

**Bills Committee on
Protection of Wages on Insolvency (Amendment) Bill 2011**

**Administration's Response to Issues Raised by Members
at the Bills Committee Meeting Held on 29 November 2011**

Purpose

This paper sets out the Administration's response to the issues raised by Members of the Bills Committee at its meeting on 29 November 2011 regarding the Protection of Wages on Insolvency (Amendment) Bill 2011 (the Bill).

How to assess additional payout arising from the expansion of the scope of the Protection of Wages on Insolvency Fund

2. In June 2009, the Administration submitted a proposal endorsed by the Protection of Wages on Insolvency Fund Board (the Fund Board) and the Labour Advisory Board (LAB) to the Legislative Council Panel on Manpower (Manpower Panel) to extend the scope of the Protection of Wages on Insolvency Fund (the Fund) to cover pay for untaken annual leave under the Employment Ordinance (EO) not exceeding the limit of an employee's entitlement in his last year of employment, subject to the payment ceiling of \$10,500. The Manpower Panel requested further extension to cover pay for all untaken annual leave and pay for untaken statutory holidays while maintaining the payment ceiling of \$10,500.

3. When deliberating on the above revised proposal at a meeting in February 2010, the Fund Board considered, among other factors, the possible financial impact on the Fund. The assessment was made by assuming that 30% (with reference to the survey on cases received by the Fund in the third quarter of 2009) of the high-time applications in 2002 at 23 023 would involve pay for untaken annual leave and/or untaken statutory holidays. Under the payment ceiling of \$10,500, the estimated additional payout from the Fund would be around \$73.2 million in a year. Based on the Fund's expenditure of \$513.8 million on ex gratia payment in the year, the additional payout represents an increase of 14%.

4. The Fund Board considered that when making proposals to extend the scope of the Fund, the financial impact aside, the long-standing guiding principles should also be observed. These include adopting a gradual and progressive approach in enhancing employee protection; setting payment ceiling similar to other payment items to ensure the sustainability of the Fund; and setting limits on the period with reference to the requirements under the EO to preclude employers from shifting their liability for defaulting statutory entitlements to the Fund. The Fund Board eventually reached a consensus on the present proposal under the Bill.

Outcome of Consultation on the motion passed by the Bills Committee

5. At the said Bills Committee meeting, some Members considered that as a payment ceiling of \$10,500 had already been laid down in the Bill, all limits on the period in respect of pay for untaken annual leave and for untaken statutory holidays should be removed. Other Members proposed that with the payment cap of \$10,500, the limit on the period in respect of pay for untaken annual leave should be relaxed to cover pay for untaken annual leave for the last two leave years payable upon termination of employment contract under the EO. One Member took the different view that any proposal should be made in line with the prudent management of the Fund.

6. Regarding the motion¹ passed by the Bills Committee at the meeting, the Labour Department consulted the Fund Board at its meeting on 12 December 2011. After thorough deliberation on the content of the motion and the various guiding principles of the Fund, the Fund Board considered that the pay for untaken annual leave payable to an employee upon termination of employment contract under the EO might be extended from not exceeding the employee's full statutory entitlement for the last leave year (ranging from seven to 14 days' pay depending on the employee's length of employment) to the last two leave years (ranging from 14 to 28 days' pay depending on the employee's length of employment). However, the coverage of pay for untaken statutory

¹ Content of the motion: That the Bills Committee on Protection of Wages on Insolvency (Amendment) Bill 2011 requests the Administration to amend the Bill so as to abolish the ceilings on the numbers of days for calculating the amounts of pay for untaken annual leave and the pay for untaken statutory holidays, and immediately consult the Protection of Wages on Insolvency Fund Board and the Labour Advisory Board in this regard, and report the outcome to this Committee before its next meeting.

holidays (i.e. pay for statutory holidays under the EO not yet taken by an employee within four months before his last day of service) should remain unchanged².

7. The Fund Board considered that the amendment proposal in paragraph 6 in response to the motion passed by the Bills Committee was made with due regard to the relevant requirements under EO so as to avoid the Fund from shouldering the liability arising from contravention committed by employers and sending the wrong message to society that such breaches were tolerable. As such, the Fund Board did not agree to totally abolish the ceiling on the numbers of days or period for pay for untaken annual leave and untaken statutory holidays under the Bill. Regarding pay for untaken annual leave, an employee may be entitled to such pay for over one leave year but not exceeding two leave years upon termination of employment contract under EO³. Having considered the above, the Fund Board came to the view that the limit on the period in respect of pay for untaken annual leave might be increased to two leave years so that some employees who were entitled to pay for untaken annual leave for more than one leave year could be fully granted ex gratia payment from the Fund to cover pay for untaken annual leave payable upon termination under the EO. However, as statutory holidays must be granted within 90 days under the EO and the four months' coverage had been set with reference to pay for taken statutory holidays within four months' wages currently covered by the Fund, the Fund Board considered that the relevant limit should be upheld.

8. At its meeting on 20 December 2011, LAB discussed the relevant issues and agreed with the views and the revised proposal of the Fund Board at paragraphs 6 and 7. LAB also considered that the Bill should be passed as early as possible for the employees' benefit.

² The proposal of the Fund Board in paragraph 6 was made in relation to the limits on the number of days on pay for untaken annual leave and pay for untaken statutory holidays under the motion on the premises that the payment ceiling of \$10,500 would remain unchanged.

³ Under section 41D of EO, pay for untaken annual leave to which an employee is entitled upon termination of his employment contract includes (1) pay for any annual leave which has not been taken by an employee who has been employed for a full year; and (2) pro rata annual leave pay that an employee is entitled upon termination of employment contract for a leave year in which the employee has at least three but less than 12 months' service.

9. After consulting and considering the views of the Fund Board and LAB, the Administration agrees that the limits on the number of days or period in respect of pay for untaken annual leave and pay for untaken statutory holidays should not be abolished.

Labour and Welfare Bureau
Labour Department
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