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27 February 2007

The Honourable Kwong Chi-kin  
Chairman  
Bills Committee on Employment (Amendment) Bill 2006  
Legislative Council  
8 Jackson Road, Central  
Hong Kong

Dear Mr Kwong,

**Employment (Amendment) Bill 2006**

Thank you for your letter of 5 February 2007 inviting the Employers' Federation of Hong Kong to express views on the above.

The Federation fully understands the Government's policy intent of protecting our valuable workforce, particularly those with low income. We have to say, however, that some of the relevant provisions of the Employment Ordinance, which the present Bill seeks to amend, were enacted 40 years ago and are no longer in tune with current market conditions and practices. In particular, a wide spectrum of variable pay schemes and packages has developed over the years whereby different employers seek to remunerate employees according to their performance (as well as, in some cases, according to the performance of the business itself). All these schemes are performance driven and based on work that has actually been done. In light of this, the Federation is of the view that the Administration should undertake a more comprehensive review on this part of the Ordinance before proposing changes, rather than seeking to change certain elements hastily as a result of one particular court case.

The Federation has great reservations on the practicability of the Bill as it makes the calculation of employee entitlements more complicated and difficult, and might consequently cause more disputes.

1. There is no indication whether the new approach "rolling 12 months average" formula should be calculated on the basis of calendar or working days, the difference between which may be very significant in certain cases.
2. It is stipulated in s5(3)(a) that any leave taken by an employee in accordance with the provisions of the Employment Ordinance (for which he is not entitled to paid wages or full wages) should be disregarded. There is however no clear indication of the type of leave. Different industries have their distinct modes of operation. Employees in the catering industry for example are required to find "replacements" at their own cost during rest days. Should rest days be ignored in this case? The situation will be further complicated and made more difficult for employers if the employee concerned took no-pay leave sporadically over the 12-month period.

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3. The “rolling 12 months average” formula also applies to employees whose remuneration does not include variable elements. This seems to us unnecessary and, in many cases, disadvantageous for employees.
4. The Bill provides that where the “rolling 12 month average calculation” is “impracticable”, reference should be made to the “wages earned by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of termination of the employee’s contract of employment.” Generally, we find such cases extremely rare, if not actually non-existent. While we understand this is again another safety measure in protecting our employees, comparison with other employees in the same trade or occupation regardless of issues of seniority, work experience, other employment propositions, etc will be meaningless and unfair both to employers and employees.
5. Many employers have established mechanisms to safeguard the income of their employees, even during their absence from work. For example, it is a common practice for retail businesses to have two different types of sales commission in place, based on team and individual performance respectively. Similarly, there are often support teams to help financial advisers to handle sale orders in their absence and the latter will still be entitled to earn their shares of commission. Including commission into the calculation of statutory entitlements in these cases will mean double benefit to the employee concerned.

Given the evolving and increasingly complex nature of the remuneration systems in Hong Kong, the Federation is of the view that there should be a comprehensive review of that part of the Ordinance concerned with calculating statutory entitlements of the employees. In the meantime, it is crucial to ensure that the provisions are practicable and reasonable. We thus earnestly urge the Committee to give serious consideration to the above views.

Yours sincerely,



Louis Pong  
CEO

c.c. Dr Kim Mak  
Mr Brian Renwick