

**Subcommittee on Employees Retraining Ordinance
(Amendment of Schedule 3) Notice 2008**

**Administration's Response to Issues
Raised at the Meeting on 21 October 2008**

Purpose

This paper sets out the Administration's response to the following issues raised by Members at the first meeting of the Subcommittee on 21 October 2008 –

- (a) background on the judicial review case relating to the imposition of the Employees Retraining Levy (levy) on employers of foreign domestic helpers (FDHs);
- (b) financial condition and operation of the Employees Retraining Board (ERB);
- (c) “savings” achieved by employers of FDHs in advanced contract renewal cases; and
- (d) proposed Members' resolution to amend the Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008 (Amendment Notice).

Background on the judicial review case

2. It is the Government's established policy that employers hiring low-skilled imported labour should contribute towards the training and retraining of the local workforce. In line with this policy, the Employees Retraining Ordinance (Cap. 423) (ERO) was enacted in 1992 to provide for the imposition of the levy, the setting up of the Employees Retraining Fund (ERF) with the levy, and the use of the ERF to support the operation of the Employees Retraining Board (ERB) to enable it to carry out its statutory functions of providing training and retraining to local workers. Under the ERO, employers of imported labour under labour importation schemes designated under it (the schemes) have been required to pay the levy since the commencement of the Ordinance.

3. In February 2003, the Chief Executive-in-Council approved the recommendation of the report of the Task Force on Population Policy that, same as employers of imported labour under the schemes, employers of FDHs should also be required to pay the levy with effect from 1 October of that year.

4. In April 2003, nine FDHs and one employer of FDH lodged an application for judicial review (JR) against (a) the imposition of the levy on employers of FDHs (at \$400 per month for each FDH employed) under the ERO and (b) the reduction of the minimum allowable wage (MAW) for FDHs by \$400 from \$3,670 to \$3,270. Eventually, only five FDHs proceeded with the application. In view of the JR, the ERB was advised to withhold the use of the levy collected from FDH employers from October 2003.

5. The Court of First Instance (CFI) dismissed the application for JR in January 2005. In July 2006, the Court of Appeal upheld the decision of the CFI. The appellants indicated that they would appeal to the Court of Final Appeal (CFA). Some of them applied for legal aid, but their application was rejected by the Director of Legal Aid in late September 2006. The appellants had not applied for leave to appeal to the CFA by the end of October 2006 -- the deadline for seeking leave.

6. Taking into account the latest developments of the JR case, the Chief Executive-in-Council decided in October 2007 that, with effect from 1 December 2007, the ERB should be allowed to start to draw down the levy collected from FDH employers to support its operation and services. From 2008-09 onwards, the Government has ceased its recurrent subvention to the ERB which has since met its operating expenses from the levy. In the long run, levy collection is essential in ensuring steady and sufficient financial resources for the ERB to enhance the employability of local workforce so as to maintain Hong Kong's economic competitiveness. Indeed, in face of the financial tsunami and its adverse impact on local employment, the demand on ERB's service will increase substantially in the foreseeable future.

Financial condition and operation of the ERB

7. Since its establishment in 1992, the ERB has offered more than 1.3 million training places, benefiting over 620 000 trainees in total (i.e. a trainee attended about two ERB courses on average). With

the rapid development of our economy and technology and changes in manpower demands, the ERB has adjusted its service orientation with more focus on “sustainability” to provide forward-looking training or retraining services. Starting from July 2008, the ERB has rebranded its services under “Manpower Development Scheme”, striving to contribute further to the manpower development of Hong Kong.

8. In the past few years, with the levy collected from employers of FDHs being put on hold in view of the legal proceedings arising from the judicial review, the ERB’s major source of income was the Government’s recurrent subvention of about \$400 million per year. The annual expenditure of the ERB was also in the region of \$400 million. According to the statistics for the second quarter of 2008, among the unemployed population, 42 800 of them belong to the original target group of the ERB (i.e. aged 30 or above with education level at Secondary 3 or below). After the relaxation of eligibility criteria in December 2007 (to cover to those aged 15 and above, with education level at sub-degree level or below), the ERB’s clientele now comprises 107 200 unemployed and 2 569 500 employed people. To meet the increasing training demands from the original and new target groups, the ERB plans to offer over 120 000 training places in 2008-09 and the budget for the year is around \$900 million. This represents an increase of about 40% in the number of training places when compared with that in the previous year, and an increase of about 95% in terms of total training hours due to enhancement of course content.

9. The ERB attaches much importance to quality assurance. As a funding and co-ordinating body, the ERB partners with its approved training bodies (TBs) (currently 67 in total) in offering training courses at over 260 training centres throughout the territory. Performance of the TBs is measured in terms of the quality and delivery of service which is monitored by rigorous management audits, surprise inspections and independent surveys, and by key performance indicators. Over the past five years, the performance indicators of ERB courses have met and exceeded the benchmark level: placement rate 83% (against benchmark level of 70%), capacity utilization rate 94% (against benchmark level of 85%), attendance rate 93% (against benchmark level of 80%). The retention rate (as to whether trainees are still in employment nine months after completion of training) was over 60%.

