

LEGISLATIVE COUNCIL BRIEF

Employment Ordinance
(Chapter 57)

EMPLOYMENT (AMENDMENT) BILL 2001

INTRODUCTION

Annex A At the meeting of the Executive Council on 22 May 2001, the Council ADVISED and the Chief Executive ORDERED that the Employment (Amendment) Bill 2001, at Annex A, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

Annex B 2. In establishing the Mandatory Provident Fund (MPF) Schemes, the policy intent was to carry forth the long-established practice under the Employment Ordinance (EO), whereby severance payment (SP)/long service payment (LSP) is offset against the amount of gratuity or occupational retirement scheme benefits made to an employee, to the MPF schemes, and that employers should not be required to make double payments. Sections 31I and 31Y of the EO (Annex B), which were amended in 1998 to reflect the offsetting arrangement and took effect on 1 December 2000, allow an employer to offset SP/LSP payable to the employee against accrued benefits of the employee being held in a MPF scheme which are attributable to the employer's contribution.

3. However, sections 31I and 31Y are worded in such a way that offsetting can only occur where MPF scheme benefit **is being held** in a MPF scheme. This precludes offsetting in the following situations -

- (a) If an employee has already withdrawn his entire accrued MPF

scheme benefits upon reaching the retirement age of 65 (as prescribed under the Mandatory Provident Fund Schemes Ordinance), but continues his employment with the employer, then when he eventually leaves his employment, the employer would not be able to offset the SP/LSP payable to the employee against the MPF scheme benefits previously paid to or in respect of the employee because no MPF scheme benefit **is being held** at the time; and

- (b) where an employee has accrued occupational retirement scheme benefits carried forward to a MPF scheme as voluntary contributions or an employer makes voluntary MPF contributions on top of the legally required amount for an employee and the scheme rules allow the employee to withdraw his accrued MPF scheme benefits in respect of the employer's voluntary contributions without leaving employment.

4. The above situations are not in line with the original policy intent of the offsetting provisions and amendments to sections 31I and 31Y are needed. It is also inconsistent with the existing provision under the EO covering the situation of an employee who dies in service. Section 31YA(1)(b)(ii) of the EO (Annex C) allows LSP to be offset against MPF scheme benefits being held in a MPF scheme or **previously paid** to or in respect of an employee who dies during employment. The Administration therefore proposes that sections 31I and 31Y be amended so that SP/LSP payable to an employee may also be offset against MPF scheme benefits which have been previously paid to or in respect of the employee.

Annex C

5. Since the Mandatory Provident Fund Schemes Ordinance exempts an employee who has reached the age of 64 on 1 December 2000 and his employer from making MPF contributions, the situation as described in paragraph 3(a) above will not occur until early 2002. However, the situation as described in paragraph 3(b) above could theoretically have taken place anytime from the commencement of the MPF scheme. According to the Mandatory Provident Fund Schemes Authority, however, while some MPF scheme rules do provide for such flexibility, it is generally not common that an employee would be allowed to take out his

accrued benefits in respect of the employer's voluntary contributions before leaving the company. Thus far, there have not been any reported cases of double payments.

6. To safeguard employers against any possibility of a surge in employees withdrawing MPF scheme benefits and subsequently leaving employment prior to the coming into effect of the proposed amendments, we propose that the amendments should take effect from the date of gazettal of the Bill. This would enable the original policy intent of the offsetting provisions to be effectively preserved. Employees will be aware that should they receive double payment after gazettal of the Bill, they may be required to repay the employers the overpaid portion upon enactment of the Bill.

THE BILL

7. The main purpose of the Bill is to amend sections 31I and 31Y so as to bring them in line with the original policy intent of the offsetting provisions and with the wording adopted in section 31YA(1) of the EO which allows offsetting of LSP against MPF scheme benefits previously paid.

