

For discussion on  
26 April 2010

## **Legislative Council Panel on Manpower**

### **Proposal to expand the scope of the Protection of Wages on Insolvency Fund to cover pay for untaken annual leave and statutory holidays under the Employment Ordinance**

#### **Purpose**

This paper seeks Members' views on a proposal to expand the scope of the Protection of Wages on Insolvency Fund (the Fund) to cover pay for untaken annual leave and statutory holidays under the Employment Ordinance (Cap. 57) (EO).

#### **Background**

2. The Fund, established under the Protection of Wages on Insolvency Ordinance (Cap. 380) (PWIO), provides timely relief in the form of ex gratia payment to employees of insolvent employers. It is administered by the Protection of Wages on Insolvency Fund Board (Fund Board) which consists of employer and employee representatives as well as public officers. The Labour Department (LD) is responsible for processing applications and the operation of the Fund. The Fund is mainly financed by an annual levy of \$450 on each business registration certificate.

3. With gradual improvement over the years, the maximum amount of ex gratia payment an employee can now receive from the Fund is \$278,500, comprising :-

- (a) wages of last four months' employment (including outstanding pay for annual leave and statutory holidays taken by the employee in the period) up to \$36,000;
- (b) one month's wages in lieu of notice up to \$22,500; and
- (c) severance payment up to \$50,000 plus 50% of the remainder of the entitlement.

4. The Labour and Welfare Bureau (LWB) submitted a proposal to extend the coverage of the Fund passed by the Fund Board and the Labour Advisory Board (LAB) to the Legislative Council Panel on Manpower (Panel) for scrutiny on 18 June 2009. The Fund Board and LAB proposed to expand the scope of the Fund to cover annual leave pay under the EO for annual leave accumulated and not yet taken by an employee, subject to the limit of his last year of employment with a maximum of seven to 14 days' annual leave pay as per the employee's length of service and the payment ceiling of \$10,500.

5. After deliberation, some Members considered that the proposal at paragraph 4 was inadequate and the Panel eventually passed a motion requesting LWB to further expand the scope of the Fund to cover pay for all untaken annual leave and statutory holidays while maintaining the payment ceiling of \$10,500.

#### **Comparison of Claims on Pay for Untaken Annual Leave and Statutory Holidays in the Third Quarter (Q3) of 2007 and Q3 2009**

6. The Fund Board held an in-depth discussion on the Panel's revised proposal at paragraph 5 at its meeting on 24 September 2009. It resolved that before considering any proposal to further extend the scope of the Fund, a detailed analysis of the applications received after the onset of the financial tsunami had to be conducted so that a thorough assessment of the financial impact of the proposal on the Fund could be made. At the Fund Board's request, LD studied the cases received by the Fund in Q3 2007 and Q3 2009 respectively to compare the employees' outstanding entitlements to annual leave and statutory holidays before and after the onset of the financial tsunami. The differences regarding the claims against ex-employers for untaken annual leave and statutory holiday pay from these two batches of applicants are as follows :-

- (a) In Q3 2007, the Fund received 232 cases which accounted for 24% of the total of 961 cases in 2007 and involved 1 078 applicants. Among them, 354 applicants claimed for untaken annual leave/statutory holiday pay at LD, Labour Tribunal or Minor Employment Claims Adjudication Board. This represented 32.8% of the total of 1 078 applicants during the quarter. Of these 354 applicants, 239 claimed for annual leave pay only and 22 claimed for statutory holiday pay only. The remaining 93 applicants claimed for both annual leave and statutory holiday pay.
- (b) As to Q3 2009, the Fund received 304 cases which accounted for 27% of the total of 1 138 cases in 2009 and involved 1 456 applicants. Among them, 441 applicants claimed for untaken annual leave/

statutory holiday pay, who represented 30.3% of the total of 1 456 applicants during the quarter. There was a rise of 24.6% in the number of applicants with relevant claims when compared with those in Q3 2007. Of these 441 applicants, 343 claimed for annual leave pay only and 10 claimed for statutory holiday pay only. The remaining 88 applicants claimed for both annual leave and statutory holiday pay.

