

For information on
19 June 2008

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

Enforcement and penalty in relation to the implementation of a statutory minimum wage

Purpose

To follow up discussion at the previous LegCo Manpower Panel meetings, this paper briefs Members on the progress of the preparatory work in respect of the enforcement and penalty aspects of a statutory minimum wage (SMW) for cleaning workers and security guards should the overall review scheduled for this October indicate that the Wage Protection Movement (WPM) fails to yield satisfactory results.

Background

2. The WPM was launched in October 2006. The Chief Executive made it clear that an overall review would be conducted in October 2008 and that if the WPM failed to yield satisfactory results, the Administration would introduce a bill on SMW for cleaning workers and security guards as early as possible in the 2008-09 legislative session.

3. Should SMW legislation be in place, breaches would be no different from breaches of the provisions on wage payments under the Employment Ordinance (EO)(Cap. 57). In other words, criminal liability involving fines and imprisonment is possible. Therefore, clarity and certainty of the legal sanctions are of paramount importance to facilitate compliance by employers and employees as well as investigation and prosecution by law enforcement agencies.

SMW and employees' benefits under SMW

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. At the Labour Advisory Board (LAB) meeting held on 19 May 2008 to discuss the definitions of wages under the EO and the SMW, members noted the importance of the definitions due to the legal sanctions involved and the practical reality that, should an SMW be in place, monitoring and enforcement of the wage floor would have to be integrated with those conducted pursuant to the EO. They therefore unanimously 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 average daily wages earned by an employee in the 12-month¹ 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.

5. The outcome of their discussion on the definition of wages was reported to Members in the last Manpower Panel meeting held on 27 May 2008. Building on LAB's initial views, we consider that breaches of SMW should be treated in the same way as similar wage offences under the EO. There are therefore few, if any, reasons for not extending the prevailing enforcement mechanism and legal sanctions of the EO to SMW.

Penalty under the SMW legislation

6. The more pertinent considerations for extending the legal sanctions of the EO to the SMW legislation are discussed in the following paragraphs.

¹ If an employee is employed for less than 12 months, the calculation shall be based on a shorter period.

Minimum wage offences

7. Currently, under the EO, employers would be required to make timely and full payment of wages to employees as soon as practicable but in any case not later than seven days after the expiry of the wage period or the day of termination. For the SMW legislation, we propose stipulating that employers are obliged to pay their employees *at least the SMW* as soon as practicable but in any case not later than seven days after the expiry of the wage period or the day of termination. We are further of the view that, under the proposed SMW legislation, an employer's failure to do so should incur criminal liability as is the case under the EO.

8. The EO provides that offences under the EO (including under-payment, non-payment and delayed payment of wages as well as illegal deductions from wages) are criminal in nature. Since breaches such as under-payment, non-payment and delayed payment of wages as well as illegal deductions from wages would also occur to SMW, we see no reason why similar offences should not apply to SMW. This is also consistent with the approach of aligning the definition of wages for the purpose of SMW as closely as possible with that under the EO. As a corollary, the existing penalty clauses for wage offences under the EO² would also apply.

9. Where a wage offence is committed by a body corporate and it had been proven to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director and responsible person such as manager, the director or manager shall be guilty of the like offence as specified in section 64(B) of the EO. By the same consideration as outlined in the foregoing paragraphs, when the SMW is in place, personal liability of directors and responsible persons along the lines of section 64(B) of the EO should also be extended to the SMW legislation.

Statutory benefit offences

10. Employees are entitled to statutory benefits such as statutory holidays, annual leave, sickness allowance, maternity protection in accordance with the EO and the calculation of these benefits is specified in the EO. The existence of a SMW legislation would not change this, though for some employees, the rate of the benefits may be affected by the existence of a SMW. Our initial view is that confirmed breaches of statutory benefits, regardless of whether they are within the ambit of the EO or the SMW legislation, should also be handled in a like manner.

² Under section 63C of the EO, an employer who wilfully and without reasonable excuse fails to pay wages to an employee when it becomes due is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for three years. Under section 63B of the EO, an employer who makes illegal deduction from the wages of an employee is also liable to prosecution and upon conviction to a fine of \$100,000 and to imprisonment for one year.

