

**Bills Committee
on Companies (Corporate Rescue) Bill**

**The Administration's Comments on Proposals relating to
Treatment of Wages and other Statutory Entitlements
owed by a Company to its Employees**

The Bills Committee has put forward the following two proposals –

- (a) offering statutory protection to employees of lower levels of income and providing other options for employees of higher levels of income; and
- (b) setting an upper limit on employees' entitlements that have to be catered for by the trust account to be set up before the commencement of the corporate rescue procedure.

First Proposal

2. The principle of equal protection for the rights of employees irrespective of their status is enshrined in the Employment Ordinance. We see no justification for treating employees differently on the basis of their income levels. It is also virtually impossible to define a generally acceptable income level for categorising employees. The components of employees' incomes vary from company to company, and may include such items as wages, cash allowances, housing and education allowances, bonuses, commissions, tips, etc. Any differential treatment may require substantial amendments to the Employment Ordinance.

3. The Department of Justice's initial view is that any differential treatment between employees of different income groups must be justified by objective and reasonable reasons in order not to raise any concerns of possible contravention of the non-discrimination principle guaranteed by the Hong Kong Bill of Rights Ordinance.

4. The Department of Justice has also advised that section 26 of the Employment Ordinance prohibits any form of payment of wages other than that specified in the section, i.e., legal tender, cheque, money order, postal order and bank account crediting. Any trade-in of the arrears between the employees and the company in kind, e.g., through shares or share option is not an acceptable form of payment specified under that section. The Administration is of the view that if agreement to trade-in arrears is allowed, the level of protection that employees can obtain will be less favourable than what they are entitled under the existing labour legislation. We have reservations about this proposal because it would reduce the level of protection of the “high-income” employees under the Employment Ordinance.

5. Even if the proposal is to be pursued, due to the possible impairment of their entitlements and the uncertainty involved, it is very likely that most of the “high income” employees will opt to have the arrears owed to them set aside in the trust account, rather than entering into trade-in agreements with the company. Consequently, the proposal may not be able to achieve its intended purpose.

Second Proposal

6. It is not clear if this proposal is intended to cover all types of employees, i.e., both those who have been laid off by a company prior to the commencement of the corporate rescue procedure (former employees) and those who would be retained by the company when the corporate rescue procedure starts (continuing employees). As former employees have no ties with the company during corporate rescue, we see no justification for their entitlements being paid out of the trust account to be capped.

7. We also see no justification for capping the amount of fund set aside in the trust account for arrears owed by the company to continuing employees. Such a proposal would impair the statutory rights and protection accorded to the employees under the Employment Ordinance. Given the moratorium during corporate rescue, continuing employees will not be able to claim the balance of the arrears (the sum above the cap) from the company.

8. As a company undergoing corporate rescue is still a going concern (not a company in liquidation), it is not appropriate to draw a parallel between the proposed cap and the maximum amount payable from the Protection of Wages on Insolvency Fund (PWIF) nor the maximum amount of a preferential payment in the liquidation of a company under section 265 of the Companies Ordinance. The proposed capping may in fact encourage continuing employees to petition for the winding up of the company early, thereby defeating the purpose of introducing a corporate rescue procedure.

Consultation with the Labour Advisory Board and the PWIF Board

9. The Secretary for Education and Manpower has suggested that both the Labour Advisory Board and the PWIF Board may need to be consulted if the proposals are to be pursued. Given the lack of details of the proposals at this stage, we cannot make an accurate assessment of the impact of the proposals on the existing legislation. Nevertheless, the Secretary for Education and Manpower's initial assessment is that they would impact on the Employment Ordinance, and possibly on the Protection of Wages on Insolvency Ordinance.

Financial Services Bureau
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