Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 25 February 2010

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 25 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. The provisions on hours worked and place of employment for calculating statutory minimum wage (SMW) in the Bill have been explained with the illustration of 15 examples in our papers submitted to the Bills Committee (LC Paper No. CB(2)922/09-10 (01) and LC Paper No. CB(2)978/09-10(01)), which are attached at Annex I and Annex II respectively for ease of reference.

3. Following the discussion at the Bills Committee meeting held on 25 February 2010, further examples are set out below to illustrate the application of the provisions.

Example (A):

As explained in our paper (LC Paper No. CB(2)978/09-10(01)) at Annex II, 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 any other 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.

As raised by a Member at the Bills Committee meeting on 25 February 2010, if the working hours of this real estate agent finish at 6:00 p.m. according to the contract of employment, but the employer directs him to continue to make phone calls to his customer from

6:00 p.m. to 11:00 p.m. at whatever place for the purpose of signing the sale and purchase agreement, the time which the employee spends in calling the customer for signing the sale and purchase agreement is hours worked under clause 3(1)(a) for the purpose of computing his minimum wage. Since the employer has instructed the employee to make these phone calls at any place, the place at which the employee calls the customer is his place of employment as defined in clause 2.

Example (B):

In another situation, the working hours of a real estate agent finish at 7:00 p.m. according to the contract of employment. However, he stays in the office of his own volition from 7:00 p.m. to 9:00 p.m., and is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the office for the purpose of doing work or receiving training. Therefore, for the purpose of computing his minimum wage, the office from 7:00 p.m. to 9:00 p.m. is not his place of employment as defined in clause 2, and hours worked under clause 3(1)(a) do not include such time from 7:00 p.m. to 9:00 p.m..

Example (C):

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, and he has to travel from the factory at 8:00 p.m. to the client's office in Dongguan. He travels from 8:00 p.m. to 10:00 p.m. and works until 11:00 p.m. at the client's office. If the period from 6:00 p.m. to 8:00 p.m. is the personal time of the operative, such time from 6:00 p.m. to 8:00 p.m. is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage. For the travelling time from 8:00 p.m. to 10:00 p.m. 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. As for the time from 10:00 p.m. to 11:00 p.m., the operative is in attendance at a place of employment for the purpose of doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer, and thus such time is hours worked under clause 3(1)(a) 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. A Member asked at the Bills Committee meeting on 25 February 2010 whether the time when the operative stays at the hotel in Dongguan is hours worked under clause 3(1)(a) or not. It should be noted that when the operative is in his personal time (such as sleeping time) at the hotel in Dongguan, he 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, and accordingly such time is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

4. Senior Assistant Legal Adviser of the Legislative Council has tabled for Members' reference at the Bills Committee meeting on 25 February 2010 a copy of the judgment of the Federal Court of Australia in the case of *Comcare Australia (Defence) v O'Dea* (1997) 150 ALR 318 regarding the interpretation of "in attendance" in relation to a workers' compensation case. This judgment has quoted the definition of "place of work" under the Safety, Rehabilitation and Compensation Act in Australia (the Comcare Act) which, in relation to an employee, includes any place at which the employee is required to attend for the purpose of carrying out the duties of his or her employment. According to page 7 of the tabled judgment, "(t)here was no suggestion that any of these words or expressions had a special or technical meaning … the Comcare Act uses those expressions in the sense that they have in ordinary speech. The meaning to be given to those words, therefore, involves a question of fact, not a question of law … ".

5. Senior Assistant Legal Adviser has advised at the Bills Committee meeting that "place of employment" in the Bill can be anywhere which fulfills the definition in clause 2, depending on the facts of the case. In the example of a real estate agent, in determining whether the time during which the employee is meeting a client in a restaurant instead of the office is hours worked under clause 3 or not, the court would look into all the relevant factors of the case such as the employment contract, the employer's agreement or direction, and any relevant trade practices. It must be a question of fact as to whether the place is a place of employment as defined in clause 2 and whether the time is hours worked under clause 3. He has also given an example on

sleeping time[1]. If an employee, say an escort guide, is in his personal time when sleeping at night, such personal time is not hours worked under clause 3(1)(a) for the purpose of computing SMW, unless there is contrary agreement with the employer. However, when he is awakened by a phone call from the employer requiring him to do work, the time during which he is awake to do work is hours worked under clause 3(1)(a) for computing SMW. In the same vein, an employee may be called upon from time to time by his employer to do work even during off-duty hours, say at home, but the working time to be counted should be distinct from his other time spent at home even though the home may for the limited duration be a place of employment. The Administration concurs with these views of Senior Assistant Legal Adviser.

