

**LegCo Panel on Manpower
(Meeting to be held on 30 Oct 2000)**

**Retirement Protection for Employees
after the Implementation of the MPF System - Follow-up Issues**

Introduction

Mandatory Provident Fund (MPF) Schemes will be launched in Hong Kong on 1 December 2000 after years of extensive preparation, to provide the workforce with an additional layer of retirement protection. The Mandatory Provident Fund Schemes Authority (MPFA) has been set up under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO). Responsible to the Management Board and advised by the Mandatory Provident Fund Schemes Advisory Committee, the MPFA's main functions are to regulate MPF trustees and protect MPF scheme member interests.

2. This paper outlines the protection of the employees' rights under MPF schemes and the overview of the MPF exempted ORSO schemes.

Coverage

3. Except for certain exempt persons stipulated in the MPF legislation, all employees aged between 18 and 65 and self-employed persons aged below 65 are required to participate as members of MPF schemes. Also, in order to provide daily-waged employees in the construction and catering industries with retirement protection, "industry schemes" are set up to facilitate the enrolment

of such employees. The legislation has also stipulated detailed rules in respect of contribution and vesting, portability, preservation and withdrawal of accrued benefits.

Responsibilities of Employers and Employees

4. Under the MPF legislation, employers must enrol their eligible employees in MPF schemes and deduct 5% from their employees' relevant income as mandatory contributions. Employers are also required to contribute 5% of the employees' income (or up to a maximum of HK\$1,000) from their own fund to a relevant registered scheme as mandatory contributions. Employers who fail to enrol employees in MPF schemes will be prosecuted and is liable to a fine of HK\$100,000 and imprisonment of six months on first conviction. The MPFA may also impose contribution surcharges and financial penalties to employers for late enrolment or non-payment.

Protection of Members' Rights

5. A professional team of about 60 inspectors has been set up by the MPFA to protect the rights of the scheme members. Their main responsibilities are to carry out inspections and investigations and handle MPF-related complaints. They are also required to take enforcement actions as and when necessary, including initiating prosecution against non-compliant parties.

6. The MPF System is the result of years of debate at all levels of the community and is worked out after careful deliberation by the Legislative Council. It strikes a fine balance between the interests of different parties. Regarding the "investment choices" of MPF schemes, the representatives of

employers and employees have agreed that the employers will choose MPF schemes while the employees will select the investment products. As schemes are chosen by employers, employers will have a significant influence on the risk level of the MPF products chosen by the employees.

7. Under the MPF System, all MPF investments are subject to the investment restrictions prescribed in the MPF legislation, for example, schemes may invest in stocks listed on recognized exchanges, “investment grade” bonds, etc. The MPF legislation also prohibits the concentration of investment in securities of a single company in order to avoid the investment risk associated with a particular company. In addition, the MPF legislation prohibits the gearing of MPF assets, investment in derivatives, and stock lending. Such requirements ensure that MPF assets are not subject to undue risk resulting in substantial losses.

8. The law also prescribes that all MPF investment managers must be qualified professionals supervised by the SFC. They must perform their duties prudently, skilfully and diligently to ensure that the assets under their management are not exposed to undue or excessive risk. Any loss to scheme members resulting from non-compliant transactions conducted by investment managers will be covered by indemnity insurance and the Compensation Fund. The interests of scheme members are hence protected.

Employees covered by ORSO Schemes

9. Currently, there are about 2 000 exempted schemes¹ and 16 000 registered schemes² governed by the Occupational Retirement Schemes Ordinance. All employers of the exempted schemes are eligible to apply for MPF exemption. It is estimated that about 11 000 out of the 16 000 registered schemes (covering about 840 000 scheme members) are eligible to apply for MPF exemption.

10. The MPFA has completed the processing of all applications for exemption by 31 July 2000. A total of 6 941 exemption applications covering about 9 200 employers and 635 000 employees have been approved by the MPFA. 80 applications³ have been rejected and the number of withdrawn applications was 90. During the period from 1 August to 19 October, three rejected applications for exemption were subsequently approved after the MPFA had scrutinised the re-submitted documents. In addition, the MPFA has received applications for withdrawal of exemption certificates from a total of 295 schemes. As such, the number of MPF exempted ORSO schemes now stands at 6 649, comprising 551 exempted schemes and 6 098 registered schemes, covering about 8 700 employers and 616 000 scheme members (representing 73% of the scheme members covered by eligible ORSO schemes).

¹ An exempted scheme is an occupational retirement scheme to which an exemption certificate was issued under s. 7 of the Occupational Retirement Schemes Ordinance.

² A registered scheme is an occupational retirement scheme to which an exemption certificate was issued under s. 18 of the Occupational Retirement Schemes Ordinance.

