

**Bills Committee on
Employment (Amendment) Bill 2006**

**Explanatory Paper on
Committee Stage Amendments Proposed by the Administration**

Introduction

This paper explains on the Committee Stage amendments (CSAs) to the Employment (Amendment) Bill 2006 (the Bill) proposed by the Administration.

Overview of the Proposed CSAs

2. The Bills Committee has examined the proposed CSAs at its meeting held on 27 March 2007. In the light of Members' views, further refinements to the CSAs are proposed. Broadly, we now propose to move the following eight CSAs - the first four items are made in response to concerns expressed by some Members and deputations from some organizations while the other four items are essentially technical refinements identified by the Administration. Explanatory notes on each item of the CSAs are given at Annex.

“Disregarding” Provisions for Calculating Statutory Entitlements (Item 1)

3. The Bill provides for the use of the daily average or monthly average of the wages earned by an employee during the past 12 months or such shorter period for the calculation of payment in lieu of notice, damages for wrongful termination of contract, end of year payment, maternity leave pay, damages for wrongful termination of an employee's contract during pregnancy, sickness allowance, damages for wrongful termination of an employee's contract on a sickness day taken by the employee, holiday pay and annual leave pay under the Employment Ordinance (EO).

4. For the sake of protection against possible reduction in the quantum of the employee's statutory entitlements, the Bill further states that in calculating the average of the wages earned by the employee during the past 12 months or the shorter period of employment, any period therein for which the employee was not paid his wages or full wages due to his taking statutory/contractual leave or not being provided with work by the employer and any amount paid to him for that period, are to be disregarded. CSAs are proposed to relevant sections of the Bill to spell out clearly the meaning of “leave”.

5. Our intention is that any period of specified leave taken by the employee or period of non-provision of work by the employer for which the employee was paid a sum not less than full wages need not be disregarded as the inclusion of both the period and the amount paid in the calculation would not depress the 12-month moving average. This will reduce the number of items to be disregarded and therefore address the concerns raised by some Members and organizations about the increased administrative work.

6. To reflect our intention, it is necessary to propose amendment to the effect that for the purposes of calculating the affected statutory entitlements on the basis of a 12-month moving average, any sum paid by an employer in respect of any specified period of leave taken by an employee and normal working day on which the employee is not provided with work by his employer is deemed to be wages though such payments are not included in the definition of wages under section 2(1) of the EO. By so doing, the wages earned in the past 12 months or such shorter period shall include wages for services rendered as defined under section 2(1) as well as payments for various statutory or contractual entitlements. It is from this extended wages that the disregarding sums are to be deducted in calculating the daily or monthly average wages.

7. In this connection, another CSA is proposed to put beyond doubt that if the amount of wages paid in respect of the specified period of leave or non-provision of work is only a fraction of the amount earned by the employee on a normal working day, both the period and the wages paid are to be disregarded. This CSA aims at preventing any argument that maternity leave pay or sickness allowance paid according to the EO, or other contractual payments paid at a fraction of the amount of wages earned on a normal working day (e.g. half pay for any study leave taken) constitutes full wages for the particular day of leave.

8. With the extended meaning of wages, the employer may, for the purpose of ‘disregarding’, use a simpler way to calculate the average wages by identifying only the exceptional circumstances of not paying the employee wages or full wages in respect of any period of say no-pay leave, maternity leave, sick leave, etc. In other words, periods of leave with full pay such as statutory holidays and annual leave (which are of more recurrent nature) together with the amount paid need not be disregarded. This alleviates the administrative work otherwise required for disregarding all periods of leave or non-provision of work and payments for such periods.

Meaning of “Leave” (Item 2)

9. In the revised CSAs, “leave” is specified to cover (a) any rest day, holiday, annual leave, maternity leave or sickness day taken by the employee under the EO; and (b) any leave taken by the employee with the agreement of the employer. Correspondingly, any sum paid in respect of any such specified period is included in the extended wages for the calculation of the average wages in the manner as explained in paragraphs 6 - 8.

10. Given the difference in the basis of calculation under the Employees’ Compensation Ordinance (ECO) (i.e. earnings) and the EO (i.e. wages), there would be difficulties in comparing the amount of periodical payments paid to an injured employee with the amount earned by that employee on a normal working day. We now propose to exclude compensation for temporary incapacity (i.e. periodical payments) under the ECO from both the extended meaning of wages and the disregarding provisions in the Bill so that all periodical payments and the corresponding periods of temporary incapacity are not to be considered in the calculation of the statutory entitlements covered in the Bill, irrespective of whether the employee is paid periodical payments at the rate of four-fifths or 100% of his “earnings” as defined in the ECO.

