

立法會
Legislative Council

LC Paper No. CB(2)954/09-10

(These minutes have been seen
by the Administration)

Ref : CB2/BC/11/08

Bills Committee on Minimum Wage Bill

Minutes of meeting
held on Thursday, 17 December 2009, at 4:30 pm
in the Chamber of the Legislative Council Building

Members present : Hon TAM Yiu-chung, GBS, JP (Chairman)
Hon Paul CHAN Mo-po, MH, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon Emily LAU Wai-hing, JP
Hon LI Fung-ying, BBS, JP
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Frederick FUNG Kin-kee, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun
Dr Hon LEUNG Ka-lau
Hon WONG Kwok-kin, BBS
Hon WONG Yuk-man
Hon IP Wai-ming, MH
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Dr Hon PAN Pey-chyou
Hon Paul TSE Wai-chun

Members absent : Hon LEUNG Yiu-chung
Hon Miriam LAU Kin-ye, GBS, JP

Hon Abraham SHEK Lai-him, SBS, JP
Hon CHIM Pui-chung
Hon Tanya CHAN
Hon CHEUNG Kwok-che
Hon WONG Sing-chi
Dr Hon Samson TAM Wai-ho, JP

Public Officers attending : Mr Alan WONG Kwok-lun, JP
Deputy Commissioner for Labour (Labour Administration)

Mr FONG Ngai
Assistant Commissioner for Labour (Policy Support and
Strategic Planning)

Miss Bertha CHENG Wai-yue
Chief Labour Officer (Statutory Minimum Wage)
Labour Department

Miss Mabel LI Po-yi
Senior Labour Officer (Statutory Minimum Wage)
Labour Department

Ms Queenie TANG Yuen-shan
Labour Officer (Statutory Minimum Wage)
Labour Department

Mr Eamonn MORAN, JP
Law Draftsman
Department of Justice

Ms Roxana CHENG Pui-lan
Senior Assistant Solicitor General
Department of Justice

Ms Amy CHAN Wing-yan
Senior Government Counsel
Department of Justice

Clerk in attendance : Mr Raymond LAM
Chief Council Secretary (2) 1

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Miss Florence WONG
Senior Council Secretary (2) 5

Ms Kiwi NG
Legislative Assistant (2) 1

I. Meeting with the Administration

The Bills Committee deliberated (index of proceedings attached at **Annex**).

2. The Administration was requested to -
 - (a) provide information on the definition of employees and legislative measures, if any, in tackling false self-employment under the statutory minimum wage legislation in other jurisdictions;
 - (b) consider exempting from the Bill local students pursuing studies in overseas universities and undertaking internships in Hong Kong;
 - (c) explain whether the exemption under clause 6(3) of the Bill for live-in domestic workers was consistent with the constitutional protection of human rights in the HKSAR;
 - (d) provide further information on the economic indicators considered when reviewing the Minimum Allowable Wage for foreign domestic helpers; and
 - (e) explain whether "standby hours" would be regarded as "hours worked" under the Bill.

II. Schedule of future meetings

3. The Bills Committee agreed that the meetings between February and mid-June 2010 would be scheduled as follows to continue discussion with the Administration -

<u>Date</u>	<u>Time</u>
10 February 2010 or 11 February 2010	10:45 am - 12:45 pm
25 February 2010	8:30 am - 10:30 am
18 March 2010	10:45 am - 12:45 pm

31 March 2010	10:45 am - 12:45 pm
22 April 2010	10:45 am - 12:45 pm
4 May 2010	4:30 pm - 6:30 pm
18 May 2010	4:30 pm - 6:30 pm
3 June 2010	8:30 am - 10:30 am
15 June 2010	4:30 pm - 6:30 pm

4. Regarding the meeting in early February 2010, the Bills Committee agreed that the Clerk would ascertain the availability of members and schedule the meeting in consultation with the Chairman.
5. The meeting ended at 6:45 pm.