### **Impact of Financial Tsunami on the Fund**

7. During the 12-month period under the attack of the financial tsunami (i.e. Q4 2008 to Q3 2009), the Fund received a total of 8 422 applications. There was a significant rise of 60% when compared with the figure (5 260) of the previous 12 months (i.e. Q4 2007 to Q3 2008). Meanwhile, the amount of ex gratia payment made by the Fund jumped by 75% from \$90.67 million during the period Q4 2007 to Q3 2008 to \$158.90 million in the corresponding period of 2008/09. In addition, in Q3 2008 (right before the onset of the financial tsunami), the average amount of payment made to each applicant was \$17,767. In comparison, the average payment in Q3 2009 was \$27,185, reflecting a rise of 53%.

8. In the wake of the financial tsunami, ex gratia payment made by the Fund remained at a high level throughout 2009 while the levy income recorded a drop at the same time. Consequently, the surplus of the Fund narrowed from \$403.95 million for the period Q4 2007 to Q3 2008 to \$276.8 million in the subsequent 12 months, representing a decline of 31%. The Fund Board was of the view that with the local economy still facing uncertainties on various fronts and some of the businesses barely surviving, coupled with the increased average payout per employee after the financial tsunami, the amount of claims received would still stay at a high level in the near future. Major annual statistics and financial position of the Fund in recent years are tabulated at **Annex** for Members' reference.

### **Legal Requirements on Leave and Records**

#### *Paid Annual Leave*

9. An employee is entitled to annual leave with pay after having been employed under a continuous contract<sup>1</sup> for 12 months. An employee shall take

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<sup>1</sup> An employee employed under a continuous contract is defined as one who has been employed under a contract of employment by the same employer for four weeks or more and has worked for 18 hours or more in each week.

the entitled annual leave with pay within the following leave year<sup>2</sup>. If an employee has been employed for a leave year and his employment contract is terminated, irrespective of the reasons of termination, he should be entitled to payment in lieu of any annual leave not yet taken. An employee with at least three but less than 12 months' employment in a leave year would be entitled to pro rata annual leave pay if his employment contract is terminated other than for the reason of summary dismissal due to his serious misconduct.

### *Statutory Holidays*

10. All employees are entitled to 12 statutory holidays in a year. If the employer requires the employee to work on a statutory holiday, the employer shall arrange an alternative holiday within 60 days before or after the statutory holiday. If both parties agree, any day within 30 days before or after the statutory or alternative holiday may be taken by the employee as a substituted holiday. Furthermore, an employee having been employed under a continuous contract for not less than three months immediately preceding a statutory holiday is entitled to the holiday pay.

### *Wage and Employment Record*

11. All employers must at all times keep a record setting out wages and employment history of each employee covering the period of his employment during the preceding 12 months. The record should include information on the commencement date of the employee's employment, wages, period of annual leave and holidays entitled and taken, together with details of payments made in respect of such periods, etc.

### **Guiding Principles in Improving the Coverage of the Fund**

12. During the meeting on 10 February 2010, the Fund Board reaffirmed that the following principles should be observed when deliberating on specific improvement proposals :-

- (a) The Fund should adopt a progressive approach in improving its coverage.
- (b) Similar to other items currently covered by the Fund, a payment ceiling should be set for annual leave/statutory holiday pay to ensure the sustainability of the Fund.

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<sup>2</sup> A leave year means any period of 12 months commencing on the day on which his employment commenced and an anniversary of such day.

- (c) The Fund should maintain its policy of discouraging employees from tolerating non-payment of statutory benefits by their employers on a prolonged basis, while encouraging employees to report malpractices promptly. This would compel employers to observe the legal requirements of payment on time on the one hand, and forestall misconducts such as abuse or conspiracy to defraud the Fund on the other. In the light of the above, a cap on the period and number of days of annual leave/ statutory holiday pay to be covered should also be set to avoid providing any incentive for employers to preclude employees from taking their annual leave/ statutory holidays entitled and to shift the obligation of granting annual leave/ statutory holiday pay to the Fund upon business closures.
- (d) Approval of the claims must be based on verifiable documents or information. If an applicant's claim for annual leave/ statutory holiday pay involves a longer period and he or his employer is unable to provide employment records<sup>3</sup> of the more distant past, the employee eventually cannot benefit from such protection involving a period in the distant past.