“Impracticable” Provisions on Calculating Statutory Entitlements by Reference to a Comparable Person (Item 3)

11. Taking into consideration of Members’ views, we now propose to specify in the relevant provisions that reference be made to the wages earned by a person who was employed at the same work by the same employer or if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district where it is impracticable to calculate the amount earned by the employee concerned. Where appropriate, the reference to a female person in respect of a comparable person is also deleted to avoid gender differentiation.

Extending the Period for Keeping Wage/Employment Records (Item 4)

12. To address Members’ concerns, we propose to amend section 49A of the EO to extend the period required for keeping wage and employment records by the employer from 6 months to 12 months in order to tie in with the proposal of calculating statutory entitlements on the basis of a 12-month moving average.

CSAs on Technical Refinements to the Bill (Items 5 to 8)

13. The Administration has identified refinements to the Bill as follows:

- (a) Expressing more clearly the intention of avoiding double payment by the employer (Item 5).
- (b) Clarifying an employee's entitlement to maternity leave pay and sickness allowance (Item 6).
- (c) Providing for the calculation of monthly average wages in the relevant provision (Item 7).
- (d) Providing for the transitional arrangements in the relevant provisions (Item 8).

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Annex**Proposed Committee Stage Amendments (CSAs) to the Employment (Amendment) Bill 2006**

Item No.	Existing Clauses in the Bill	Gist of the CSAs	Reasons for proposing the CSAs
1.	<ul style="list-style-type: none"> • Clause 3 on termination of contract by payment in lieu of notice • Clause 5 on end of year payment • Clause 6 on payment for maternity leave • Clause 7 on prohibition against termination of employment of an employee during her pregnancy • Clause 9 on sickness allowance • Clause 10 on rate of sickness allowance • Clause 12 on rate of holiday pay • Clause 14 on rate of annual leave pay 	<p><u>Calculation of Statutory Entitlements</u></p> <ul style="list-style-type: none"> • To provide that for the purposes of calculating the statutory entitlements covered in the Bill on the basis of a 12-month moving average, any sum paid by an employer in respect of any specified period of leave taken by an employee and any normal working day on which the employee is not provided with work by his employer is deemed to be wages, though such payments are not wages given the definition of wages in section 2(1) of the Employment Ordinance (EO) to mean monetary rewards in respect of work done or to be done. • To explicitly express that if the amount of wages paid in respect of the specified period of leave or non-provision of work is only a fraction of the amount earned by the employee on a normal working day, both 	<ul style="list-style-type: none"> • To give effect that the wages earned by an employee in the past 12 months or such shorter period includes wages for services rendered as defined under section 2(1) of the EO and payments for various statutory or contractual entitlements. It is from this extended wages that the disregarding sums are to be deducted in calculating the daily or monthly average wages. • To put beyond doubt that maternity leave pay or sickness allowance or other contractual payments paid at a fraction of the amount of wages earned on a normal working day and the corresponding period should be disregarded. • To achieve the combined effect that it is only necessary to identify the exceptional circumstances where the employee is not

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		the period and the wages paid are to be disregarded.	<p>paid wages or full wages in respect of any period of say no-pay leave, maternity leave, sick leave, etc, for the purpose of disregarding.</p> <ul style="list-style-type: none"> ● To alleviate the administrative work as required for disregarding all periods of leave or non-provision of work and payments for such periods.
2.	<ul style="list-style-type: none"> ● Clause 3 on termination of contract by payment in lieu of notice ● Clause 5 on end of year payment ● Clause 6 on payment for maternity leave ● Clause 7 on prohibition against termination of employment of an employee during her pregnancy ● Clause 9 on sickness allowance ● Clause 10 on rate of sickness 	<p><u>Meaning of “Leave”</u></p> <p>To set out clearly that the term “leave” covers the following:</p> <ul style="list-style-type: none"> (a) any rest day, holiday, annual leave, maternity leave or sickness day taken by the employee in accordance with the EO; and (b) any leave taken by the employee with the agreement of the employer. 	<ul style="list-style-type: none"> ● To express more clearly the meaning of “leave” to which the Bill refers.