Offences of record keeping

11. Under the EO, every employer must at all times keep a record setting out the wages and employment history of each employee covering the period of his employment during the preceding 12 months to facilitate the calculation of employees' statutory benefits. An employer who fails to keep such records is liable to prosecution³. Furthermore, an employer who wilfully or recklessly gives false information or withholds information upon public officers' demand for production of such records would also result in criminal prosecution⁴.

12. To ensure effective enforcement of the SMW legislation, we consider that employers should likewise be required to keep records sufficient to prove that they are paying the minimum wage or above to their employees. As the SMW would be assessed on an hourly basis, the records should show a worker's attendance and the number of hours worked for verification by employees and for inspection by enforcement officers⁵.

13. To facilitate an employee to verify whether he has been paid at least the SMW, he should be conferred a right to access the wage records relating to him under the SMW legislation. Upon request by an employee, the employer would be required to show the wage record to the employee within a specified period of time. Failure to do so without any valid ground may constitute an offence.

14. In future, employers' liability to keep the minimum wage records including the number of hours worked and employees' rights to access to the minimum wage records would be stipulated in the SMW legislation. The information to be kept in the records would also be specified in the legislation to facilitate employers' compliance.

Enforcement of SMW legislation

15. Should the SMW be in place, Labour Department (LD) would take up the enforcement work and have such incorporated as an integral part of LD's day-to-day duties. Adopting the present mode of enforcement, labour inspectors of the LD will conduct surprise workplace inspections to ensure that

³ As stipulated under section 63D(1) of the EO, the relevant penalty is a fine of \$10,000.

⁴ As stipulated under section 63B(2) of the EO, the relevant penalty is a fine of \$100,000 and imprisonment for 1 year.

⁵ Under section 49(1) of the EO, the Commissioner for Labour may specify the form of any consent, request, notice in writing, certificate, application, record or return required for the purposes of the EO and under section 49(2), the Commissioner may publish in the Gazette any forms specified by him under section 49(1).

employers have paid at least the minimum wage to their employees in a timely manner. LD would also extend its vigorous enforcement against minimum wage offences; and such include, for example, speedy investigation of reported offences, conducting trade-targeted campaigns to detect offences, and taking out prompt prosecution against offenders to safeguard the statutory rights and benefits of the minimum wage earners. Under an SMW regime, there would be additional resource implications since enforcement officers would need to cover more aspects relating to the due payment of SMW when they inspect the wage records, and interview employers and employees.

16. One of the key enforcement targets would be residential buildings. For those buildings managed by management companies or owners' corporations (OCs), prosecution would be taken out against the companies or the OCs if sufficient evidence in respect of wage and benefit offences involving their employees is detected. But the following issues need to be carefully studied further:

- application of section 64(B) of the EO (re. paragraph 9 above) – while exemption may be subject to abuse, its application may arouse unease and concern among OC committee members who are mostly serving in a voluntary capacity; and
- enforcement in respect of buildings without management companies and OCs, some of which may accommodate the poor and the elderly.

Possible behavioural change in engaging cleaning/security service

17. Unlike other occupations/sectors, cleaning workers and security guards would be more domestically-oriented. Jobs, therefore, are less likely to shift abroad, despite the large pool of cheap labour available in the neighbouring economies. But in reality, an SMW may affect employers' hiring decisions, such as the number of employees hired.

18. There may be situations where all owners of the buildings would be liable for the offences as employers. To avoid being liable, the owners may resort to sub-contracting the cleaning and/or security services to workers as independent contractors. Alternatively, they may employ fewer security guards or even replace them by security equipment such as intercom and/or closed-circuit television to avoid possible legal sanctions.

19. As a result, these low-skilled jobs taken up by workers with little occupational mobility could diminish and those workers that the SMW originally meant to protect may not benefit from the SMW eventually.

Way Forward

20. Members of LAB have noted in general term the issues raised in this paper. They share the view that the SMW enforcement and penalty provisions should be aligned as closely as possible with those of the EO. They also note the problems relating to residential buildings without OCs and without contracting out their cleansing and security services to management companies. LAB will continue to discuss these issues in depth.

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

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