8. Clause 1 stipulates the commencement date of the Employment (Amendment) Ordinance 2001. Clause 2 amends section 31I such that severance payment payable to an employee can be reduced by MPF scheme benefits that have already been paid to or in respect of the employee. Clause 3 amends section 31Y to provide the same effect for long service payment. Clause 4 amends the Chinese text of section 31YA(1) to more accurately reflect the underlying policy intent of this provision. Clause 5 provides the detailed transitional arrangements.

PUBLIC CONSULTATION

9. The Labour Advisory Board has no objection to the proposed amendments. The Legislative Council Panel on Manpower was informed about the proposed amendments on 17 May 2001.

BASIC LAW IMPLICATIONS

10. The Department of Justice advises that the proposed Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

11. The Department of Justice advises that the proposed Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

12. The amendments will not affect the current binding effect of the EO.

FINANCIAL AND STAFFING IMPLICATIONS

13. There are no financial or staffing implications for the Government.

ECONOMIC IMPLICATIONS

14. The proposal should not have economic implications as it merely aims to make clear the original policy intent of the law that an employer is allowed to offset SP/LSP payable to an employee against MPF scheme benefits previously paid to the employee.

LEGISLATIVE TIMETABLE

15. The legislative timetable will be-

Publication in the Gazette	25 May 2001
First Reading and commencement of Second Reading debate	6 June 2001
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

PUBLICITY

16. A press release will be issued on 24 May 2001, the day before the Bill is due to be published in the Gazette.

ENQUIRIES

17. For enquiries, please contact Miss Mabel Li, Senior Labour Officer. Her telephone number is 2852 3517.

Education and Manpower Bureau
24 May 2001

A BILL

To

Amend sections 31I and 31Y of the Employment Ordinance to clarify that an employer may reduce a severance payment or long service payment payable to an employee by a relevant mandatory provident fund scheme benefit that has been paid to or in respect of the employee; and to make a clarifying amendment to section 31YA(1) of the Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Employment (Amendment) Ordinance 2001.

(2) Section 4 comes into operation at the beginning of the day on which this Ordinance is published in the Gazette.

(3) Except as provided by subsection (2), this Ordinance is deemed to have come into operation on 25 May 2001.

2. Severance payment to be reduced by amount of gratuities and benefits in certain cases

Section 31I of the Employment Ordinance (Cap. 57) is amended-

(a) in paragraph (b), by adding ", or has been paid to or in respect of the employee" after "employee";

(b) by adding "to or in respect of the employee" before "to the extent".

3. Long service payment to be reduced by amount of gratuities and benefits in certain cases

Section 31Y is amended-

- (a) in paragraph (b), by adding ", or has been paid to or in respect of the employee" after "employee";
- (b) by adding "to or in respect of the employee" before "to the extent".

4. Reduction of long service payment and other amounts on employee's death

Section 31YA(1) is amended by adding “就該僱員而被持有、” after “扣除”。

5. Transitional and savings

(1) If, before 25 May 2001 -

- (a) a relevant mandatory provident fund scheme benefit has been paid to or in respect of an employee; and
- (b) either -
 - (i) a severance payment has been paid to the employee; or
 - (ii) the employee becomes entitled to a severance payment,

then -

- (c) the amendment made by this Ordinance to section 31I of the principal Ordinance does not affect the employee in relation to the benefit and the payment; and
- (d) the employer of the employee -
 - (i) where paragraph (b)(i) is applicable, is not entitled to recover from the employee any portion of the payment that has been paid on the ground solely that the payment could have been reduced if it were paid on or after 25 May 2001; and

- (ii) where paragraph (b)(ii) is applicable, is liable to pay the payment as if section 31I of the principal Ordinance had not been amended by this Ordinance.

(2) If, before 25 May 2001 -

- (a) a relevant mandatory provident fund scheme benefit has been paid to or in respect of an employee; and
- (b) either -
 - (i) a long service payment has been paid to the employee; or
 - (ii) the employee becomes entitled to a long service payment,

then -

- (c) the amendment made by this Ordinance to section 31Y of the principal Ordinance does not affect the employee in relation to the benefit and the payment; and
- (d) the employer of the employee -
 - (i) where paragraph (b)(i) is applicable, is not entitled to recover from the employee any portion of the payment that has been paid on the ground solely that the payment could have been reduced if it were paid on or after 25 May 2001; and
 - (ii) where paragraph (b)(ii) is applicable, is liable to pay the payment as if section 31Y of the principal Ordinance had not been amended by this Ordinance.

