

Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 17 December 2009

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 17 December 2009 to examine the Minimum Wage Bill (the Bill).

Constitutional protection of human rights in the HKSAR

2. A Member enquired whether the exemption for live-in domestic workers (the exemption) contained in clause 6(3) of the Bill is consistent with the constitutional protection of human rights in the HKSAR.

Relevant provisions

3. Article 25 of the Basic Law (BL 25) provides that:

All Hong Kong residents shall be equal before the law.

4. Article 22 of the Hong Kong Bill of Rights (HKBOR), which incorporates Article 26 of the International Covenant on Civil and Political Rights into Hong Kong's domestic law, provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Justifiable difference

5. It is considered that the exemption is legally tenable as situations that are not comparable are involved and there is a justifiable difference in treatment between live-in domestic workers and other workers.

6. The exemption reflects the differences in the nature of work and employment/remuneration package between live-in domestic workers and workers who are not employed to work and live in their employer's household free of charge.

7. The difference in treatment takes into account the fact that "live-in" is an essential element defining a live-in domestic worker's job. A live-in domestic worker is employed to work and live in his or her employer's household because he or she is expected to be present continuously to provide service on demand, if required, e.g. taking care of the elderly or new-born baby. It is also common knowledge that domestic duties are multifarious and can vary day in day out. In the circumstances, it would be extremely difficult, if at all possible, to ascertain the actual hours worked so as to calculate live-in domestic workers' wage on an hourly basis.

8. More importantly, "wage" is only one element of the employment/remuneration package of live-in domestic workers. Apart from wage, such workers are also remunerated in kind, through being provided with free accommodation and usually free food, and through savings on travelling expenses and time between home and work. In the case of foreign domestic helpers (FDHs), the protection of the mandatory Standard Employment Contract guarantees them not only Minimum Allowable Wage (MAW) and free accommodation and food (or food allowance), but also free passage and free medical treatment, etc.

9. For the reasons set out above, it is considered that the exemption is compatible with BL25 and Article 22 of the HKBOR.

Information on statutory minimum wage systems in other jurisdictions

10. The Administration was asked to provide information on the definition of employees under the statutory minimum wage (SMW) legislation in other jurisdictions.

11. We have studied the SMW systems in a number of jurisdictions through information trawled from the research report on the minimum wage system in selected places prepared by the Research and Library Services Division of the Legislative Council Secretariat, desktop research on the Internet as well as study visits to some jurisdictions. It is noted that different definitions of employees are adopted for entitlement to SMW in the statutes of these jurisdictions. For instance, the definitions used in the SMW legislation in the United States¹ and Australia² are similar to the provisions in the Bill, while a broader meaning is adopted in the United Kingdom³.

MAW for FDHs

12. The MAW for FDHs has been in place since 1973, and is subject to regular reviews by the Government in accordance with a long-established mechanism. In conducting the reviews, the Government takes account of Hong Kong's general economic and employment situations and their overall trends, as reflected through a basket of economic indicators comprising the economic growth rate, wage trends of elementary workers, household incomes of FDH employers, consumer price change and employment situation.

13. In the past 36 years, there were 24 revisions to the MAW. All but two were upward adjustments. Five revisions were for increases of 20% or more. Owing to economic downturn, there were two downward revisions, viz. by 5% in 1999, and by about 11% in 2003. Details of the revisions in the last ten years have been provided to the Bills Committee vide LC Paper No. CB(2)288/09-10(02).

Labour and Welfare Bureau/
Department of Justice
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¹ In the United States, "employee" means any individual employed by an employer.

² In Australia, "employee" means a national system employee (i.e. an individual so far as he or she is employed or usually employed by a national system employer, except on a vocational placement).

³ In the United Kingdom, "worker" shall mean an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment, or any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.