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	<ul style="list-style-type: none"> allowance • Clause 12 on rate of holiday pay • Clause 14 on rate of annual leave pay 		
3.	<ul style="list-style-type: none"> • Clause 3 on termination of contract by payment in lieu of notice • Clause 5 on end of year payment • Clause 6 on payment for maternity leave • Clause 7 on prohibition against termination of employment of an employee during her pregnancy • Clause 9 on sickness allowance • Clause 10 on rate of sickness allowance • Clause 12 on rate of holiday pay • Clause 14 on rate of annual leave pay 	<p><u>Comparable Person</u></p> <ul style="list-style-type: none"> • To specify in the relevant provisions that reference be made to the wages earned by a person who was employed at the same work by the same employer or if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district. • To delete the word “female” in the proposed sections 14(3B) and 15(2B) in respect of the comparable person for the calculation of the daily or monthly average wages where it is impracticable to calculate the amount earned by the concerned pregnant employee. 	<ul style="list-style-type: none"> • To improve the clarity and practicability of the provisions on calculating statutory entitlements by reference to a comparable person where it is impracticable to calculate the average wages earned by the employee concerned. • To give effect to gender neutrality.

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4.	<ul style="list-style-type: none"> ● New addition 	<p><u>Keeping of wage and employment records</u></p> <ul style="list-style-type: none"> ● To amend section 49A of the EO to extend the period for which wage and employment records are to be kept from 6 months to 12 months. 	<ul style="list-style-type: none"> ● To tie in with the proposal of calculating statutory entitlements on the basis of a 12-month moving average set out in the Bill.
5.	<ul style="list-style-type: none"> ● Clause 6 on payment for maternity leave ● Clause 10 on rate of sickness allowance ● Clause 12 on rate of holiday pay ● Clause 14 on rate of annual leave pay 	<p><u>Avoidance of double payment by employers</u></p> <p>To amend the relevant provisions to specify that where an employee is paid by the employer a sum of money in respect of a period of maternity leave, a sickness day, a holiday or a day of annual leave, the related maternity leave pay, sickness allowance, holiday pay or annual leave pay payable is to be reduced by that sum.</p>	<ul style="list-style-type: none"> ● To express more explicitly the intention of avoiding double payment by the employer.

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6.	<ul style="list-style-type: none"> • Clause 6 on payment for maternity leave • Clause 10 on rate of sickness allowance 	<p><u>Clarification of entitlement to maternity leave pay & sickness allowance</u></p> <ul style="list-style-type: none"> • To amend the relevant provisions to provide that no maternity leave pay or sickness allowance is payable in respect of a day on which the employee would not have worked had the employee not been on maternity leave or not been sick and for which no wages would normally be payable by the employer. 	<ul style="list-style-type: none"> • To express more explicitly the intention of entitling an employee to maternity leave pay or sickness allowance only in respect of a day for which wages would normally be payable.
7.	<ul style="list-style-type: none"> • Clause 8 on prohibition of assignment of heavy, hazardous or harmful work to a pregnant employee 	<p><u>Prohibition of assignment of heavy, hazardous or harmful work</u></p> <ul style="list-style-type: none"> • To add “or monthly average (as appropriate)” after “daily average” in the proposed section 15AA(8). 	<ul style="list-style-type: none"> • To cover the calculation of monthly average in respect of payment in lieu of notice where the notice period is expressed in months and the one month’s wages as penal damages for wrongful termination of the employee’s contract during her pregnancy under section 15(2)(a) and (b) of the EO.

Item No.	Existing Clauses in the Bill	Gist of the CSAs	Reasons for proposing the CSAs
8.	<ul style="list-style-type: none"> • Clause 16 on application of the EO as amended by the Employment (Amendment) Ordinance 2006 	<p style="text-align: center;"><u>Transitional arrangement</u></p> <ul style="list-style-type: none"> • To renumber the proposed section 75 as section 76. • To insert “or (4C)” after “section 33(4BA)” in the proposed section 76(2)(c). • To add “(ca) any sum payable to the employee under section 40A(2) ” to the proposed section 76(2). 	<ul style="list-style-type: none"> • To revise the section number under Clause 16. • To provide for the transitional arrangement regarding the sickness allowance payable notwithstanding the termination of an employee’s contract of employment on a sickness day taken by the employee under section 33(4C) of the EO after the commencement of the amending Ordinance. • To provide for the transitional arrangement regarding the holiday pay payable after the termination of an employee’s contract of employment under section 40A(2) of the EO after the commencement of the amending Ordinance.

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