(3) If-

- (a) at any time before the date of publication of this Ordinance in the Gazette, a relevant mandatory provident

fund scheme benefit has been paid to or in respect of an employee;
and

- (b) on or after 25 May 2001, the employee becomes entitled to a severance payment,

then the employer of the employee may, on or after the date of publication, reduce the payment by the benefit in accordance with section 31I of the principal Ordinance as amended by this Ordinance.

(4) If-

- (a) at any time before the date of publication of this Ordinance in the Gazette, a relevant mandatory provident fund scheme benefit has been paid to or in respect of an employee; and
- (b) on or after 25 May 2001, the employee becomes entitled to a long service payment,

then the employer of the employee may, on or after the date of publication, reduce the payment by the benefit in accordance with section 31Y of the principal Ordinance as amended by this Ordinance.

(5) If, at any time on or after 25 May 2001 but before the date of publication of this Ordinance in the Gazette -

- (a) a severance payment, to which an employee's entitlement arises on or after 25 May 2001, has been paid to the employee; and
- (b) the payment has not been reduced, in accordance with section 31I of the principal Ordinance as amended by this Ordinance, by a relevant mandatory provident fund scheme benefit that has been paid to or in respect of the employee at any time before the date of publication,

then the employer of the employee may, on or after the date of publication, recover from the employee an amount equal to -

- (c) if the payment is more than the benefit, the benefit;

(d) if the payment is not more than the benefit, the payment.

(6) If, at any time on or after 25 May 2001 but before the date of publication of this Ordinance in the Gazette -

(a) a long service payment, to which an employee's entitlement arises on or after 25 May 2001, has been paid to the employee; and

(b) the payment has not been reduced, in accordance with section 31Y of the principal Ordinance as amended by this Ordinance, by a relevant mandatory provident fund scheme benefit that has been paid to or in respect of the employee at any time before the date of publication,

then the employer of the employee may, on or after the date of publication, recover from the employee an amount equal to -

(c) if the payment is more than the benefit, the benefit;

(d) if the payment is not more than the benefit, the payment.

(7) In this section, "principal Ordinance" (主體條例) means the Employment Ordinance (Cap. 57) as in force immediately before 25 May 2001.

Explanatory Memorandum

This Bill makes technical, clarifying amendments to sections 31I, 31Y and 31YA(1) of the Employment Ordinance (Cap. 57). In particular -

(a) sections 31I(b) and 31Y(b) are amended to bring them in line with the wording adopted in section 31YA(1)(b)(ii) of the Ordinance; and

(b) the Chinese text of section 31YA(1) is amended to more accurately reflect the underlying policy intent of this provision.

2. Under the amended sections 31I and 31Y, a severance payment or a long service payment payable to an employee is to be reduced by a relevant

mandatory provident fund scheme benefit that has been paid to or in respect of the employee.

3. Clause 5 provides for transitional and savings provisions in view of the commencement date specified in clause 1(3). (That date is the date of publication of the Bill in the Gazette.)

Annex B

**BLIS ON
INTERNET**

Section of Enactment

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Chapter: 57	Title:	EMPLOYMENT ORDINANCE	Gazette Number: L.N. 120 of 2000
Section: 31I	Heading:	Severance payment to be reduced by amount of gratuities and benefits in certain cases	Version Date: 01/12/2000

If an employee becomes entitled to payment of a severance payment under this Part and-

(a) because of the operation of the employee's contract of employment, one or more gratuities based on length of service or one or more relevant occupational retirement scheme benefits have been paid to the employee; or

(b) a relevant mandatory provident fund scheme benefit is being held in a mandatory provident fund scheme in respect of the employee,

the severance payment is to be reduced by the total amount of all of the gratuities and benefits to the extent that they relate to the employee's years of service for which the severance payment is payable.