6. It is important that the SMW legislative framework should seek to aptly provide generic principles that are applicable to different trades and industries regarding hours worked for the purpose of computing SMW. In the application of the generic principles in clause 3, the facts and circumstances of each individual case should be taken into account in determining whether the time should be counted as hours worked for SMW computation. We will vigorously launch publicity and promotional activities prior to the implementation of SMW, so that both employers and employees would know and understand the legal provisions and their respective obligations and entitlements under the SMW regime. We will include in the publicity materials sample cases and illustrations with authentic examples drawn from different trades and industries regarding the application of the provisions.

Information on hours worked in other jurisdictions

7. A Member requested the Administration to provide information about the provisions on hours worked in the SMW legislation in the Mainland, the United Kingdom and the United States. Another Member asked whether other jurisdictions with SMW legislation have also in place statutory regulations regarding the number of working hours of employees. We have conducted desktop research on the Internet and relevant information is set out at Annex III and Annex IV respectively.

[1] The issue of an employee falling asleep during working hours should be more a contractual issue with his employer than a matter which may affect the hours worked for the purpose of calculating the hourly wage rate.

Clause 5(5) of the Bill on commission payment

8. Clause 5(5) of the Bill has been explained in our paper submitted to the Bills Committee (LC Paper No. CB(2)978/09-10(01)), as attached at Annex II. Clause 5(5) sets out how commission should be counted for SMW computation in a wage period. For the purposes of the Bill, commission is counted as part of wages payable in respect of the wage period according to the timing when the commission is paid.

9. Further examples as raised at the Bills Committee meeting held on 25 February 2010 are set out below to illustrate the application of the provision.

Example (D):

A real estate agent Mr X 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 addition to his monthly basic salary, the employer, in accordance with the contract of employment, pays him (a) on 31 January, $4,000 commission out of the commission in February; and (b) on 5 March, $16,000 being the balance of the commission.

For computing SMW in the Bill, the amount of wages payable to Mr X in respect of these wage periods is:

January	$3,000 basic salary	+	$4,000 commission	=	$7,000
February	$3,000 basic salary	+	$16,000 commission	=	$19,000

Example (E):

Another real estate agent Mr Y is entitled to a monthly basic salary of $4,000 plus commission according to the contract of employment. His wage period is each calendar month. He signs a sales agreement in April. According to the contract of employment, the commission of $20,000 for the deal is paid to him (a) on 31 May, 30%, i.e. $6,000; and (b) on 3 July, 70%, i.e. $14,000, in addition to his monthly basic salary.

For computing SMW in the Bill, the amount of wages payable to Mr Y in respect of these wage periods is:

May	$4,000 basic salary	+	$6,000 commission	=	$10,000
June	$4,000 basic salary	+	14,000 commission	=	$18,000

Example (F):

Another real estate agent Mr Z is entitled to a monthly basic salary of $4,500 plus commission according to the contract of employment. His wage period is each calendar month. He signs a sales agreement in November. In addition to his monthly basic salary, the employer, according to the contract of employment, pays him the commission of $20,000 for the deal as follows: (a) on 31 October, $3,000 commission; (b) on 1 December, another $3,000 commission; and (c) on 2 January, $14,000 being the balance of the commission.

For computing SMW in the Bill, the amount of wages payable to Mr Z in respect of these wage periods is:

October	$4,500 basic salary	+	$3,000 commission	=	$7,500
November	$4,500 basic salary	+	$3,000 commission	=	$7,500
December	$4,500 basic salary	+	$14,000 commission	=	$18,500

10. A Member asked whether there are provisions on the counting of commission payment in the SMW provisions in other jurisdictions. We have conducted desktop research on the Internet on the SMW legislation in other jurisdictions but are not aware of any related provisions.

Labour and Welfare Bureau
March 2010

Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 28 January 2010

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 28 January 2010 in examining the Minimum Wage Bill (the Bill).

