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Panel on Manpower

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 26 April 2010**

**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 summarizes past discussions of the Panel on Manpower ("the Panel") on the Administration's proposal to expand the scope of the Protection of Wages on Insolvency Fund ("PWIF") to cover untaken annual leave pay under the Employment Ordinance.

Protection of Wages on Insolvency Fund

2. PWIF was set up in 1985 to provide timely relief in the form of ex gratia payment to employees of insolvent employers. Employees who are owed wages, wages in lieu of notice and severance payment by their insolvent employers may apply for ex gratia payment from PWIF.

3. PWIF is mainly financed by a levy at the rate of \$450 per annum on each Business Registration Certificate issued under the Business Registration Ordinance (Cap. 310). Other sources of income for PWIF include money recovered from the remaining assets of insolvent employers through subrogation as well as bank deposit returns. The Labour Department is responsible for processing the applications and the operation of PWIF. The Protection of Wages on Insolvency Fund Board ("the PWIF Board"), established under the Protection of Wages on Insolvency Ordinance (Cap. 380), has the statutory functions of administering PWIF and making recommendations to the Chief Executive with respect to the rate of levy.

Previous adjustments of the levy rate

4. When PWIF was set up in 1985, the levy rate was set at \$100. Since

then, the levy rate has been revised three times. The first revision took place in July 1991 when the levy rate was raised from \$100 to \$250.

5. In May 2002, the levy rate was further increased from \$250 to \$600 as the upsurge in claims for ex gratia payment after the Asian financial crisis had led to rapid depletion of PWIF. The PWIF Board reviewed the levy rate in February 2003 and February 2004 and considered that it should remain unchanged.

6. At its meeting on 15 November 2007, the Panel was consulted on the Administration's proposal to reduce the levy rate from \$600 to \$450. Members were informed that the PWIF Board had agreed unanimously that the levy rate should be reduced from the current level of \$600 per annum to \$450 per annum and the proposal was supported by the Labour Advisory Board. The levy reduction was implemented on 14 March 2008.

Scope of ex gratia payment from PWIF

7. When discussing the proposed reduction of the levy rate at the meeting of the Panel on 15 November 2007, some members asked whether the Administration would conduct a review on the scope of ex gratia payment so that employees of insolvent employers would be able to claim ex gratia payment for items such as maternity leave pay. The Administration responded that PWIF was set up to provide timely relief in the form of ex gratia payment to employees of insolvent employers instead of providing full compensation. The suggestion to broaden the scope of ex gratia payment from PWIF would require discussions by the PWIF Board and labour-management consensus.

8. Some members expressed dissatisfaction about the Administration's response and pointed out that it was employees' right to receive wages and severance payment in full from employers. They considered the Employment Ordinance (Cap. 57) ("EO") insufficient to give full protection to employees of insolvent employers. They also expressed regret that the Administration had attended to employers' request to reduce the levy rate but gave little attention to the request of the labour sector to provide more protection for employees.

9. The Administration responded that employers had to abide by EO which had stipulated clearly their statutory responsibilities. PWIF was financed by an annual levy on each Business Registration Certificate. PWIF was not set up to provide full compensation for employees of insolvent employers but to enable those who were owed wages, wages in lieu of notice and severance payment to apply for ex gratia payment from PWIF.

Proposal to expand the scope of the Protection of Wages on Insolvency Fund to cover untaken annual leave pay under the Employment Ordinance

10. At the Panel meeting on 18 June 2009, the Administration briefed members on the proposal to expand the scope of PWIF to cover untaken annual leave pay under EO. Members were informed that the PWIF Board proposed the extension of PWIF to cover annual leave pay under EO for annual leave accumulated and not yet taken by employees of insolvent cases, subject to a limit of one leave year with a maximum of seven to 14 days' annual leave pay as per an employee's length of employment and a payment ceiling of \$10,500 ("the proposal").

11. Some members expressed support for the proposal and urged the Administration to implement the proposal as soon as practicable so as to benefit employees earlier.

12. Some members requested the Administration to consider extending the scope of PWIF to cover contribution to the Mandatory Provident Fund on the part of the insolvent employer who had defaulted payment.

