Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 11 February 2010

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 11 February 2010 in examining the Minimum Wage Bill (the Bill).

Application of the provisions on hours worked and place of employment in the Bill

2. As explained in our paper on the Administration's Response to Issues Raised at the Bills Committee Meeting Held on 28 January 2010 (LC Paper No. CB(2)922/09-10(01)), statutory minimum wage (SMW) is expressed at an hourly rate in the Bill and entitlement to minimum wage is derived by multiplying the total number of hours worked by an employee in the wage period by the SMW rate. Clause 3 of the Bill stipulates the hours that must be taken to be included and the hours that must be taken to be excluded in computing minimum wage, while clause 2 specifies the definition for "place of employment" to which clause 3 refers. Given the multifarious work patterns of employees, clause 3 does not seek to give an exhaustive list of hours worked for the purpose of computing minimum wage. Apart from clause 3, the question as to whether any time or period is hours worked by an employee for the computation of SMW has to be decided by reference to any agreement or contract between the employer and the employee and to all other relevant circumstances of the case.

3. Further examples as raised by Members at the meeting held on 11 February 2010 are set out below to illustrate the application of the provisions.

Example (1):

When a real estate agent is, in accordance with the contract of employment, or with the agreement or at the direction of the employer, in attendance at a property sales office or another place for the purpose of doing work such as awaiting customers, according to clause 3(1)(a) of the Bill such time is hours worked for the purpose of computing his minimum wage.

The working hours of this real estate agent finish at 6:00 p.m. according to the contract of employment. However, if, with the agreement or at the direction of the employer, he is in attendance at a place of employment say in the office from 6:00 p.m. to 11:00 p.m. for the purpose of doing work such as waiting for the return calls from the clients, or arranging the signing of a sale and purchase agreement with the customers, such time from 6:00 p.m. to 11:00 p.m. is hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Example (2):

An operative works in a factory in Hong Kong, with working hours ending at 6:00 p.m. according to the contract of employment. On a day, the operative is assigned by the employer to deliver some moulds to a client's office in Dongguan. He travels, in accordance with the contract of employment, or with the agreement or at the direction of the employer, from the factory at 6:00 p.m. to the cross-border coach terminal. He reaches the terminal at 6:45 p.m.. He waits there and takes the coach departing at 7:00 p.m. to travel to the client's office in Dongguan. For the travelling time between his factory in Hong Kong and the client's office in Dongguan (which also includes the period from 6:00 p.m. to 7:00 p.m. mentioned above) during which he is, in accordance with the contract of employment, or with the agreement or at the direction of the employer, travelling in connection with his employment, the time is hours worked under clause 3(1)(b) for the purpose of computing his minimum wage.

In the same scenario, the operative stays overnight in Dongguan as return transport is not available until the next morning. The employer may also provide free accommodation and/or meals for the operative in Dongguan. When the operative in his personal time (such as sleeping time) in Dongguan is not in attendance at a place of employment for the purpose of doing work or receiving training in

accordance with the contract of employment, or with the agreement or at the direction of the employer, such time is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Example (3):

In the tourism industry, when an escort guide accompanying a tour group outside Hong Kong is in his personal time (such as sleeping time) and is not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the contract of employment, or with the agreement or at the direction of the employer, such time is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage. However, when the escort guide works because, for instance, a client in the tour group falls sick at midnight and seeks his assistance, the time spent in attending to and assisting the client is hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

It is a common practice in the tourism industry for the employer to provide accommodation to an escort guide in the same hotel as the tour group. An escort guide may also have to be on call or standby during the night so that the tour group can seek his assistance as and when necessary. Nevertheless, there is a wide range of on-call or standby arrangements, depending on the terms in the contract of employment or the agreement between the employer and the employee. Whether the on-call or standby time is hours worked under clause 3(1)(a) depends on whether the escort guide is in attendance at a place of employment which is defined in clause 2 as any place at which the employee is, 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, and this includes the place as designated by the employer (such as the hotel, if so designated).