Hours worked and place of employment

2. The main object of the Bill is to provide for a statutory minimum wage (SMW) at an hourly rate so as to forestall the payment of excessively low wages. SMW is expressed as an hourly rate to help ensure that employees' pay is commensurate with the time that they have worked and is at a rate not lower than the SMW level. 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(1) of the Bill states the hours that must be taken to be included in computing minimum wage, and clause 3(2) states the hours that must be taken to be excluded in computing minimum wage. In addition, clause 2 specifies the definition for "place of employment" to which clause 3 refers.

3. Clause 2 of the Bill provides that:

> "place of employment" (僱傭地點), in relation to an employee, means 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.

4. Clause 3 provides that:

3. Hours worked

(1) The hours worked by an employee in a wage period must be taken to include –

(a) any time during which the employee is in attendance at a place of employment, irrespective of whether he or she is provided with work or training at that time; and

(b) any time during which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, travelling in connection with his or her employment except time referred to in subsection (2)(b).

(2) The hours worked by an employee in a wage period must be taken not to include –

(a) any period allowed by the employer for a meal except to the extent (if any) during that period that the employee is doing work in accordance with the contract of employment or with the agreement or at the direction of the employer; and

(b) any time during which the employee is travelling (in either direction) between his or her place of residence and his or her place of employment other than a place of employment that is outside Hong Kong and is not his or her usual place of employment.

5. Given the multifarious work patterns of employees, clause 3 does not 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 SMW computation 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.

Examples for the application of the provisions

6. Examples which are drawn from various trades and industries for the application of the provisions are set out below for illustration.

Clause 3(1)(a)

Example (1):

A shop assistant works in the shop from 9:00 a.m. to 1:00 p.m. and from 2:00 p.m. to 6:00 p.m. in accordance with the contract of employment. He also works overtime from 6:00 p.m. to 7:00 p.m. with the agreement or at the direction of the employer. According to clause 3(1)(a), the time from 9:00 a.m. to 1:00 p.m. and from 2:00 p.m. to 7:00 p.m. is hours worked for the purpose of computing his minimum wage.

Owing to personal reasons (e.g. to avoid busy traffic), the shop assistant returns to the shop at 8:00 a.m. However, if he is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the shop for the purpose of doing work or receiving training, then, for the purpose of computing his minimum wage, the shop from 8:00 a.m. to 9:00 a.m. is not his place of employment as defined in clause 2, and hours worked under clause 3(1)(a) do not include such time from 8:00 a.m. to 9:00 a.m..

Example (2):

It is the existing practice of some catering establishments to arrange their employees to be off duty say for a few hours in the afternoon during the interval between the service hours of lunch and dinner. It is commonly known as the time of "落場" (literally meaning "leaving the field"). If an employee during this period 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 of "落場" is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Example (3):

In the airline industry, an employer may arrange the cockpit and cabin crew to have a layover in a destination outside Hong Kong after they perform work during the course of a flight. The employer may also provide free accommodation and/or meals for the crew during the layover. If an employee in his personal time (such as sleeping time) during the layover 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 (4):

An operative works in the factory in Hong Kong on Mondays, and in the factory in Dongguan from Tuesdays to Fridays. The employer may also provide free accommodation and/or meals for the operative when he is in Dongguan. If 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 (5):

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.

Example (6):

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) such time is hours worked for the purpose of computing his minimum wage.

Clause 3(2)(a)

Example (7):

A clerk is allowed his meal time from 1:00 p.m. to 2:00 p.m. and he is not doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer, during the period. Therefore, according to clause 3(2)(a), the hours worked by the clerk for the purpose of computing his minimum wage do not include the period from 1:00 p.m. to 2:00 p.m..

In another situation, the clerk takes his meal in the office from 1:00 p.m. to 2:00 p.m.. Although he is in the office during the period from 1:00 p.m. to 2:00 p.m., he is not, in accordance with the contract of employment, or with the agreement or at the direction of the employer, in attendance in the office for the purpose of doing work or receiving training. Under such circumstances, for the purpose of computing his minimum wage, the office from 1:00 p.m. to 2:00 p.m. is not his place of employment as defined in clause 2, and hours worked under clause 3(1)(a) do not include such period from 1:00 p.m. to 2:00 p.m..

