

For information on
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Legislative Council Panel on Manpower

Preparatory Work for Introducing a Statutory Minimum Wage for Cleaning Workers and Security Guards if the Wage Protection Movement Fails to Yield Satisfactory Results

Definition of A Statutory Minimum Wage

PURPOSE

To follow up the discussion at the last meeting of the Manpower Panel on 24 April 2008, this paper briefs Members on the progress of the preparatory work in respect of the definition of a statutory minimum wage (SMW) should the Wage Protection Movement (WPM) eventually fail to yield satisfactory results and a SMW for cleaning workers and security guards be introduced. It is pertinent to note that the level of precision and, in particular, the interface with the Employment Ordinance (EO) (Cap. 57) would become all the more important in the case of a SMW due to the legal sanctions involved.

BACKGROUND

2. The definition of “wages” is not something new. Enacted in 1968, the EO sets out the wage components and permissible deductions from wages, in addition to provisions on statutory benefits such as statutory holidays, annual leave, sickness allowance, maternity protection, severance payment and long service payment, etc. Please see **Annexes 1 and 2** for details of wage components and permissible deductions. Under the current law, insofar as wages are concerned, the level is decided between the employers and employees on the open market, with the EO focusing on ensuring the timely and full payment of wages.

3. The mandatory wage requirement introduced in May 2004 for Government out-sourced contracts represented a major attempt to set a wage floor¹ for non-skilled workers engaged by government service contractors. The

¹ Under this mandatory wage requirement, Government service contractors must pay their employees carrying government service contracts a monthly wage rate not lower than the Quarterly monthly average of the relevant occupation as stipulated in the Census & Statistics Department (C&SD) at the time the tenders are invited.

Government is doing so in its capacity as a *consumer* of services, not as a formulator or regulator of public policies. The behavioural change induced, therefore, is confined to those who wish to bid for, and/or have secured, Government out-sourced contracts. Nevertheless, the positive response to the mandatory wage requirement paved the way for the introduction of the WPM. Similar to the mandatory wage requirement for Government out-sourced contracts, the WPM is voluntary and non-legislative, covers only the cleansing and guarding services sectors, and with reference wage levels set through a comparable mechanism. Of significance, however, is that the WPM has raised wage protection as an issue to a new platform. First, it becomes a community-wide endeavour to canvass support from all employers. Secondly, it is accompanied by a political commitment to legislate for a SMW, if the WPM proves ineffective.

SMW and “Wages” under the EO

4. An SMW is in essence a wage floor. The purpose of the SMW is to forestall the payment of excessively low wages, thereby protecting the vulnerable groups prone to exploitation. In other words, a SMW does not change the *nature* of wages, what it does is to set *the lowest level permissible* under the law. Insofar as the payment of wage is concerned, with a SMW, the law would need to be concerned about not only the timely and full payment of wages, but also the timely and full payment of wages at at least the SMW level. It therefore follows that, unless otherwise justified, there is no cogent reason not to follow the definition of wages in the EO which has been well tested through time. Ensuring as seamless an interface as possible between the definition of wages for the purpose of SMW and for the purpose of enforcing employees’ benefits and rights under the EO would ensure consistency and forestall confusion to employers, employees and the enforcement agencies alike.

5. Nevertheless, during the course of our detailed examination of the provisions of the EO, the Labour Department (LD) has identified two areas in respect of which specific annotations for the purpose of SMW may be needed. These are the time basis for defining SMW and the calculation of statutory benefits. Details are set out in the paragraphs to follow.

Time Basis for SMW

6. Since wage level is currently determined by the market, there is no need for the EO to specify the time basis on which to assess the adequacy of the wage level. Such a need would, however, arise should a SMW be introduced. Overseas experience suggests that the SMW can be set on an hourly, daily and monthly basis, with hourly basis being the most common practice. In fact, the

mandatory wage requirement for Government out-sourced contracts and the WPM have both adopted an hourly computation approach. Should the overall review this October indicate the ineffectiveness of the WPM and in the event of the introduction of a SMW, then we favour the adoption of an hourly rate approach to assessing the wage level too. This would help forestall exploitation of employees by ensuring that their pay would be commensurate with the duration of work, with wages no lower than the SMW level.

Calculation of Employees' Statutory Benefits

7. Under the EO, the holiday pay is a sum equivalent to the average daily wages earned by an employee in the 12-month² period preceding the statutory holiday or the first day of the statutory holiday if there is more than one consecutive day. Likewise, other statutory benefits under the EO are calculated in accordance with the relevant provisions. Using the example of holiday pay as an illustration, paragraphs 8 and 9 below set out elaboration that we consider necessary in calculating the statutory benefits for an employee who is eligible for the SMW. .

8. Consistent with the spirit of SMW, if an eligible employee is paid below the SMW in the relevant 12-month period due to an agreement made by the employee with his employer, this term of agreement should be considered as “contracting out” and thus be rendered void. The principle of “contracting out” is consistent with section 70³ of the EO. Since the employee concerned should be paid at at least the SMW level in the relevant period, his entitlements to statutory benefits such as holiday pay under the EO should not be lower than the level of the SMW in the said period.

9. There may, nevertheless, be situation where during the relevant 12-month period, the SMW level is adjusted, resulting in different daily wages in the period. Under such circumstance, to respect the balance of rights and obligations between the employers and employees as at the time the work eligible for SMW is performed, LD considers it only fair that the calculation of the daily rate of the holiday pay under the EO should refer to the average daily wages earned by an employee in the 12-month period preceding the statutory holiday.