³ These MPF exemption applications were rejected because of their non-compliance with the exemption requirements.

11. On 12 May 2000, the MPFA issued a letter to all employers who operate ORSO registered schemes but have not applied for MPF exemption or are not eligible for exemption. Employers' contributions under these schemes are better than the MPF requirement. The MPFA urges these employers to maintain the existing benefit levels for their employees. A questionnaire⁴ was enclosed with the letter. The survey results are attached at the Appendix.

12. The MPFA is contacting those employers who have indicated that they would not maintain their existing level of benefits. They will be strongly encouraged to uphold the objective of setting up the occupational retirement schemes on a voluntary basis, with the aim of protecting their employees' benefits and winning their loyalty. The MPFA will also emphasize that both employers and employees should approach the issue with an open mind and discuss the interface arrangements between the MPF scheme and their occupational retirement scheme.

Protection of employees' rights on the implementation of the MPF

13. Under the MPFSO, employers should make the mandatory contributions for their relevant employees from their own funds. An employer who, without reasonable excuse, fails to comply with the requirement of mandatory contributions commits an offence. A first offender is liable on conviction to a maximum fine of \$100,000 and imprisonment for 6 months.

⁴ As at 19 Oct 2000, the MPFA has received a total of 1 958 completed questionnaires. The response rate is 63%.

14. If an employer, in implementing the MPF, unilaterally introduce changes to the existing terms of employment, the employees may claim remedies against unreasonable variation of employment terms under the Employment Ordinance (EO). The affected employees may lodge their complaint with the Labour Department (LD), which will provide voluntary conciliation service to help the two parties settle their dispute. If the dispute cannot be settled by conciliation, the employees may take their case to the Labour Tribunal (LT). If their employment contracts have been varied unreasonably, the LT may award remedies which include order of reinstatement or re-engagement, if both parties agree, or award of terminal payments. Furthermore, it is an offence under the EO for employer to make unlawful wage deductions, subject to a maximum fine of \$100,000 and imprisonment for one year. An employer cannot deduct the wages of his employees for the purpose of making the employer's contribution to the MPF.

15. An employer who changes the wage structure and converts part of the wages into cash allowances (such as housing allowance) in a bid to reduce MPF contributions, will not be able to evade his liabilities for employee benefits under the EO. This is because "wages" defined under the EO includes all remuneration and allowances in money terms and all employee benefits under the EO, including severance payment and long service payment, are calculated on the basis of wages.

16. If an employer seeks to evade his liabilities under the MPFSO by changing the status of his employees to self-employed persons, and such

unilateral variation of the employment contract on the part of the employer causes a substantial and fundamental change to the contract which is to the employees' disadvantage, it may amount to constructive dismissal under the common law. The aggrieved employees can claim termination compensation from the employer. Where such change has been made with the employees' agreement, the distinction between "employee" and "self-employed person" still remains to be determined on the basis of the actual facts of the case. If the change of status is in name only and the employer-employee relationship has not changed in essence, the employer will not be able to evade his responsibilities under the MPFSO and the EO.

17. The MPFA and the LD are very concerned with recent reports about some employers seeking to evade or reduce their MPF liabilities through change of existing employee benefits and terms of employment. Employees may contact the MPFA for enquiries and assistance on matters relating to employers' compliance with the MPFSO. They can also approach the LD for complaints against unreasonable variation of employment terms.

Complaints received by the LD

18. From January to September 2000, the LD handled a total of five complaints about variation of employment terms due to the implementation of the MPF. Among the five cases, three were concerned with the proposed replacement of existing occupational retirement schemes by MPF Schemes. There was also one case alleging wage deduction by the employer due to the MPF. These four cases have been resolved after conciliation or advice given to the parties concerned. The remaining complaint was related to the replacement

of employment contract by contract for service and dispute over workers' entitlement to statutory holiday pay and annual leave pay under the EO. As the case could not be resolved by conciliation, it has been referred to the LT for adjudication of the claims for holiday and leave pay.

Financial Services Bureau

Labour Department

October 2000

Survey Conducted on Employers of ORSO Registered Schemes**- Result of Completed Questionnaires**

Benefit Levels:	<u>No. of</u> <u>Replies</u>	<u>%</u>	<u>No. of</u> <u>Employees</u> <u>Covered</u>	<u>%</u>
- Plan to maintain the same level of benefits	1 312	67	58 664	73
- Not to maintain the same level of benefits but to provide additional voluntary contributions	90	5	7 630	9
- To provide mandatory contributions only	171	9	4 703	6
- Not yet decided	<u>385</u>	<u>19</u>	<u>9 828</u>	<u>12</u>
	1 958	100	80 825	100
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