Example (8):

A tour guide, when accompanying a tour group, has to make arrangements for meals en route. When the tourists take their meal, the tour guide is in attendance in the restaurant in accordance with the contract of employment, or with the agreement or at the direction of the employer, for the purpose of doing work, such as for overseeing the meal arrangements, acting as interpreter for the tourists or helping them in ordering refreshments as necessary. Although the tour guide is also taking his meal, he is at the same time doing work in accordance with the contract of employment, or with

the agreement or at the direction of the employer, during the period. Therefore, clause 3(2)(a) does not operate to exclude the period from the hours worked by the tour guide for the purpose of computing his minimum wage. Rather, since the tour guide is in attendance in the restaurant in accordance with the contract of employment, or with the agreement or at the direction of the employer, for the purpose of doing work, such time is hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Example (9):

A watchman has his meal time from 1:00 p.m. to 2:00 p.m.. At the same time, he remains in attendance at his watchman post for the purpose of doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer. As he is doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer, clause 3(2)(a) does not operate to exclude the period from the hours worked for the purpose of computing his minimum wage. Since the watchman is in attendance at the place of employment in accordance with the contract of employment, or with the agreement or at the direction of the employer, for the purpose of doing work, such time is hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Clause 3(1)(b) and (2)(b)

Example (10):

A messenger resides at Sheung Shui and works in a company at Kowloon Bay. According to clause 3(2)(b), the time during which he is travelling between his place of residence and his company is not hours worked for the purpose of computing his minimum wage.

On a day, the messenger delivers some documents from his company at Kowloon Bay to a client's office at Tsuen Wan, and then returns to the company. For the travelling time between his company at Kowloon Bay and the client's office at Tsuen Wan 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.

Example (11):

An operative works in the factory at Chai Wan on Mondays, and in the factory in Dongguan from Tuesdays to Fridays. He resides at Sheung Shui. For the travelling time between his place of residence at Sheung Shui and the factory at Chai Wan, clause 3(2)(b) provides that it is not hours worked for the purpose of computing his minimum wage. Since the factory in Dongguan is also his usual place of employment, according to clause 3(2)(b) the time during which he is travelling between his place of residence at Sheung Shui and the factory in Dongguan is not hours worked for the purpose of computing his minimum wage.

Example (12):

An escort guide meets the tour group at the airport and takes care of the tourists and various co-ordinations for their trip out of Hong Kong. He accompanies the tour group travelling by air. For the travelling time between Hong Kong and the destination during which the escort guide 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.

On-call or standby time

7. As stated above, if an employee is in attendance at a place of employment and his attendance at that place is in accordance with the contract of employment or with the agreement or at the direction of the employer for the purpose of doing work or receiving training, such time is included as hours worked according to clause 3(1)(a) of the Bill for the purpose of computing his minimum wage.

8. There are variations in the arrangements when an employee is on call or standby. Whether the on-call or standby time is hours worked under clause 3(1)(a) depends on whether the employee is in attendance at a place of employment as required by the employer or employment contract, as defined in clause 2, for the purpose of doing work or receiving training. If the employee, while on call or standby, is not in attendance at a place of employment for the purpose of doing work or receiving training, the time is not hours worked under clause 3(1)(a) for

computing minimum wage.

9. However, if the employee, while on call or standby, is in attendance at a place of employment according to the contract of employment, or with the agreement or at the direction of the employer, the on-call or standby time is hours worked under clause 3(1)(a). The place of employment as defined in clause 2 is 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 (including the home of the employee, if so designated).

10. At the meeting of the Bills Committee held on 28 January 2010, a Member also referred to the decisions of the Court of Final Appeal (CFA) in FACV No. 30 of 2005 (CFA case of correctional services officers) and FACV Nos. 22 & 23 of 2008 (CFA case of hospital doctors). For the case of FACV No. 30 of 2005 (CFA case of correctional services officers), the appeal concerned the proper interpretation of the relevant Civil Service Regulations in the context of the facts. As for FACV Nos. 22 & 23 of 2008 (CFA case of hospital doctors), the CFA was to determine the doctors' claims for compensation regarding overtime work whilst working (in accordance with their contract) during on call away from hospital and their entitlement to rest days and statutory holidays under the Employment Ordinance (EO) when being on call. Therefore, these CFA decisions do not have direct relevance to the statutory interpretation of clause 3(1)(a) of the Bill in relation to on-call or standby time.

