

LEGISLATIVE COUNCIL BRIEF

Employment Ordinance
(Chapter 57)

Employment (Amendment) Bill 2009

INTRODUCTION

At the meeting of the Executive Council on 16 June 2009, the Council ADVISED and the Chief Executive ORDERED that the Employment (Amendment) Bill 2009 at Annex should be introduced into the Legislative Council to create an offence relating to an employer's failure to pay any sum awarded by the Labour Tribunal (LT) and the Minor Employment Claims Adjudication Board (MECAB) comprising wages and entitlements underpinned by criminal elements under the Employment Ordinance (EO).

JUSTIFICATIONS

2. While LT provides a speedy, inexpensive and informal forum for the adjudication of employment-related claims, the modes of execution of LT awards are no different from the enforcement of any other civil judgments in respect of which the successful party bears the responsibility of enforcing the judgment if it is not complied with.

3. There has been increasing concern in the community over some employers' failure in effecting payment to their employees even after LT had so awarded. A concrete measure strongly favoured by stakeholders is to make non-payment of LT awards a criminal offence so as to achieve additional deterrence against defaulting employers. Some employer representatives also agree that irresponsible employers who are financially able but unwilling to pay the awards should be sanctioned. After examination, it is considered that the proposed criminalisation of non-payment of LT awards should be pursued.

4. While defaults of wages and other statutory entitlements are already offences under the EO⁽¹⁾, non-payment of LT awards per se is not a criminal offence.

Note ⁽¹⁾ The EO offences include failure to pay, among others, wages, statutory holiday pay, annual leave pay, sickness allowance, maternity leave pay, year end payment, severance payment and long service payment etc.

5. Difficulties in prosecution arise in some cases where the components of wages and their computation emanate from an oral contract between the employer and the employee agreed years ago, rendering it difficult to establish the contractual intention. If the proposed offence is created and an award is made by LT or MECAB and clearly indicates that wages or other statutory entitlements are payable by an employer, the prosecution will no longer need to go behind the award to ascertain the contractual intention.

Coverage

6. Although LT is but one of the branches of the Judiciary involved in civil judgments, the Administration considers that as failure to pay wages and other statutory benefits as well as to comply with LT award on severance payment are already offences under the EO, we could build on this basis to distinguish employment-related civil debts under LT awards from other types of civil debts. We thus consider that the new offence should only apply to non-payment of LT awards comprising wages and entitlements underpinned by criminal elements of the EO.

Penalty and Elements of the Offence

7. In order to achieve additional deterrence and send a strong message to the community that non-payment of LT awards is a serious offence, the maximum penalty for the new offence is to be set at \$350,000 and three years' imprisonment. This is on par with the highest penalty level for wage offences under the EO.

8. During the consultation process, some stakeholders stressed the importance of distinguishing between cases in which employers have genuine financial difficulty to pay LT awards, and cases in which employers are financially able but unwilling to pay. They generally support that the offence should focus on the latter category of cases, i.e. targeting the wilfully defaulting employers rather than those with genuine financial difficulties. The new offence will therefore adopt "wilfully and without reasonable excuse" as essential elements of the offence. These are also elements of existing wage offences attracting the maximum penalty in paragraph 7 above.

Liability of Directors and Partners

9. In cases where the employer is a body corporate, an LT award will be entered against the corporate employer. Some stakeholders strongly feel that the personal liability of directors and responsible persons for a body corporate provided for under section 64B(1)⁽²⁾ of the EO is at present an important deterrent against wage offences. As such, they support introducing a similar provision to help prevent non-payment of LT awards. As many employers are body corporate nowadays, we see the need to adopt a similar rule of liability, so that where non-payment of award committed by a body corporate is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of director, or other similar officer of the body corporate, the director or other similar officer of the body corporate commits the like offence.

