speedy recruitment very difficult.

Do you think employers would opt for this scheme and decide to lay off senior staff, replacing them with lower-paid staff? What is being done to prevent this as the Hong Kong Government is only tracking the issue of total headcount?

This is a potential loophole that has already been identified by the Secretary for Labour and Welfare who has said that the Government will not actively monitor such situations. The Government may, however, investigate if reports are made by employees. The Secretary for Labour and Welfare specifically identified firing employees and hiring friends or families in their place as being acts of fraud that would not be tolerated.

What should a company do if there is a low performing staff member, can the company terminate their employment in light of ESS? Will this affect the amount they are entitled to?

Provided headcount is maintained via recruitment; the low performing employee can be terminated without breaching the ESS. However, I expect that for many employers, I expect a blind eye would be turned to below-par employees during the operation of the ESS—especially if the continued hire of such employees do not pose any serious risk to the business.

If there is a relocation of a staff member, how does this affect their ESS entitlement?

Relocation can take a number of forms. Direct relocation to another office is likely to reduce headcount, and the role would need to be replaced. Relocation by way of secondment might not result in a headcount reduction and therefore may not affect ESS benefits.



Will the ESS that employees receive still be treated as taxable from the individual salary tax perspective?

While ESS must be used to pay employee salaries, it is not an 'additional' payment to the employees—especially where the employee is still receiving full or substantial pay. Employees that have been put on reduced income below HK\$18,000 or fully unpaid leave would be entitled to receive HK\$9,000 per month during the operation of the scheme. Since such payment would be regarded as wages, it is our understanding that it would be taxable.

Which exact month(s) are relevant for comparing against March headcounts? Should June's headcount submitted on 10 July be counted instead of May's headcount submitted on 10 June?

This is currently unclear. The original announcement said that headcount during the operation of the ESS would be compared to March 2020. This was, however, clarified to headcount not being reduced during the operation of ESS (i.e. during the period June – November 2020). We are awaiting the final guidance from the Government.

Does the company need to provide evidence that there is a downtrend of their business/turnover/profit during this period to apply for ESS?

No. Organisations that are still performing well and not struggling can apply for ESS provided the two undertakings are provided:

- (i) the payment is used to pay wages; and
- (ii) there is no reduction in headcount.