

Paper for the Legislative Council Panel on Manpower

Meeting on 15 November 2001

**Industrial accident compensation insurance for
workers with a self-employed status in the construction industry**

Purpose

This paper informs Members of the current provisions under the Employees' Compensation Ordinance (ECO) and the Administration's position in respect of accident compensation insurance for self-employed persons.

Current provisions under the ECO

2. The ECO operates on the basis of individual employer liability. An employer is liable to pay compensation to his employees who are injured by accident or suffer from specified occupational disease that arise out of and in the course of their employment. It is also stipulated that in work involving sub-contracting, the principal contractor is liable to pay compensation under the Ordinance to his sub-contractors' employees who are injured in the execution of the work if the direct employer defaults payment.
3. The Ordinance is applied to all workers who are employed under a contract of service or apprenticeship. Self-employed persons, who are in fact independent contractors, are not covered by the ECO.
4. The employer is also required to take out a minimum amount of insurance to cover his liabilities under the ECO as well as at common law. A principal contractor in the construction industry may take out an insurance policy to cover his liability to his employees and his sub-contractors' employees under the Ordinance and at common law. Where the principal contractor takes out such an insurance policy, the sub-contractor insured under the policy is considered as having complied with the compulsory insurance requirement in respect of his employees. Furthermore, a "group of companies" as defined in

section 2 of the Companies Ordinance may also take out an insurance policy to cover the liabilities to employees as laid down under the ECO and at common law in respect of the companies in the group and insured under the policy.

Self-employment in the Construction Industry

5. Sub-contracting is a common practice in the construction industry in Hong Kong. It is well established that sub-contractors are not employees of the principal contractor. As a matter of fact, many sub-contractors are employers on their own right. They enter into service contracts in the capacity of a limited company, a partnership or a sole proprietor, engage employees to work to fulfill the contract, or even sub-contract the contracted work. As a sole proprietor, they may carry out business in their own name or under a business name.

6. Indeed, a sub-contractor in any industry is in essence an entrepreneur who seeks profit by providing services to another party. Like any other entrepreneurs, he has control over how to maximise his profits, minimize his risks and is free to enter into a contract for service with different parties.

Insurance arrangements for self-employed persons

7. The insurance industry is of the view that under the current provisions, the employees' compensation insurance policy only covers employees, be they employees of the insured employer or of his sub-contractor, if the latter is also specified in the policy. In the past, a small number of insurers underwrote employees' compensation insurance policies that provided a special "sub-contractors' extension" clause so that they also covered the sub-contractors. Recently, we are told that the Reinsurers Forum has formally informed the Accident Insurance Association that, in a bid to standardise the practice of the industry, reinsurers would not accept any "sub-contractors' extension" clause.

8. To protect him against injuries sustained in work accidents, a sub-contractor has to make his own insurance arrangements. For example, he may take out a personal accident insurance policy. Since such insurance arrangements are essentially service contracts, the level and items of protection as well as the insurance premium have to be negotiated between the parties.

Recent developments

9. Since the Mandatory Provident Fund Scheme (MPFS) came into operation in December 2000, labour unions claimed that some employers in the construction industry had forced their employees to become self-employed persons in order to evade their responsibility under the MPFS. They are

concerned that these so called 'self-employed' persons would lose the right to claim compensation under the ECO when they are injured at work.

10. The Administration is of the view that even if an employer attempted to change the status of an employee into 'self-employed' by simply entering into a new sub-contractor's contract with the employee, he still has to fulfill his obligation under the ECO where the relationship between the parties remains in essence an employer-employee relationship. In previous rulings, the court has not simply looked at the labelling of the person to determine the employment relationship. The court has been applying a number of tests to examine whether a worker is an employee or a self-employed person. These tests include the degree of control, power of selection and dismissal, nature of the remuneration, how the workplace is organised, who provides the materials and equipment, whether there is a risk of loss or profit etc.

11. In the period between December 2000 and October 2001, there were 12 employees' compensation cases that involved disputes on the employment relationship in the construction industry. This was against some 53 000 employees' compensation cases that were reported to the Labour Department in the same period. While such disputes also occurred before December 2000, we do not have separate figures by industry. Furthermore, among the 79 MPF-related complaints received by the Labour Department in the same period, there were only two complaints of employees being forced to become self-employed persons in the construction industry.

Implications of including self-employed persons under the ECO

12. If the ECO were amended to include self-employed persons, then it would be a major departure from the original purpose of protecting employees only and would take up a new dimension in protecting all persons who provide contract for service.

13. Such amendment would also bring serious economic and financial implications if every contractor who hires the service of another person were required to take out compulsory accident insurance cover. The impact on insurance premium has yet to be assessed. To gauge the size of the issue, reference could be made to the figures of the Mandatory Provident Fund Schemes Authority (MPFSA). According to the MPFSA, a total of 300 000 self-employed persons in all industries were enrolled in various MPF schemes as at the end of September 2001. Among them, some 22 500 were registered under the industry scheme for the construction industry.

14. Furthermore, there may be funding implications on the Employees Compensation Assistance Scheme (ECAS). If self-employed persons in the construction industry were covered under the ECO and the person or company who engaged such self-employed persons were responsible for taking out an insurance cover, it would appear logical to put these self-employed persons under the protection of ECAS too. According to the experience of the Employees Compensation Assistance Fund Board, a significant proportion of applications came from the construction industry. It would lead to an increase in the number of applications under the ECAS. It would also be difficult to detect abuse, in particular in works involving interior decoration in which the employment pattern is characterised by high workers' mobility and multi-tier sub-contracting.

15. An amendment to cover self-employed persons under the ECO may also inadvertently give the wrong impression that the Administration condones the arrangements of turning 'employees' into 'self-employed persons'. If the amendment were made, there would be a false sense of security and workers in the construction industry might be *persuaded* to agree to work as 'self-employed' persons. As a result, they might take up other responsibilities as independent contractors or lose their rights as employees under other legislation.

Conclusion

16. Having considered the above-mentioned implications and figures, the Administration considers that there is no imminent need to extend the ECO to cover self-employed persons.

17. We will continue to remind employers that they could not evade their responsibilities by changing the employment relationship in name. Where there is sufficient evidence, we will prosecute employers who fail to perform their statutory duties under the ECO.

Education and Manpower Bureau
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