10. In deliberating the application of section 64B(1) in the context of LT defaults, we recognize that in some cases the employee may have limited knowledge of the role of the director or responsible person at the time of default either because the employee has already left the company or because the award was made ex-parte. There is thus merit in ensuring the effectiveness of holding culpable directors or responsible persons liable while, at the same time, avoiding netting in those who have totally no part to play in the body corporate's default. With a view to balancing these considerations, we propose to introduce a rebuttable presumption as to consent, connivance or neglect on the part of a director or responsible person of the body corporate if the prosecution can prove his involvement in the management of, or knowledge of the award made against, the body corporate. The presumption may be rebutted by the accused if there is sufficient evidence to raise an issue that the offence was committed without the accused's consent or connivance and was not attributable to the accused's neglect and the contrary is not proved by the prosecution beyond reasonable doubt. Similar provisions requiring directors and responsible persons to adduce evidence on potentially exculpatory matter can be found in other ordinances⁽³⁾.

Notes ⁽²⁾ Section 64B(1) of the EO stipulates that where an offence under section 63B or 63C committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, the director, manager, secretary or other similar officer shall be guilty of the like offence.

⁽³⁾ Examples include section 60 of Unsolicited Electronic Messages Ordinance (Cap. 593), section 118 of Copyright Ordinance (Cap. 528), regulation 117 of Poultry (Slaughtering for Export) Regulations (Cap. 139E) and section 51 of Entertainment Special Effects Ordinance (Cap. 560) etc.

11. The presumption explained in paragraph 10 above is made on the basis that whether a director or responsible person does consent to or connive at the failure of the body corporate to pay an LT award, or whether the failure is attributable to his neglect, is very much a matter within his own knowledge. A director or responsible person concerned in the management has a role or decision making power on the operation of the body corporate including, inter alia, the fulfilment of its legal obligations to pay entitlements to its employees. This is not a new concept but one which is currently adopted in other ordinances⁽⁴⁾.

12. Section 64B(2)⁽⁵⁾ of the EO provides for a similar liability on other partner of a firm or person concerned in the management for wage offences committed by a partner of the firm. Similar to the provisions on directors as explained in paragraphs 9 to 11 above, provisions will also be made to impose liability on partners or persons concerned in the management of a firm.

Applicability to MECAB Awards

13. MECAB has similar jurisdiction as LT on employment-related claims made by not more than ten claimants for a sum of money not exceeding \$8,000 per claimant, and the enforcement mechanisms available to the aggrieved employees are the same as those for enforcement of LT awards. As a corollary, the difficulties in enforcement of awards granted by LT also apply to awards granted by MECAB. Therefore, we consider that, just as non-payment of LT awards is to be criminalised, non-payment of MECAB awards should also be criminalised.

THE BILL

14. The main object of the Bill is to add a new part under the EO for introducing a new offence against non-payment of LT/MECAB awards by employers. The major provisions are as follows -

- (a) The new offence is to apply to an employer's failure to pay any sum under an award by LT/MECAB comprising wages and entitlements underpinned by criminal elements under the EO;

Notes ⁽⁴⁾ Examples include section 60 of Unsolicited Electronic Messages Ordinance (Cap. 593), section 118 of Copyright Ordinance (Cap. 528), regulation 117 of Poultry (Slaughtering for Export) Regulations (Cap. 139E) and section 51 of Entertainment Special Effects Ordinance (Cap. 560) etc.

⁽⁵⁾ Section 64B(2) of the EO stipulates that where an offence under section 63B or 63C committed by a partner in a firm is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any other partner of the firm or any person concerned in the management of the firm, that partner or the person concerned in the management of the firm shall be guilty of the like offence.

- (b) An employer commits an offence if he wilfully and without reasonable excuse fails to pay the awarded sum within 14 days from the date on which the sum is due, and is liable for a maximum penalty of \$350,000 and three years' imprisonment; and
- (c) Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or attributable to any neglect on the part of any director or responsible person, the director or responsible person commits the like offence. As a rebuttable presumption, if it is proved that a director or responsible person is concerned in the management or knew or ought to have known about the award, it will be taken that the offence is committed with the accused's consent, connivance or attributable to the accused's neglect unless there is sufficient evidence to raise an issue that the offence was committed without the accused's consent or connivance and was not attributable to the accused's neglect and the contrary is not proved by the prosecution beyond reasonable doubt. In the case of an offence committed by a partner of a firm, similar provisions are made in relation to any other partner or person concerned in the management of the firm.