13. The Administration responded that arrears of wages of the last four months payable by PWIF already included the part of wages which had been deducted for employee's contribution but had not been paid to the MPF account. The PWIF Board was cautious of any proposals to extend the scope of PWIF in the wake of the financial tsunami. In this connection, it considered that the proposal had struck a balance between protecting the interests of employees on the one hand and ensuring prudent use of PWIF on the other.

14. Some members pointed out that many workers, apart from not taking their annual leave in the first year, also did not take their statutory holidays in the first year. When their companies became insolvent, their full amount of pay for holidays, including statutory holidays and annual leave in the first and second year, could be forfeited. As PWIF had an accumulated surplus of \$1.583 billion as at May 2009, the PWIF Board should consider allowing employees to receive payment at the ceiling of \$10,500 to cover the full amount of pay for statutory holidays and annual leave in arrears.

15. The Administration responded that the arrears of wages up to a maximum of \$36,000 of the last four months payable by PWIF already included the statutory holidays and annual leave pay owed to an employee for his leave taken in the period. The PWIF Board had reached a consensus on the proposal on the basis that the untaken annual leave pay would cover one leave year only. The Labour Department had studied the employees' claims on annual leave pay with reference to cases received by PWIF in the third quarter of 2007. Among the applicants with claims on annual leave pay, 86% claimed sums not exceeding \$10,500, 73% claimed not more than 14 days'

annual leave pay, and 61% claimed annual leave pay of not more than one leave year. On the basis of these findings, the proposal could meet the annual leave pay claims for the majority of the applicants of PWIF.

16. The Administration advised that law-abiding employers rarely withheld the entitlements of employees to take statutory holidays in a calendar year. Amongst all the claims for ex-gratia payment from PWIF, claims for annual leave pay was ranked fourth in terms of applications. Given that the issue was controversial, there had been a lengthy discussion among the PWIF Board before a consensus was reached.

17. Members were generally concerned whether the proposal could protect the interests of low-income workers. They considered that the proposal had imposed two restrictions, namely the limit of one leave year with a maximum of seven to 14 days' annual leave pay as per an employee's length of employment, and a payment ceiling of \$10,500 for annual leave pay. As workers were only allowed to take annual leave in arrears, a worker who had been employed for more than one year was bound to suffer financial loss under the proposal as he would not be able to claim the untaken annual leave in the first and second year in full. For low-income workers, it was unlikely that they could claim the maximum ceiling of \$10,500 for annual leave pay. In addition, a worker who was eligible to claim 14 days' paid annual leave would only be paid \$10,500, instead of \$11,250 which was half of the maximum of \$22,500 for one month's wages in lieu of notice payable by PWIF. Members suggested relaxing the proposal and not imposing a limit on the number of days of untaken annual leave while maintaining the payment ceiling for annual leave pay at \$10,500.

18. The Administration advised that the PWIF Board had been conscientious in working out a proposal to extend the scope of ex gratia payment from PWIF and its Chairman, in particular, had been actively persuading the employer members and employer associations to support the proposal. It should be noted that the PWIF Board stood by its decision which had been reached before the economic downturn triggered by the financial tsunami and the outbreak of swine influenza, notwithstanding that some quarters in the business community had mooted the idea of shelving the proposal in the light of the current economic environment. Having regard to members' views, the Administration would request the PWIF Secretariat to assess the financial implications of members' suggestion for the consideration of the PWIF Board.

19. Members passed a motion urging the Administration to amend the scope of PWIF to cover the full amount of pay for holidays, including statutory holidays and annual leave, in arrears while maintaining the ceiling at \$10,500.

Relevant papers

20. For further details of the discussions, members may wish to refer to the following documents -

- (a) Administration's paper on its proposal to expand the scope of PWIF to cover untaken annual leave pay under EO for the meeting of the Panel on Manpower on 18 June 2010 (LC Paper No. CB(2)1859/08-09(05)); and
- (b) minutes of meeting of the Panel on Manpower on 18 June 2009 (LC Paper No. CB(2)2381/08-09).

21. The above papers are also available on the website of the Legislative Council (<http://www.legco.gov.hk>).

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