Bills Committee on Minimum Wage Bill

Administration's Response to the Submission from the Employers' Federation of Hong Kong to the Bills Committee

Introduction

This paper provides the Administration's response to the issues raised in the submission from the Employers' Federation of Hong Kong to the Bills Committee ("the Submission") (LC Paper No. CB(2)967/09-10(01)).

Response from the Administration

Part (a) of the Submission: General

2. The definition of "place of employment" in clause 2 and the provisions on hours worked in clause 3 of the Minimum Wage Bill ("the Bill") have been explained 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 reference. These provisions reflect our policy regarding hours worked for the purpose of computing statutory minimum wage (SMW).

3. The term "place of employment" in clause 3 has been defined in clause 2. Accordingly, the reference to "any time during which the employee is in attendance at a place of employment" in clause 3(1)(a) has already been qualified by the notion of " *in accordance with the contract of employment or with the agreement or at the direction of the employer*". In Example (2), if an employee during the time of "落場" (literally meaning "leaving the field"), though staying in the restaurant, is not in attendance in the restaurant 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, then such time of "落場" is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage because the restaurant is not a place of employment as defined in clause 2 at that time.

Part (b) of the Submission: Specific comments

4. The issues in this part pertain to the application of the definition of "place of employment" under clause 2 and the provisions on hours worked under clause 3 to the facts and circumstances in individual cases, which is a question of fact to be determined by reference to all the relevant circumstances of each case, as illustrated below.

Clause 3(1)(b) – Example (3)

5. The employee in Example (3) is not travelling during the layover period in a destination outside Hong Kong, and thus clause 3(1)(b) is not relevant. If there is any time during the layover period that he, in accordance with the contract of employment or with the agreement or at the direction of the employer, travels in connection with his employment, then such time of travelling is hours worked under clause 3(1)(b).

Clause 3(1)(a) – Example (4) and Example (5)

6. When the employee in Example (4), though staying in the factory, is not in attendance there 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, the factory is not a place of employment as defined in clause 2 at that time. As regards the time during which the employee in Example (4) deals with some emails and the employee in Example (5) responds to a phone call at night, if the employee in dealing with the emails or responding to the phone call is doing so 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, then it is hours worked under clause 3(1)(a).

Clause 3(2)(a) – Example 7

7. If the clerk in checking emails 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 hours worked for the purpose of computing his minimum wage. Rather, such time is hours worked under clause 3(1)(a) since he is in attendance at a 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.

On-call or standby time

8. 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. It is not appropriate for clause 3(1)(a) to classify on-call or standby time as hours worked or not indiscriminately without regard to the multifarious variations in the actual arrangements of different employers and employees. Whether on-call or standby time is hours worked under clause 3(1)(a) must be determined according to the factual matrix of the case.

9. In the example of the employee being on standby over the weekend quoted in the Submission, whether the standby time is hours worked under clause 3(1)(a) depends on whether the employee 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. Specifically, if the employee while being on standby is in attendance at a place of employment, then such time is hours worked under clause 3(1)(a); on the contrary, if he is not in attendance at a place of employment during the standby, such time is not hours worked under clause 3(1)(a). Therefore, this must be determined by reference to the contract of employment or the agreement or direction of the employer.

10. 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. Therefore, the employer and the employee may also agree to regard on-call or standby time as hours worked for computing SMW.

11. All in all, the Bill does not seek to prescribe what is and what is not working hours which should be subject to the mutual agreement of employers and employees. What clause 3 does is to state the hours that must be taken to be included and the hours that must be taken to be excluded in computing minimum wage, and this is for the purpose of SMW only. We would also continue to consider the different views received on the drafting of clause 3.

Labour and Welfare Bureau/
Department of Justice
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.

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