15. Further details on individual clauses of the Bill are set out in its Explanatory Memorandum.

LEGISLATIVE TIMETABLE

16. The legislative timetable will be –

Publication in the Gazette	26 June 2009
First Reading and commencement of Second Reading debate	8 July 2009
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

17. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The Bill does not affect the current binding effect of the EO. The proposal has no economic, productivity, environmental or sustainability implications. Moreover, the proposal would promote harmonious labour relations, which underlie Hong Kong's strengths as an international business hub.

18. There will be staffing and financial implications for the Government for enforcing the new offence. The Labour Department (LD) and the Judiciary will work out the resource requirement. Any additional resources will be sought according to the established procedures.

PUBLIC CONSULTATION

19. The proposal of making non-payment of LT awards a criminal offence was reported to the Labour Advisory Board (LAB) and Legislative Council Panel on Manpower (Manpower Panel) in July 2008. The proposal on the new offence was subsequently discussed and agreed at LAB and Manpower Panel in December 2008.

PUBLICITY

20. A press release will be issued on 24 June 2009. A spokesman from LD will be available to handle press enquiries.

BACKGROUND

21. Being remunerated punctually and fully is a right of an employee. Despite provisions in the EO and vigorous enforcement action by LD, wage offences still occur from time to time. LT and MECAB have jurisdiction over the civil claims for wages and statutory entitlements. As is the case for any civil judgments, the onus of enforcing LT and MECAB award rests with the claimants. At present, some employees with little means are often deterred by the time and costs involved in seeking to have awards in their favour enforced and there are cases of employers who, although they do not have genuine financial difficulty, choose not to settle LT and MECAB awards.

22. To enhance the enforcement of LT awards, the Labour and Welfare Bureau and LD consulted LAB and Manpower Panel on the various options floated by stakeholders in April 2008. After examination, the Administration considered making non-payment of LT awards a criminal offence a viable enhancement measure and reported to LAB and Manpower Panel in July 2008. The proposal on the new offence was further reported to LAB and Manpower Panel in December 2008. The Administration has further undertaken to introduce the bill on the new offence in the legislative session of 2008-09.

ENQUIRIES

23. Enquiries on this brief should be addressed to Mr Byron NG, Assistant Commissioner for Labour (Labour Relations), on 2852 4099 or Miss Bonny WONG, Senior Labour Officer (Labour Relations) of LD, on 2852 3517.

Labour and Welfare Bureau
June 2009

EMPLOYMENT (AMENDMENT) BILL 2009

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PART IXB

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A BILL

To

Add a new Part IXB to the Employment Ordinance to create an offence relating to an employer's failure to pay any sum payable under an award of the Labour Tribunal or Minor Employment Claims Adjudication Board that provides, in whole or in part, for the payment of any specified entitlement under that Ordinance; and to make consequential amendments to section 31O of that Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Employment (Amendment) Ordinance 2009.

2. Commencement

This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

3. Making of severance payment

(1) Section 31O(1A) of the Employment Ordinance (Cap. 57) is repealed.

(2) Section 31O(3)(a) is amended by repealing "or (1A)".

4. Part IXB added

The following is added –

“PART IXB

OFFENCE OF EMPLOYER’S FAILURE TO PAY ANY SUM PAYABLE UNDER AWARD OF LABOUR TRIBUNAL OR MINOR EMPLOYMENT CLAIMS ADJUDICATION BOARD

43N. Interpretation of Part IXB

(1) In this Part –

“award” (判令) includes an order;

“registrar” (主任), in relation to a tribunal, means the Registrar of the Labour Tribunal or the Registrar of the Minor Employment Claims Adjudication Board (as the case may be);