Council Business Division 2
Legislative Council Secretariat
11 February 2010

**Proceedings of meeting of the
Bills Committee on Minimum Wage Bill
on Thursday, 17 December 2009, at 4:30 pm
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000629 - 000644	Chairman	Opening remarks	
000645 - 000832	Chairman Hon Tommy CHEUNG Hon WONG Kwok-hing	Dates of forthcoming meetings	
000833 - 001427	Chairman Admin	Administration's response to issues raised at the Bills Committee meeting held on 4 December 2009 [LC Paper No. CB(2)544/09-10(01)]	
001428 - 002115	Chairman Hon WONG Kwok-hing Admin	Concerns about the effectiveness of the three-pronged approach adopted by the Labour Department (LD) in tackling false self-employment, and whether the Administration would introduce legislative amendments to tackle the problem of false self-employment; Response of the Administration that LD would keep relevant statistics on cases related to claims of false self-employment to facilitate better understanding of the problem and would report back to the Panel on Manpower	The Administration to provide information on the legislative measures, if any, in tackling false self-employment under the statutory minimum wage (SMW) legislation in other jurisdictions
002116 - 002624	Chairman Hon LI Fung-ying Admin	Whether the Administration would consider implementing written contracts as one of the measures to prevent false self-employment Expression of view that local students, regardless of whether they were pursuing their studies in Hong Kong or abroad, undertaking internships in Hong Kong should be exempted from the Minimum Wage Bill (the Bill) if the internships were related to their full-time accredited programmes Response of the Administration that extending the exemption to overseas	

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		<p>university students undertaking internships in Hong Kong, without a workable law enforcement system, would give rise to abuse. Nevertheless, the Administration would continue to listen to and consider views received</p>	
002625 – 003654	<p>Chairman Hon Tommy CHEUNG Admin</p>	<p>Whether entering a contract of internship could make it clear that no employer-employee relationship was involved</p> <p>Response of the Administration that in determining whether there was an employer-employee relationship, the court would take into account all factors pertaining to the relationship between the relevant parties regardless of how their status was labeled</p>	<p>The Administration to consider exempting from the Bill local students pursuing studies in overseas universities and undertaking internships in Hong Kong</p>
003655 - 005500	<p>Chairman Hon LEUNG Kwok-hung Admin Hon LEE Cheuk-yan Hon IP Wai-ming</p>	<p>Taking into account that employers might seek to change the status of their employees to self-employed persons upon the implementation of the Bill, the Administration should review the definition of "employee" and amend the Employment Ordinance (Cap. 57) (EO) to clearly distinguish an employee from those self-employed, and put in force legislative measures to tackle the problem of false self-employment</p> <p>Response of the Administration that -</p> <p>(a) the definition of "employee" in the Bill was modeled on that of EO which had been well established and was considered appropriate;</p> <p>(b) it had undertaken to revert to the Panel on Manpower on the measures tackling false self-employment in due course; and</p>	<p>The Administration to provide information on the definition of employees under the SMW legislation in other jurisdictions</p>

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		<p>(c) if the court ruled that it was a false self-employment, the employer concerned would have to pay back statutory benefits retroactively to the employees who were falsely labelled as "self-employed". A failure to pay SMW was no different in nature from under-payment of wages, currently a criminal offence under EO. Breaches of SMW should also constitute a wage offence which was subject, on conviction, to a maximum fine of \$350,000 and imprisonment of three years</p>	
<p>005501 – 010727</p>	<p>Chairman Hon Mrs Regina IP Admin Hon IP Kwok-him</p>	<p>Details on the number of student interns involving employment relationship</p> <p>The Administration advised that according to the information provided by local post-secondary institutions, there were some 128 000 students studying in full-time accredited programmes and around 15 000 of whom were required to undergo internships for the award of academic qualifications in the accredited programmes. However, it did not have information on the number of local students who studied in universities abroad and undertook internships in Hong Kong</p> <p>Whether a letter initiated by a student claiming to undertake an internship rather than taking up employment could serve as a proof that it was not an employment relationship; the Administration explained that the existence of an internship or employment relationship hinged on facts rather than label; and in ascertaining the nature of the relationship, all relevant facts of the case should be taken into account</p>	

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010728 - 011044	Chairman Hon LEUNG Kwok-hung	View of Hon LEUNG Kwok-hung that the Administration should attach importance to tackling the problem of false self-employment	
011045 - 011533	Chairman Admin	Administration's response to members' concern on indirect discrimination under Sex Discrimination Ordinance and Race Discrimination Ordinance [LC Paper No. CB(2)558/09-10(01)]	
011534 - 012747	Chairman Hon LEE Cheuk-yan Admin Hon LEUNG Kwok-hung	<p>Whether the exemption under clause 6(3) of the Bill for live-in domestic workers would violate Article 39 of the Basic Law which stated that provisions of various international conventions as applied to Hong Kong should remain in force and should be implemented through the laws of HKSAR</p> <p>The Administration advised that as mentioned in paragraph 36 of the Legislative Council Brief, the Bill was in conformity with the Basic Law, including the provisions concerning human rights</p> <p>View of Hon LEE Cheuk-yan and Hon LEUNG Kwok-hung that live-in domestic workers should not be excluded from the Bill</p>	The Administration to explain whether the exemption under clause 6(3) of the Bill for live-in domestic workers was consistent with the constitutional protection of human rights in HKSAR, and provide further information on the economic indicators considered when reviewing the Minimum Allowable Wage for foreign domestic helpers
012748 - 013654	Chairman Hon LEE Cheuk-yan Admin	<p>Discussion on the prescribed minimum hourly wage rate</p> <p>Rationales for stipulating in clause 3(2) of the Bill that the hours worked by an employee in a wage period did not include, for SMW computation, the period allowed by the employer for a meal, and the counting of overtime pay in calculating the minimum wage</p> <p>The Administration's response that -</p> <p>(a) there was a need to expressly state how the hours worked were</p>	