10. The ERB has also been developing standardised skills assessments to ensure that the learning objectives of its courses are met

and that graduates have attained acceptable skill standards. Furthermore, the ERB is making efforts to strengthen its quality assurance mechanism to ensure the recognition of all its courses under the Qualifications Framework, so that trainees will be able to acquire credible qualifications for employment and progression. It will invite experienced practitioners of different industries to be Technical Advisors who will contribute expert advice on course design, training facilities, practical assessment standards and so forth. It will also assist the TBs in developing and improving their internal system for assuring the quality of training courses and arrange Teaching Advisors to conduct class visits to provide suggestions on improving teaching skills to the instructors.

“Savings” achieved by FDH employers in advanced contract renewal cases

11. FDH employers of pre-existing contracts (i.e. contracts with visa granted before 1 August 2008) are required to pay a monthly levy of \$400 as provided under the ERO in respect of the pre-existing contracts. They might have chosen to pay the levy in a lump sum for the standard contract period of 24 months (i.e. \$9,600) or by four equal instalments of \$2,400 each. For the latter group of employers who have chosen to pay by instalments, the amount of outstanding levy would be \$2,400, \$4,800 or \$7,200 per each pre-existing contract, depending on the number of instalment(s) outstanding.

12. Employers who opt for the advanced contract renewal arrangement have to honour the contractual obligations under the pre-existing contract and the new contract, and bear certain costs. Such costs include –

- (a) providing free passage to the FDH’s place of origin under the pre-existing contract, and free passage from the FDH’s place of origin to Hong Kong under the new contract, according to clause 7(a) of the standard employment contract for FDHs. It is, however, noteworthy that this is not a requirement specific to advanced contract renewal cases and is, in fact, equally applicable to contracts that have been completed in full, or prematurely terminated for other reasons;
- (b) paying the FDHs, under the new contractual term, the prevailing MAW of \$3,580 per month, effective since 10

July 2008, which is \$100 higher than the previous level. The amount of “additional” cost incurred by the concerned FHD employer would depend on the length of the remaining contract period of the pre-existing contract;

- (c) paying the FDHs a month’s or a proportionate portion of wage to fulfill the contractual obligation of giving one-month’s termination notice, where insufficient notice is given;
- (d) a fee of \$160 for applying for employment visa with the Immigration Department;
- (e) fees for notarisation of the new employment contract by the relevant consulates. The Consulate-General (CG) of the Philippines in Hong Kong charges \$297.5 per contract, whereas the CG of Indonesia charges \$320 per contract; and
- (f) agency fees in case of engagement of an employment agent (EA). The amount of fees varies among agents. It should be noted that engagement of an EA is not always required for contract renewal applications, depending on the requirements of the relevant CGs¹.

It is evident from the above that the amount of costs to be borne by individual employers, and thus the “savings” they may eventually enjoy, would vary depending on the individual circumstances of the employment relationship in question.

Proposed Members’ resolution to amend the Amendment Notice

13. The Amendment Notice aims to suspend, for a period of two years with effect from 1 August 2008, the obligation on employers of all imported labour, including FDHs, to pay the levy. As at 31 July 2008, there were about 252 200 FDHs and 1 330 other imported labour

¹ The CG of the Philippines in Hong Kong does not require FDH employers and employees to process their advanced renewal applications through EAs. For the CG of Indonesia in Hong Kong, where the pre-existing contract was signed through an EA, then the parties have to engage an EA to handle the advanced contract renewal; where the contract was not signed through an EA, the parties may proceed with the contract renewal on their own. Generally speaking, where the contract to be prematurely terminated is a renewed contract, the new contract might not need to be signed through EAs.

such as care workers and farm workers working in Hong Kong under the Supplementary Labour Scheme. Their employers will benefit from the levy suspension when they renew the contracts of the imported labour/FDHs at any time during the two-year suspension period. All new employment contracts with visas granted during the period will also be eligible for the levy suspension.

14. Notwithstanding this temporary levy suspension, the Government's overall policy, that the operating expenses of the ERB should be primarily met by the levy income and that employers hiring low-skilled imported labour should contribute towards the training and retraining of the local workforce, remains unchanged. As at 14 September 2008, the levy collected from employers of FDHs and the interest earned have accumulated to over \$4.9 billion in the ERF. The annual expenditure of the ERB is estimated to be about \$900 million in 2008-09 and is expected to further increase when the recommendations of the strategic review conducted by the ERB are fully implemented beyond 2008-09.

15. The Government's view is that any proposed Members' resolution to amend the Amendment Notice to extend the levy suspension period, whether definitely or indefinitely, would have charging effect within the meaning of Rule 31(1) of the Rules of the Procedures. The Administration will make representations to the President that any resolution to that effect should be ruled out of order.

Labour and Welfare Bureau
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