“specified entitlement” (指明權利) means –

- (a) any wages or any other sum payable under section 23, 24 or 25, or interest payable under section 25A on the wages or sum;
- (b) any end of year payment payable under Part IIA;
- (c) any maternity leave pay or sum payable under Part III;
- (d) any severance payment payable under Part VA;
- (e) any long service payment payable under Part VB;
- (f) any sickness allowance or sum payable under Part VII;
- (g) any holiday pay payable under Part VIII;
- (h) any annual leave pay payable under Part VIIIA;
- (i) any sum payable in respect of rest days, maternity leave, holiday or annual leave which the employer is required under this Ordinance to grant to an employee but fails to grant, to the extent that the

sum is not covered by paragraph (a), (b), (c), (d), (e), (f), (g) or (h); or

- (j) an award of terminal payments under section 320 to the extent that the award covers entitlements referred to in paragraph (a), (b), (c), (d), (e), (f), (g), (h) or (i);

“tribunal” (審裁處) means the Labour Tribunal or Minor Employment Claims Adjudication Board.

(2) A reference in this Part to an award of a tribunal includes –

- (a) a settlement treated as an award of the Labour Tribunal under section 15(9) of the Labour Tribunal Ordinance (Cap. 25); and
- (b) a settlement treated as an award of the Minor Employment Claims Adjudication Board under section 14(4) of the Minor Employment Claims Adjudication Board Ordinance (Cap. 453).

(3) A reference in this Part to the date of an award means, in relation to a settlement referred to in subsection (2) –

- (a) the date of filing of the settlement in the Labour Tribunal under section 15(8) of the Labour Tribunal Ordinance (Cap. 25); or
- (b) the date of filing of the settlement with the Registrar of the Minor Employment Claims Adjudication Board under section 14(3) of the Minor Employment Claims Adjudication Board Ordinance (Cap. 453).

43O. Application

(1) This Part applies to an award of a tribunal that is made on or after the commencement date.

(2) In this section, “commencement date” (生效日期) means the date on which the Employment (Amendment) Ordinance 2009 (of 2009) comes into operation.

43P. Offence of employer’s failure to pay any sum payable under award of tribunal

(1) If –

(a) an award of a tribunal provides, in whole or in part, for the payment by an employer of any specified entitlement; and

(b) the employer wilfully and without reasonable excuse fails to pay –

(i) any sum payable under the award (other than a sum to which subparagraph (ii) applies) within 14 days after the date of the award; or

(ii) any sum payable under the award that is, by the terms of the award, payable otherwise than on the date of the award, within 14 days after the date on which the sum is, by those terms, payable,

the employer commits an offence and is liable on conviction to a fine of \$350,000 and to imprisonment for 3 years.

(2) A reference in subsection (1)(b)(i) or (ii) to any sum payable under an award includes –

(a) any part of a sum payable under the award; and

(b) in the case of a sum payable by instalments, any instalment or part of an instalment.

(3) For the purposes of subsection (1), if –

(a) an award of a tribunal provides for the payment of a sum but does not indicate whether or not that sum includes any specified entitlement; and

(b) the claim to which the award relates consists, in whole or in part, of any specified entitlement,

then, unless there is evidence to the contrary, the award is to be treated as providing for the payment of a specified entitlement.

43Q. Liability of directors, partners, etc. for offence under section 43P

(1) Where an offence under section 43P committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, the director, manager, secretary or other similar officer commits the like offence.

(2) Where an offence under section 43P committed by a partner in a firm is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any other partner in the firm or any other person concerned in the management of the firm, the other partner or the other person concerned in the management of the firm commits the like offence.

(3) An offence under section 43P committed by a body corporate is presumed to have been committed with the consent or connivance of, or to be attributable to the neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, if it is proved that, at the time the offence was committed, the director, manager, secretary or other similar officer –

- (a) was concerned in the management of the body corporate; or
- (b) knew or ought to have known that the award of the tribunal in respect of which the offence was committed had been made against the body corporate.