## **Proposal**

13. Following the above guiding principles, the Fund Board, after carefully considering the impact of the financial tsunami on the Fund and the relevant legal requirements, unanimously agreed that a prudent approach should be maintained. Regarding the proposal to expand the scope of the Fund, the Fund Board reached the following consensus :-

- (a) The scope of the Fund should be expanded to cover the following two types of leave/holiday pay subject to the payment ceiling of \$10,500 :-
  - (i) annual leave pay under the EO for annual leave accumulated and not yet taken by an employee, subject to the limit of his last year of employment with a maximum of seven to 14 days' pay as per an employee's length of employment (same as the proposal passed by both the Fund Board and LAB described in paragraph 4); and

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<sup>3</sup> Please refer to paragraph 11 for the provision requiring employers to keep employment records.

- (ii) holiday pay under the EO for statutory holidays not yet taken by an employee within four months prior to his last day of service (same as the extent of coverage in respect of the arrears of wages stated in paragraph 3(a)).
- (b) The Fund Board would review again the coverage of the Fund in the light of operational experience and the Fund's financial position after the relevant Bill has taken effect for 12 months.

### **Consultation with the Labour Advisory Board**

14. The LAB discussed at its meeting on 22 March 2010 the proposal to expand the scope of the Fund to cover pay for untaken annual leave and statutory holidays as set out in paragraph 13 above. Employer members took a prudent approach and considered that due regard had to be given to the long-term implication of expanding the scope of the Fund for its financial viability. On the other hand, an employee member considered it inadequate to include only the pay for statutory holidays not yet taken by an employee within his last four months of service but agreed that any further delay in legislation would not be in the interest of enhancing the protection for workers. Therefore, LAB members, notwithstanding their different views as outlined above, favoured, on balance, endorsing and implementing as soon as possible the recommendation of the Fund Board, including the proposal that a review of the coverage of the Fund be conducted one year after the Bill has taken effect.

### **Advice Sought**

15. Members are requested to advise on the proposal to expand the scope of the Fund to cover pay for untaken annual leave and statutory holidays under the EO as set out in paragraph 13 above.

Labour and Welfare Bureau  
Labour Department  
April 2010

**Table A : Major Annual Statistics of the Fund**

	<b>2007</b>	<b>2008</b>	<b>2009</b>
Applications received (number of employees)	4 836 (↓36%)	6 448 (↑33%)	7 260 (↑13%)
Cases received (number of employers)	961 (↓19%)	818 (↓15%)	1 138 (↑39%)
Amount of claims received	\$185m (↓42%)	\$409m (↑121%)	\$421m (↑3%)
Total ex gratia payment released	\$95.0m (↓34%)	\$96.3m (↑1%)	\$174m (↑81%)
Average ex gratia payment per approved application	\$19,334 (↓9%)	\$19,609 (↑1%)	\$25,933 (↑32%)
Business Registration Certificate levy	\$515m (↑6%)	\$456m (↓11%)	\$442m (↓3%)
Total accumulated surplus as at end of the year	\$1,119m	\$1,490m (↑33%)	\$1,749m (↑17%)

( ↑ ↓ % : Comparison with figures of the same period last year )

**Table B : Financial position of the Fund (according to financial year)**

	<b>2007-08</b> <b>(\$m)</b>	<b>2008-09</b> <b>(\$m)</b>	<b>2009-10</b> <b>(\$m)</b>
Income	559.5	471.3	467.1
Expenditure	103.0	153.7	177.6
Surplus/(Deficit)	456.5	317.6	289.5
Reserve (Accumulated Surplus)	1,228.6	1,546.1	1,835.7