Clause 3(2)(a) of the Bill

11. Under clause 3(2)(a) of the Bill, any period allowed by the employer for a meal is not hours worked for the purpose of computing minimum wage, except to the extent (if any) during that period that the employee is doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer. Clause 3(2)(a) serves to state the hours that must be taken to be excluded in computing minimum wage under the Bill. It does not change the existing arrangements under the EO whereby employers and employees are free to agree between themselves the employment terms on meal break. It is not the policy intent of the Bill to prescribe whether an employee should be remunerated for meal break under his contract of employment, nor is

the object of the Bill to regulate the arrangement of meal break. As always, these employment issues are subject to the mutual agreement of the employer and the employee.

12. As under clause 3(2)(a) hours worked do not include meal break when the employee is not doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer, payment, if any, made to the employee for the time of meal break not worked by the employee is not counted as part of the wages payable when determining the employee's entitlement to be paid wages not less than the SMW under the Bill.[1] Specifically, although meal break (when the employee is not doing work in accordance with the contract of employment or with the agreement or at the direction of the employer) is excluded from hours worked for the computation of SMW, the average hourly wage rate so derived would not be distorted to prejudice the employee's interest.

Clause 14 of the Bill

13. According to clause 14 of the Bill, a provision of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Bill is void. The Bill confers on employees a right to be paid the minimum hourly wage rate for each hour worked by the employee. Clause 14 prevents an employer and an employee agreeing that the employee will be paid less than the minimum hourly wage rate. The clause renders any such agreement void. It uses the word "purports" to refer to the fact that while the agreement claims to have the effect of extinguishing or reducing the right, benefit or protection it does not, because of clause 14, have that effect. Clause 14 is modelled on section 70 of the EO which renders void any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred on the employee by the EO.

Publicity and promotional activities

14. In the course of preparing the Bill, the Labour Department (LD) has undertaken an intensive and extensive engagement and consultation process with various stakeholders. We have taken into account the work

1 Under clause 5(2) of the Bill, a payment made to an employee in any wage period for an hour (or any part of an hour) not worked by the employee must not be counted as part of the wages payable in respect of that or any other wage period.

patterns of employees in different trades and industries with a view to ensuring that the SMW regime is feasible and strikes a reasonable balance among various interests. Prior to the implementation of SMW, LD will vigorously launch publicity and promotional activities so that both employers and employees would know and understand the legal provisions and their respective obligations and entitlements under the SMW regime. We will include sample cases and illustrations with authentic examples drawn from different trades and industries in the publicity materials.

Labour and Welfare Bureau
February 2010

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

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.

Labour and Welfare Bureau
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Annex III

Information on the provisions on hours worked in SMW legislation in the Mainland, the United Kingdom (UK) and the United States (US)

Mainland	Under the Minimum Wage Regulations, minimum remuneration should be payable to a worker by his/her employer pursuant to the law, provided that such worker has performed normal work within the statutory working time or the time as agreed in the contract of employment which is signed in compliance with the law. Normal work means the work performed by a worker within the statutory working time or the time as agreed in the contract of employment pursuant to that contract which is signed in compliance with the law.
UK	In general, the time when a worker is available at or near a place of work for the purpose of doing work and is required to be available for such work must be included in the calculation of national minimum wage pay under the National Minimum Wage Regulations 1999 (Amendment) Regulations 2000. In relation to a worker who by arrangement sleeps at or near a place of work and is provided with suitable facilities for sleeping, time during the hours he is permitted to use those facilities for the purpose of sleeping shall only be treated as being time work when the worker is awake for the purpose of working. Time when a worker is travelling for the purpose of duties carried out by him in the course of time work shall be treated as being time work with some exceptions.
US	Under the Fair Labour Standards Act, in determining the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which is excluded from

	measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Annex IV

Whether other jurisdictions with SMW legislation have statutory regulations on the number of working hours of employees

Jurisdiction	**With statutory regulations on working hours**
France	Yes
Guangdong and Shenzhen	Yes
Japan	Yes
UK	Yes
US	Yes