

**LegCo Panel on Manpower
(For Meeting on 16 November 2000)**

**Proposed Amendments to Clarify
Various Provisions of the Employment Ordinance**

Introduction

This paper seeks Members' views on proposals to amend the Employment Ordinance (EO), Cap 57, for the following purposes :

- (A) to clarify various provisions; and
- (B) to make necessary amendments as a result of the repeal of the women-specific provisions of the Women and Young Persons (Industry) Regulations.

Background

(A) Clarify various provisions of the Employment Ordinance

2. Under section 15(1) of the EO, an employer is prohibited from dismissing an employee during her pregnancy by giving notice under section 6 or wages in lieu of notice (WILON) under section 7 of the EO. An employer who contravenes this section commits an offence and is liable, on conviction, to a fine of \$100,000. Similar provision is provided by section 33 of the EO for prohibition of dismissal of an employee during paid sick leave. The purpose of these provisions is to prohibit employers from dismissing pregnant employees or employees on paid sick leave except in circumstances where summary dismissals are justified under section 9 of the EO. Under Section 9 of the EO, an employer may terminate a contract of employment without notice or payment in lieu of notice if the employee has committed serious misconduct, such as fraud or dishonesty or habitual neglect of duties.

3. However, section 15(1) and section 33 of the EO are worded in a way such that they appear to only prohibit dismissal of employees during pregnancy or paid sick leave under section 6 or section 7, without covering wrongful dismissals which are not justified under section 9. This means once an employer alleges that he has dismissed an employee during

pregnancy or paid sick leave summarily under section 9 of the Ordinance, there will be difficulties in prosecuting the employer for contravention of section 15(1) or section 33, even if the alleged summary dismissal is subsequently proved to be unsubstantiated. This is not in line with the policy intention. We therefore consider it necessary and desirable to amend the EO to clarify the wordings of these provisions so as to make it clear that an employer may not terminate the employment of an employee during pregnancy or paid sick leave except in circumstances where summary dismissal is justified under section 9 of the Ordinance, and that employer who do so shall be subject to prosecution.

4. Under the EO, an employer shall pay to his employee, not later than 7 days after the day of termination, any sum due to him on termination of employment contract and that failure to make such payment within the time limit is a prosecutable offence. This sum includes, inter alia, wages in lieu of notice, long service payment and compensation for dismissal during paid sick leave. However, there is currently no provision in the EO stipulating the time limit for payment of compensation for dismissal during pregnancy. It is therefore necessary to amend the EO to require an employer to make compensation payable for dismissal of a pregnant employee within 7 days after the day of dismissal and to make non-payment of the amount within the time limit an offence.

5. Under Part IIA of the Ordinance, an employee is eligible for an end of year payment if he has been employed under a continuous contract for a whole payment period and there is contractual agreement for such payment. Section 11F further provides for pro-rata end of year payment in early termination of contract. The intention of these provisions is to ensure that an employee's entitlement to end-of-year payment will not be adversely affected by early termination of his contract by the employer. However, this provision, as it is now worded, gives rise to a situation whereby an employee who wrongfully terminates the contract without giving proper notice or payment of wages in lieu of notice may be entitled to it. As this is not in line with our policy intention, it is proposed to amend the Ordinance to the effect that an employee who terminates his contract otherwise than in the special circumstances prescribed under section 10 (such as fear of violence and ill-treatment by the employer) shall not be entitled to proportional end of year payment.

6. Acts of discrimination within the meaning of Sex Discrimination Ordinance (the SDO) and the Disability Discrimination Ordinance (the DDO) have been excluded from Part VIA of the Ordinance

(which relates to employment protection) since the enactment of the SDO and the DDO. The rationale is to avoid subjecting an employer to double penalties under both the Ordinance and these two pieces of legislation in respect of a single act. The Family Status Discrimination Ordinance (the FSDO) which provides, among other things, protection for employees against unlawful discrimination on the ground of family status, has come into operation on 21 November 1997. Under the same rationale of avoiding double penalties, it is proposed that the Ordinance should be amended to exclude acts of discrimination which are covered by the FSDO.

(B) Necessary amendments as a result of the repeal of the women-specific provisions of the Women and Young Persons (Industry) Regulations

7. The Women and Young Persons (Industry) Regulations (the Regulations) under the Employment Ordinance, which used to contain restrictions for women employed in industrial undertakings were revamped in July 1997 to remove all “women-specific” provisions and references to “women” which were deemed to be discriminatory under the SDO. However, the title and the citation of the Regulations as well as the references to the Regulations in the Ordinance were not amended in that exercise. It is proposed that textual amendments should be made by deleting all references to “women” in the Ordinance in respect of the Regulations, in the title and citation of the Regulations; as well as in the title of the Regulations mentioned in paragraph 1 of Schedule 3 to the SDO.

EO (Amendment) (No. 2) Bill 2000

8. We intend to introduce an Employment (Amendment) Bill 2000 into the Legislative Council during the current legislative session to make clear the intention of the provisions and to propose a number of technical amendments. The major proposed amendments seek to -

- (i) Provide that an employee who terminates his contract otherwise than in accordance with section 10 of the Ordinance shall not be entitled to proportional end of year payment;

- (ii) Provide that an employer shall not terminate a continuous contract of employment of a pregnant employee, or of an employee on any sickness day in respect of which sickness allowance is payable under section 33 of the Ordinance, otherwise than in accordance with section 9; and that employers who do so shall, unless the contrary is proved, be taken to terminate any such contract otherwise than in accordance with section 9. It shall, however, be a defence for the employer in proceedings for an offence under section 15 or section 33 to prove that he purported to terminate the continuous contract of employment of the employee concerned in accordance with section 9 and that, at the time of such termination, he reasonably believed that he had a ground to do so.
- (iii) Include in section 25 of the Ordinance payment of compensation for dismissal of a pregnant employee payable under section 15(2) such that the said compensation shall be paid within 7 days after the day of termination and that an employer who willfully and without reasonable excuse fails to comply with the above commits an offence.
- (iv) Provide that acts of discrimination against persons on the ground of family status within the meaning of the FSDO shall be excluded from the application of Part VIA of the Ordinance.
- (v) Make amendments and specify transitional provisions as a result of the change of the title of the Regulations.

9. The Labour Advisory Board has endorsed the above proposed amendments.

Advice Sought

10. Members are invited to provide their views on the Administration's proposal to introduce the Employment (Amendment) (No. 2) Bill 2000 on the above various clarifying provisions and technical amendments.

Education and Manpower Bureau

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