It should be noted that although the escort guide in this example sleeps in the hotel where the employer provides him the accommodation and he is on call or standby during the night, it is not necessarily the case that the hotel is his place of employment during the on-call or standby time. If he is not in attendance at a place of employment, then the on-call or standby time is not hours worked under clause 3(1)(a). The question as to whether he, while on call or standby, is in attendance at the hotel for the purpose of doing work

or receiving training is to be determined by the contract of employment or the agreement or the direction of the employer. It is pertinent to note that this is the situation for the purpose of computing SMW under the Bill; whether contractually this escort guide is entitled to any payment for being on call or standby is a different issue.

4. A Member asked the Administration to provide information as to whether there are any court judgments on the meaning of "in attendance" and "當值" when the employee is permitted to sleep when being in attendance and in the case of escort guides in the tourism industry. We have consulted the Department of Justice and are not aware of any relevant court judgments in these situations.

Clause 5(5) of the Bill

5. A Member asked the Administration to provide examples on the application of clause 5(5) of the Bill.

6. Under the Bill, the definition of "wages" is aligned as closely as possible with that under the Employment Ordinance (EO). In accordance with section 2 of the EO, "wages" means all remuneration, earnings, allowances, 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. Allowances including, among others, commission are within the definition of wages. However, wages do not include any commission which is of a gratuitous nature or which is payable only at the discretion of the employer.

7. For counting the payment of commission to determine whether an employee has been remunerated wages at a rate not less than the SMW, clause 5(5) of the Bill provides that:

> "Despite subsections (3) and (4), for the purposes of this Ordinance, any commission paid in a wage period after the first 7 days of that period, or within 7 days after the end of a wage period, must be counted as part of the wages payable in respect of that period irrespective of when the work is done or the commission is otherwise payable."

Therefore, for the purposes of the Bill, commission is counted as part of the wages payable in respect of a wage period according to the timing when the commission is paid.[1] In view of the great diversity of commission systems among various trades and different establishments, this provision ensures certainty and clarity to employers and employees in determining whether employers have remunerated their employees not below the SMW level, and facilitates enforcement of the SMW legislation. It also provides flexibility to cushion fluctuations in the commission income of some employees during different wage periods.

8. Examples for the application of clause 5(5) are set out below for illustration.

Example (4):

> In accordance with the contract of employment, an employer pays commissions to a retail shop sales staff on 31 July and 5 August. The wage period of this sales staff is each calendar month. According to clause 5(5), for the purposes of the computation of SMW, the commissions should be counted as part of the wages payable in respect of the wage period of July. On the other hand, if the employer pays the commission on 10 August according to the contract of employment, it should be counted as part of the wages payable in respect of the wage period of August under clause 5(5).

Example (5):

> A real estate agent Mr A is entitled to a monthly basic salary of $3,000 plus commission according to the contract of employment. His wage period is each calendar month. In respect of January and February, he is remunerated his monthly basic salary of $3,000 without any commission. On 31 March, he is paid commission of $20,000 as well as his monthly basic salary of $3,000 in respect of March. According to clause 5(5), the commission of $20,000 should be counted as part of the wages payable in respect of the wage

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1 The EO provides that wages shall become due on the expiry of the last day of the wage period and shall be paid as soon as is practicable but in any case not later than 7 days thereafter. To be in line with this 7-day provision of the EO, when clause 5(5) counts commission as part of the wages payable in respect of the wage period in which the commission is paid, this has to include as well the 7-day period after the end of the wage period. To avoid uncertainty, commission paid in the first 7 days of a wage period is counted as wages of the previous wage period for the purposes of the computation of SMW in the Bill.

period of March. Therefore, for the purposes of the computation of SMW, the amount of wages payable to Mr A in respect of the wage periods of January, February and March is $3,000, $3,000 and $23,000 respectively.

Example (6):

Another real estate agent Mr B is also entitled to a monthly basic salary of $3,000 plus commission according to the contract of employment. His wage period is each calendar month. He is paid commission of $5,000 on 2 February, $5,000 on 1 March and $10,000 on 3 April, in addition to his monthly basic salary of $3,000. According to clause 5(5), the commission paid should be counted as part of the wages payable in respect of the wage periods respectively of January (commission $5,000), February (commission $5,000), and March (commission $10,000). Therefore, for the purposes of the computation of SMW, the amount of wages payable to Mr B in respect of the wage periods of January, February and March is $8,000, $8,000 and $13,000 respectively.

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