(4) An offence under section 43P committed by a partner in a firm is presumed to have been committed with the consent or connivance of, or to be attributable to the neglect on the part of –

- (a) any other partner in the firm, if it is proved that, at the time the offence was committed, the other partner was concerned in the management of the firm; or
- (b) any other partner in the firm or any other person concerned in the management of the firm, if it is proved that, at the time the offence was committed, the other partner or the other person knew or ought to have known that the award of the tribunal in respect of which the offence was committed had been made against the firm.

(5) The presumption under subsection (3) or (4) is rebutted by a person charged with an offence under section 43P by virtue of that subsection if –

- (a) there is sufficient evidence to raise an issue that the offence was committed without the person's consent or connivance and was not attributable to the person's neglect; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.

**43R. Proof of certain matters in proceedings
for offence under section 43P**

(1) For the purposes of proceedings for an offence under section 43P, a document (“first-mentioned document”) purporting to be a copy of a specified document, and purporting to be certified by or on behalf of the registrar of a tribunal or the registrar of a court as a true copy of the specified document, is admissible in evidence on its production without further proof and, unless there is evidence to the contrary –

(a) the court before which the first-mentioned document is produced must presume –

- (i) that the first-mentioned document is certified by or on behalf of the registrar of a tribunal or the registrar of a court; and
- (ii) that the first-mentioned document is a true copy of the specified document;

(b) in the case of the first-mentioned document purporting to be a copy of a specified document referred to in subsection (2)(a) and prepared by an officer of a tribunal or of a court, the first-mentioned document is evidence of all matters contained in it; and

(c) in the case of the first-mentioned document purporting to be a copy of a specified document referred to in subsection (2)(b) and prepared by an officer of a tribunal or of a court, the first-mentioned document is evidence of the facts specified in subsection (4) or (5).

(2) In subsection (1), “specified document” (指明文件)

means –

- (a) a claim filed with a tribunal, or an award made by a tribunal, or any other document relating to proceedings before a tribunal or a court; or
- (b) any document that is relevant to any fact specified in subsection (4) or (5).

(3) For the purposes of proceedings for an offence under section 43P, a certificate purporting to be issued by or on behalf of the registrar of a tribunal or the registrar of a court and stating any of the facts specified in subsection (4) or (5) is admissible in evidence on its production without further proof and, unless there is evidence to the contrary –

- (a) the court before which the certificate is produced must presume that the certificate is issued by or on behalf of the registrar of a tribunal or the registrar of a court; and
- (b) the certificate is evidence of the facts so stated.

(4) The following facts are specified for the purposes of subsection (3) in relation to a certificate purporting to be issued by or on behalf of the registrar of a tribunal –

- (a) whether any payment has been made to the tribunal in full or partial discharge of an award of the tribunal and, if so, particulars of the payment (including the date, amount and, in the case of an award made in favour of 2 or more claimants, to which claimant the amount is paid);
- (b) whether a decision has been made in any proceedings to set aside or review an award of the tribunal and, if so, the particulars of the decision;

- (c) whether any proceedings are pending to set aside or review an award of the tribunal and, if so, the particulars of the pending proceedings;
- (d) whether any person was present at the hearing of the tribunal at which an award of the tribunal was made or at any hearing of the claim to which the award relates; and
- (e) whether any document relating to proceedings before the tribunal has been served on any person and, if so, the particulars of service (including the mode, time and address of service).

(5) The following facts are specified for the purposes of subsection (3) in relation to a certificate purporting to be issued by or on behalf of the registrar of a court –

- (a) whether a decision has been made in an appeal (if any) against an award of a tribunal and, if so, the particulars of the decision; and
- (b) whether an appeal is pending against an award of a tribunal and, if so, the particulars of the pending appeal.

(6) In this section, “registrar of a court” (司法常務官) means –

- (a) the Registrar of the High Court; or
- (b) the Registrar of the Court of Final Appeal.

(7) In subsections (1) and (3), a reference to a court before which a document or a certificate is produced includes a magistrate.

43S. Prosecution of offence under section 43P

(1) No prosecution for an offence under section 43P may be commenced without the consent in writing of the Commissioner.