(Replaced 4 of 1998 s.5)

**BLIS ON
INTERNET**

Section of Enactment

Chapter: 57	Title: EMPLOYMENT ORDINANCE	Gazette Number: L.N. 120 of 2000
Section: 31Y	Heading: Long service payment to be reduced by amount of gratuities and benefits in certain cases	Version Date: 01/12/2000

If an employee becomes entitled to payment of a long service payment under this Part and-

(a) because of the operation of the employee's contract of employment, one or more gratuities based on length of service or one or more relevant occupational retirement scheme benefits have been paid to the employee; or

(b) a relevant mandatory provident fund scheme benefit is being held in a mandatory provident fund scheme in respect of the employee,

the long service payment is to be reduced by the total amount of all of the gratuities and benefits to the extent that they relate to the employee's years of service for which the long service payment is payable.

(Replaced 4 of 1998 s.5)

**BLIS ON
INTERNET**

Section of Enactment

▼

Chapter: 57	Title: EMPLOYMENT ORDINANCE	Gazette Number: L.N. 120 of 2000
Section: 31YA	Heading: Reduction of long service payment and other amounts on employee's death	Version Date: 01/12/2000

- (1) If-
- (a) an employee has died; and
 - (b) as a result of the death, a person becomes entitled to payment of a long service payment and-
 - (i) because of the operation of the employee's contract of employment, one or more gratuities based on length of service or one or more relevant occupational retirement scheme benefits have been paid to the person in respect of the employee; or
 - (ii) a relevant mandatory provident fund scheme benefit is being held in a mandatory provident fund scheme in respect of the employee, or has been paid to or in respect of the employee,
- the long service payment is to be reduced by the total amount of all of the gratuities and benefits to or in respect of the employee to the extent that they relate to the employee's years of service for which the long service payment is payable.
- (2) If-
- (a) an employee has died; and
 - (b) as a result of the death, a person-
 - (i) because of the operation of the employee's contract of employment, becomes entitled to payment of a gratuity based on length of service or to payment of a relevant occupational retirement scheme benefit; or
 - (ii) becomes entitled to payment of a relevant mandatory provident fund scheme benefit; and
 - (c) a long service payment under this Part has been paid to the person in respect of the employee, the gratuity or benefit is, to the extent that it is attributable to the same years of service as those for which the long service payment is payable, to be reduced by the whole of the long service payment.
- (3) Subsection (2) has effect even though the years of service for which the long service payment was made exceed those to which the gratuity or benefit is attributable.
- (4) If-
- (a) the employer of an employee who has died is, as a result of the employee's death, required to make a long service payment under section 31RA to a person; and
 - (b) another person is entitled to one or more gratuities, relevant occupational retirement scheme benefits or relevant mandatory provident fund scheme benefits as a result of that death,
- that other person is entitled to be paid the gratuities, relevant occupational retirement scheme benefits and relevant mandatory provident fund scheme benefits relating to the employee's years of service only to the extent that the total amount of those gratuities and benefits exceeds the amount of the long service payment.
- (5) If-
- (a) the employer of an employee who has died has made a long service payment under section 31RA to a person as a result of the employee's death; and
 - (b) the administrator of an occupational retirement scheme has paid a relevant occupational retirement scheme benefit, or the approved trustee of a mandatory provident fund scheme has paid a relevant mandatory provident fund scheme benefit, to another person as a result of that death,
- that other person must repay the benefit to that administrator or trustee except for the amount of the excess referred to in subsection (4).
- (6) On being repaid the benefit, the administrator or trustee must pay it to the employer concerned.
- (7) Section 70A of the Occupational Retirement Schemes Ordinance (Cap 426) and section 12A of the

Mandatory Provident Fund Schemes Ordinance (Cap 485) have effect in relation to this section.

(Replaced 4 of 1998 s.5)
