

For information
on 21 October 2003

LegCo Panel on Manpower

Proposed Amendments to the Employees Compensation Assistance Ordinance (Chapter 365)

PURPOSE

This paper informs Members of the Administration's proposal to introduce amendments to the Employees Compensation Assistance Ordinance (ECAO).

BACKGROUND

2. To ensure that employers are able to discharge their statutory obligations of paying compensation or damages to their employees who are injured at work, the Employees' Compensation Ordinance (ECO) requires employers to take out an insurance policy to cover their liabilities under the ECO and the common law.

3. The Employees Compensation Assistance Scheme (ECAS) is set up under the ECAO to provide assistance to injured employees who are unable to recover their entitlements for employment-related injuries from their employers after exhausting legal and financially viable means of recovery. ECAS also provides for the protection of employers against default of their insurers who become insolvent. It is administered by the Employees Compensation Assistance Fund Board (the Board), which holds the Employees Compensation Assistance Fund (the Fund) upon trust. The Fund is financed by a levy paid by employers on the premium of their employees' compensation (EC) insurance policies.

THE PROBLEM

4. There is ambiguity in section 23 of the ECAO which deals with assistance to employers for legal costs in employment-related compensation claims in the event of their insurer's insolvency. It is also found that section 46A(8) of the Ordinance does not truly reflect the policy intent on the transitional arrangement for removing the protection of insurer insolvency from the ECAO.

THE PROPOSAL

5. It is proposed that the ECAO should be amended -
- (a) to make it clear that the Board may, in the event of insurer insolvency, assist employers in meeting the costs incurred or liable to pay in legal proceedings in relation to claims for compensation or damages arising from an employment-related injury which happened to their employees; and
 - (b) to clarify that, after the provisions relating to insurer insolvency are excised from the ECAO, the ECAO will continue to cover those claims for which the insurer has become insolvent before that date, irrespective of whether the employer's liability to pay compensation or damages is determined before, on or after that date.

JUSTIFICATIONS

(A) Assistance to Employers on Legal Costs

6. Sections 17 and 18 of the ECAO provide that an employer may apply to the Board for assistance in relation to the payment of compensation or damages for which he is liable if his insurer becomes insolvent. Section 23(7) further provides that in addition to the compensation or damages to be paid to an employer, the Board may also assist the employer in respect of the costs incurred by the employer in making the application under section 17 or 18.

7. In processing the cases affected by the insolvency of the HIH Group of insurance companies¹, the Board received advice from its legal advisers that the "costs in making the application" under section 23(7) might be narrowly interpreted to exclude costs incurred in the course of court proceedings brought by the injured employee against the employer. Similarly, the Department of Justice (DoJ) also advised the Labour Department that the ECAO did not give power to the Board in assisting employers on the costs of such legal proceedings.

¹ On 9 April 2001, three insurers of the HIH Group were placed into provisional liquidation. A notice of insolvency in respect of the insurers was issued pursuant to section 20 of the ECAO. Employers who have taken out employees' compensation insurance policies with these HIH insurers are entitled to apply to the Board for assistance.

8. As an usual practice, an EC insurance policy normally indemnifies an employer for the legal costs that he has incurred or is liable to pay in proceedings relating to a claim that arose from work injuries. It would be inequitable to the employer, who has taken out an EC insurance policy covering such costs, has paid the statutory levy for the benefit of the Board, and has been assisted by the Board in paying compensation or damages to the injured employee, to be denied assistance from the Board on legal costs if his insurer is insolvent. Moreover, if the Board does not assist employers on legal costs, employers would have little incentive to defend the claims at court diligently even though they might have doubts on the claim. This would result in the Board having to join in the legal proceedings to contest the claims or paying the uncontested claims as awarded by the court. Even so, the Board could not assist the employer for legal costs payable to injured employees as ordered by the court.

9. Injured employees would also be affected if their employers defaulted payment of the legal costs as ordered by the Court. In these circumstances, the injured employees would need to pay legal fees to their lawyers on their own account. This would reduce the amount of compensation that the employees could actually receive in the end.

10. It is proposed that amendments to the ECAO should be introduced so that in the event of insurer insolvency, the Board may, in addition to assisting employers for compensation or damages, also assist employers on legal costs in relation to proceedings brought by their employees for employment-related injuries.

(B) Transitional Arrangement for the Excision of the Protection of Insurer Insolvency

11. The Employees Compensation Assistance (Amendment) Ordinance 2002 (the Amendment Ordinance), which aimed at introducing a series of reform measures to ECAS, was enacted on 26 June 2002. The Amendment Ordinance provides for, among other things, the excision of the protection for employers in the event of their insurers' insolvency when the Employees Compensation Insurer Insolvency Scheme² (ECIIS) comes into operation. The target date of such excision is 1 April 2004.

² Established in February 2003, the ECIIS is an administrative scheme operated by the insurance industry and financed by a charge (at 2% of the premium) imposed on insurers underwriting employees' compensation insurance policies. The Scheme has been collecting the charge since April 2003 and would cover cases where the insurer becomes insolvent on or after 1 April 2004.

12. In order to protect the interests of employers whose insurers had become insolvent before 1 April 2004, it is our policy intention to allow these employers to continue having the right to receive assistance from the Board on or after 1 April 2004. The transitional arrangement is provided for in section 46A(8). However, we have identified ambiguity in this section such that the policy intention cannot be truly reflected.

13. DoJ has advised that the current wordings in section 46A(8) would have the unintended effect of excluding those employers who have been affected by the HIH insolvency from the protection of the ECAO if their liability towards their injured employees is determined on or after 1 April 2004. These employers would also not be entitled to seek assistance under the ECIIS. To achieve the policy intent as mentioned in paragraph 12, it is necessary to amend the relevant provisions on the transitional arrangement. There are now some 180 outstanding HIH cases in court involving more than 90 applicants.

FINANCIAL IMPLICATIONS

14. The proposal does not carry any additional financial implications on employers. In setting the revised levy rate for the ECAS when the Amendment Ordinance was enacted in June 2002, it was then assumed that the Board is liable to assist employers in respect of legal costs and hence the liability has already been included in the financial projections. The proposal will not therefore lead to further increase in the levy rate for the Board which is currently set at 3.1% on the premium of employees' compensation insurance policies.

PUBLIC CONSULTATION

15. Both the Employees Compensation Assistance Fund Board and the Labour Advisory Board supported the proposals.

LEGISLATIVE TIMETABLE

16. We intend to introduce the legislative amendments into the Legislative Council in the current legislative session and to put the amendments into operation before 1 April 2004.

Labour Department
Economic Development and Labour Bureau
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