(2) Before giving consent to prosecute under subsection (1), the Commissioner must hear the person against whom the allegation is made, or give the person an opportunity of being heard.

(3) Subject to subsection (1), a prosecution for an offence under section 43P may be brought in the name of the Commissioner and may be commenced and conducted by any officer of the Labour Department authorized in that behalf in writing by the Commissioner.

(4) Nothing in this section derogates from the powers of the Secretary for Justice in respect of the prosecution of criminal offences.”.

Explanatory Memorandum

The object of this Bill is to amend the Employment Ordinance (Cap. 57) to create an offence relating to an employer’s failure to pay any sum payable under an award of the Labour Tribunal or Minor Employment Claims Adjudication Board that provides, in whole or in part, for the payment of any specified entitlement under that Ordinance.

2. Clause 4 adds a new Part IXB (consisting of proposed sections 43N, 43O, 43P, 43Q, 43R and 43S) to the Employment Ordinance.

3. The proposed section 43N contains definitions to be used for the interpretation of the proposed Part IXB, including –

(a) “specified entitlement”, as defined, includes entitlements such as wages, end of year payment, maternity leave pay, severance payment, long service payment, sickness allowance, holiday pay and annual leave pay;

- (b) “tribunal” is defined to mean the Labour Tribunal or Minor Employment Claims Adjudication Board;
- (c) “registrar”, in relation to a tribunal, is defined to mean the Registrar of the Labour Tribunal or the Registrar of the Minor Employment Claims Adjudication Board; and
- (d) a reference to an award of a tribunal includes a settlement treated as an award upon its being signed by the parties and filed under the Labour Tribunal Ordinance (Cap. 25) or the Minor Employment Claims Adjudication Board Ordinance (Cap. 453).

4. The proposed section 43O limits the application of the proposed Part IXB to an award of a tribunal made on or after the day appointed for the coming into operation of the Bill, if enacted.

5. Under the proposed section 43P(1), an employer commits an offence if an award of a tribunal provides for the payment by the employer of any specified entitlement and the employer fails to pay any sum payable under the award within 14 days after the sum is due. The penalties for the offence are a fine of \$350,000 and imprisonment for 3 years.

6. Under the proposed section 43P(3), if an award of a tribunal provides for the payment of a sum but does not indicate whether or not that sum includes any specified entitlement, and the claim to which the award relates consists, in whole or in part, of any specified entitlement, then, unless there is evidence to the contrary, the award is to be treated as providing for the payment of a specified entitlement for the purposes of the proposed section 43P(1).

7. The proposed section 43Q(1) and (2) provides that where an offence under the proposed section 43P committed by a body corporate or a partner in a firm is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director or other senior officer of the body corporate, or another partner in the firm or another person concerned in the management of the firm, that director, officer, partner or person commits the like

offence. The proposed section 43Q(3), (4) and (5) provides for rebuttable presumptions as to consent, connivance or neglect on the part of a director or other senior officer of the body corporate, or another partner in the firm or another person concerned in the management of the firm based on that director's, officer's, partner's or person's involvement in management or knowledge or constructive knowledge of an award.

8. The proposed section 43R provides for proof of certain matters in proceedings for an offence under the proposed section 43P. The proposed section 43R(1) and (2) provides that a copy of a claim, award or any other document relating to proceedings before a tribunal or a court or of a document relevant to certain specified facts and certified by or on behalf of the registrar of a tribunal or the Registrar of the High Court or the Registrar of the Court of Final Appeal ("the registrar of a court") to be a true copy is admissible in evidence. The proposed section 43R(3), (4) and (5) provides that a certificate issued by or on behalf of the registrar of a tribunal or the registrar of a court as to payment into the tribunal or as to other specified facts is admissible as evidence of those facts.

9. Under the proposed section 43S, the consent of the Commissioner for Labour is required for instituting a prosecution for an offence under the proposed section 43P.

10. As the existing offence under section 31O(1A) of the Employment Ordinance will be subsumed under the offence under the proposed section 43P, clause 3 contains consequential amendments to that section 31O.