

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

**Administration's Response to Issues Raised
at the Bills Committee Meeting Held on 27 March 2007**

Introduction

This paper sets out the Administration's response to issues raised by Members on the Committee Stage amendments (CSAs) to the Employment (Amendment) Bill 2006 (the Bill) proposed by the Administration at the Bills Committee meeting held on 27 March 2007.

Qualifying the period referred to in the proposed new section 7(1A)(b) and in other CSAs with similar construction

2. In response to Members' concerns, we will refine the proposed CSAs to clarify that the term "period" in the relevant sections refers to any period for which the employee was not paid his wages or full wages.

Providing examples illustrating the application of the proposed new section 7(1A)

3. As requested by Members, some general examples on the application of the principles proposed in the "disregarding" provisions of the Bill are given at Annex for reference.

Confirming whether, where an employee was paid wages in respect of any period described in the proposed new section 7(5) or in other CSAs with similar construction, if the amount of the wages was equal to or exceeded the amount earned by that employee on a normal working day, the wages and the period should not be disregarded

4. Section 7(1) of the Bill spells out a new mode of calculation with reference to the average of the wages earned by the employee in the past 12 months or such shorter period of employment and section 7(1A) provides that any of the specified periods for which an employee was not paid wages or full wages and any amount paid in respect thereof are to be disregarded. The proposed new section 7(5) [which is now re-numbered as section 7(1AA)] further provides that "wages" includes any sum paid by the employer in respect of the specified periods. In this context and in other CSAs with similar construction, where the amount of the wages paid to the employee for the specified period is equal to or exceeds the amount earned by the employee on a normal working day, the wages and the period need not be disregarded in line with the policy intention.

Ascertaining whether the meaning of “wages” mentioned in the proposed CSAs would create another statutory definition on “wages” already given in section 2(1) of the EO; and if so, to replace the term “wages” mentioned in the CSAs with a new one

5. Under section 2(1) of the EO, “wages” is defined to cover all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment, subject to a few exceptions including commission which is of a gratuitous nature or which is payable only at the discretion of the employer. Wages as defined in this section does not cover payments for any statutory/contractual leave or period of non-provision of work.

6. To facilitate the calculation of statutory entitlements under the proposed mode of 12-month moving average, we put up CSAs to provide that “wages” in the relevant provisions includes any sum paid by the employer in respect of any leave and normal working day on which the employee is not provided with work by his employer. With this extended meaning of “wages”, for the purpose of ‘disregarding’ in calculating the average wages, the employer needs only to ascertain the period(s) for which the employee was not paid wages or full wages and the amount paid in respect thereof. This will reduce the number of items to be disregarded and simplify the calculation.

7. As explained, the extended meaning of “wages” under the proposed CSAs does not seek to and would not vary in any way the existing definition of wages in section 2(1) of the EO. It is adopted only for the purposes of calculating the affected statutory entitlements under the proposed mode of 12-month moving average in the relevant sections of the Bill.

Deleting the word “female” from the proposed new sections 14(3B) and 15(2B) to avoid gender differentiation

8. Sections 14(3B) and 15(2B) provide for the reference to a comparable “female” 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. We note the concerns of some Members about gender neutrality. We will refine the two provisions to delete the word “female”.

**Examples on the Application of the “Disregarding” Provisions Proposed
under the Employment (Amendment) Bill 2006**

Example 1

Calculation of holiday pay for 1 January 2007 under the proposed section 41

- Post: Assembling Worker
- Remuneration: Daily- rated at \$300 with no-pay rest days
- Annual payroll in 2006: \$93,000 including wages of \$90,300 for working on 301 days (i.e. 365 days – 52 rest days – 12 statutory holidays) and payments of \$2,700 for 9 statutory holidays
- Leave taken in 2006: 52 rest days without pay, 3 statutory holidays (falling within the first 3 months of employment) without pay and 9 statutory holidays at full wages
- Disregarding period and sum: 55 days but “zero” amount in respect of the 52 no-pay rest days and the 3 no-pay statutory holidays
- Calculation of the daily average of the wages earned in 2006:
$$\frac{\$93,000}{365 - 52 - 3 \text{ (days)}} = \$300$$
- Holiday pay for 1 January 2007: \$300

Example 2

Calculation of sickness allowance for 4 sickness days under the proposed section 35

- Post: Clerk
- Remuneration: Monthly-rated at \$10,000 with paid rest days
- Annual payroll in the 12 months immediately before the first sickness day: \$120,000 including wages for services rendered and payments for leave
- Leave taken in the 12-month period: 71 days (comprising 52 rest days, 12 statutory holidays and 7 days of annual leave) all at full wages
- Disregarding period and sum: Nil
- Calculation of the daily average of the wages earned in the 12-month period:
$$\frac{\$120,000}{365 \text{ (days)}} = \$329$$
- 4-day sickness allowance: $\$329 \times 4/5 \times 4 = \$1,053$

Example 3

Calculation of 7-day annual leave pay under the proposed section 41C

- Post: Driver
- Remuneration: Basic pay at \$9,000/month + shift allowance at \$100/day on night shift + performance allowance at \$1,000/month on meeting the stipulated criteria
- Annual payroll in the 12 months immediately before the first day of annual leave: \$128,600 including basic pay for working days and leave taken (\$102,000 for 11 months and 10 days, i.e. excluding 20 sickness days), shift allowance (\$12,000 for 120 days on night shift, i.e. 10 days/month on average), performance allowance (\$9,000 for 9 months meeting the required criteria) and sickness allowance (\$5,600 for 20 sickness days)
- Leave taken with less than full wages in the 12-month period: 52 rest days at basic pay of \$15,600 and 20 sickness days at \$5,600 (as calculated at the rate of four-fifths of the average daily wages earned by the employee during the one month immediately before the first sickness day)
- Disregarding period and sum: 52 rest days and 20 sickness days at \$21,200 in total
- Calculation of the daily average of the wages earned in the 12-month period:
$$\frac{\$128,600 - \$15,600 - \$5,600}{365 - 52 - 20 \text{ (days)}} = \$367$$
- 7-day annual leave: $\$367 \times 7 = \$2,569$

Example 4

Calculation of 1-month payment in lieu of notice under the proposed section 7

- Post: Beauty Consultant
- Remuneration: Basic pay at \$6,000/month + contractual commission accrued and calculated on a monthly basis according to a sliding scale
- Annual payroll in the 12 months immediately before the date of notification of contract termination: \$600,000 including basic pay for working days and leave taken, and commission
- Leave taken with less than full wages in the 12-month period: 15 days of half-pay study leave
- Disregarding period and sum: 15-day study leave with pay at \$1,500
- Calculation of the monthly average of the wages earned in the 12-month period:
(a) No. of months included in the calculation -
$$\frac{365 - 15 \text{ days}}{365 \text{ days}} \times 12 = 11.5 \text{ months}$$

(b) Monthly average wages -
$$\frac{\$600,000 - \$1,500}{11.5 \text{ (months)}} = \$52,043$$
- 1-month payment in lieu of notice: \$52,043

(Note: The examples above are based on hypothetical data for the purpose of illustrating the application of the general principles in the “disregarding” provisions of the Bill only.)