² If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.

³ Under section 70 of the EO, any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by the Ordinance shall be void.

Views of the Labour Advisory Board

10. The Labour Advisory Board discussed the definitions of wages under the EO and the SMW on 19 May. Members noted the complexities of the interface between these two definitions and the importance of the definition of the SMW due to the legal sanctions involved. They agreed that –

- (a) As a matter of principle, we should align the definition of wages for the purpose of SMW as closely as possible with that under the EO;
- (b) The SMW should be assessed on an hourly basis; and
- (c) In calculating statutory benefits for minimum wage earners, we should follow the EO approach of using the average daily wages earned by an employee in the 12-month⁴ period as the basis, and adopt the no “contracting out” principle for such earners who agreed to be paid below the SMW rate prevailing during the 12-month period.

WAY FORWARD

11. We are working in earnest in respect of other aspects of the preparatory work for the possible introduction of a SMW for cleaning workers and security guards. These aspects include the mechanism for setting and adjusting the minimum wage level and enforcement and penalty in relation to the implementation of the SMW. Should the WPM eventually fail, the Administration will introduce a bill on a SMW for cleaning workers and security guards as early as possible in the 2008-09 legislative session.

12. Members are invited to note the content of this paper.

Labour and Welfare Bureau
Labour Department
May 2008

⁴ If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.

**Definition of wages under
section 2 of the Employment Ordinance (EO)**

Under section 2 of the EO, “wages” means “all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges¹, 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, but does not include -

- (a) the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;
- (b) any contribution paid by the employer on his own account to any retirement scheme;
- (c) any commission which is of a gratuitous nature or which is payable only at the discretion of the employer;
- (ca) any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer;
- (cb) any travelling allowance which is of a non-recurrent nature;
- (cc) any travelling allowance payable to the employee to defray actual expenses incurred by him by the nature of his employment;
- (cd) the value of any travelling concession;
- (d) any sum payable to the employee to defray special expenses incurred by him by the nature of his employment
- (da) any end of year payment, or any proportion thereof;
- (e) any gratuity payable on completion or termination of a contract of employment; or
- (f) any annual bonus, or any proportion thereof, which is of a gratuitous nature or which is payable only at the discretion of the employer.”

¹ "tips and service charges" in relation to wages, means sums of money received, directly or indirectly, by an employee in the course of and in connection with his employment which are-

- (a) paid or derived from payments made by persons other than the employer; and
- (b) recognized by the employer as part of the employee's wages.

**Deductions from wages under
section 32 of the Employment Ordinance (EO)**

Under section 32 of the EO, an employer may make the following deductions¹ from the wages of his employee –

“(a) deductions for absence from work:

Provided that-

- (i) in the case of a contract of employment under which wages are calculated on a basis of time, no such deduction shall exceed a sum proportionate to the period of time during which the employee was absent from work;
- (ii) no such deduction shall be made for the purpose of defraying or partly defraying the cost of holiday pay or sickness allowance which the employer has paid or may be or may become liable to pay to the employee;

(b) deductions for damage to or loss of goods, equipment or property belonging to or in the possession or control of the employer or expressly entrusted to an employee for custody, or for loss of money for which an employee is required to account, where such damage or loss is directly attributable to his neglect or default:

Provided that-

- (i) the total amount recoverable by deduction in any one case shall not exceed the equivalent in value of the damage or loss suffered by the employer or \$300, whichever is the less; and
- (ii) the total of such deductions in any one wage period shall not exceed one quarter of the wages payable to the employee in respect of that wage period;

¹ Except with the approval in writing of the Commissioner, the total of all deductions, excluding deductions in respect of absence from work or any deduction pursuant to an attachment order made under section 20(1) of the Guardianship of Minors Ordinance (Cap 13), section 9A(1) of the Separation and Maintenance Orders Ordinance (Cap 16) or section 28(1) of the Matrimonial Proceedings and Property Ordinance (Cap 192), made under this section from the wages of an employee in any one wage period shall not exceed one half of the wages payable to the employee in respect of the wage period.

- (c) deductions in respect of meals supplied by the employer at the request of the employee not exceeding the cost to the employer of such meals including expenses of production and service;
- (d) deduction for accommodation provided by the employer for the employee or his family made in respect of the period such accommodation has been in the occupation of the employee or his family;
- (e) deductions for the recovery of any advance or over-payment of wages made by the employer to the employee:

Provided that-

- (i) except with the approval in writing of the Commissioner, no such deductions shall be made by way of discount, interest or any similar charge in consideration of such advance or over-payment; and
- (ii) the total of such deductions in any one wage period shall not exceed one quarter of the wages payable to the employee in respect of that wage period;
- (f) deductions, with the written consent of an employee, for the recovery of any loan made by the employer to the employee;
- (g) deductions made at the request in writing of the employee in respect of contributions to be paid by him through the employer for the purpose of any medical benefit scheme, superannuation scheme, retirement scheme or thrift scheme lawfully established for the benefit of the employee or his dependants;
- (h) deductions which are required or authorized under any enactment to be made from the wages of an employee;
- (i) other deductions made at the request in writing of the employee and with the approval of the Commissioner, which may be signified in respect of any particular case in writing or in general by notice in the Gazette.”