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		<p>counted for the purpose of SMW computation in order to avoid disputes and minimize ambiguity given that breaches of SMW would result in criminal sanction. Clause 3(2)(a) provided that the hours worked by the employee for the computation of SMW did not include any period allowed by the employer for a meal, except to the extent (if any) during that period the employee was doing work in accordance with the contract of employment or with the agreement or at the direction of the employer. In determining the employee's entitlement to be paid wages not less than the SMW, payment for meal break not worked by the employee was not counted as part of the wages payable and thus the hourly wage rate so derived would not be distorted;</p> <p>(b) Notwithstanding this, save for introducing statutory minimum wage and proposing necessary consequential amendments, the Bill would not seek to change the existing arrangements under EO whereby employers and employees were free to agree between themselves the employment terms on meal break; and</p> <p>(c) the definition of wages under the Bill was aligned to that in EO, under which overtime pay was wages</p>	
013655 - 014312	Chairman Hon LEUNG Kwok-hung Admin	Whether the period that an employee, at the direction of an employer, attending at a workplace during a meal should be included as hours worked in the calculation of minimum wage	

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		<p>The Administration advised that for SMW computation clause 3(2)(a) of the Bill clearly stated that the hours worked by an employee in a wage period did not include any period allowed by the employer for a meal except to the extent during that period that the employee was doing work in accordance with the contract of employment or with the agreement or at the direction of the employer</p>	
014313 - 014528	Chairman Dr Hon LEUNG Ka-lau Admin	<p>Illustration of calculation of the average hourly wage rate in a wage period for SMW computation under the Bill by the following example -</p> <p>Given an employee was paid at \$25 per hour for eight hours a day, including an hour for meal, i.e. total number of hours worked by the employee in the wage period was seven, the average hourly wage rate for SMW computation under the Bill was calculated as -</p> $(\$25 \times (8-1)) / (8-1)$ $= \$175 / 7$ $= \$25$	
014529 - 015055	Chairman Hon LI Fung-ying Admin	<p>View of Hon LI Fung-ying that clause 3(2)(a) was redundant and might affect the existing contract of employment given that working hours for a wage period should have been laid down in the contract of employment</p> <p>The Administration responded that in the light of the criminal implication of breaches of SMW, there was a need to expressly state whether the period for a meal was included in the hours worked in a wage period for the purpose of calculating the minimum wage under the Bill. To facilitate the understanding of the employers and employees on the Bill, the Administration would</p>	

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		<p>launch publicity prior to the implementation of the SMW system</p>	
<p>015056 - 015930</p>	<p>Chairman Admin Hon Andrew LEUNG Dr Hon LEUNG Ka-lau Hon LEE Cheuk-yan</p>	<p>Whether there was a need to keep records on the number of hours worked by employees, especially those senior staff who were remunerated above the SMW rate</p> <p>The Administration explained that without knowing the hours worked, there would be considerable difficulty in ascertaining if the per hour rate of monthly, weekly and daily remunerated work reached at least the SMW rate. Under section 49A of EO, employers were legally obliged to keep wage and employment records of their employees. For the purpose of enforcing SMW, in order to determine whether employers had remunerated their employees not below the SMW rate, the additional requirement of keeping the total number of hours worked in a wage period would be included through consequential amendments to EO. There was a need to strike a balance between administrative consideration and effective law enforcement</p>	
<p>015931 - 021440</p>	<p>Hon LEE Cheuk-yan Chairman Dr Hon LEUNG Ka-lau Admin SALA2</p>	<p>Clarification about the meaning of "place of employment" under clause 3(1)(a) of the Bill</p> <p>On whether a place at which an employee, at the direction of the employer, was in attendance for the purpose of "standby" qualified the place of employment under the Bill, the Administration advised that for SMW computation the "place of employment" was defined under clause 2 of the Bill as any place at which the employee was, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training</p>	<p>The Administration to explain whether "standby hours" would be regarded as "hours worked" under the Bill</p>

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