

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

**Explanatory Paper on the Committee Stage amendments  
Proposed by the Administration**

**Introduction**

This paper explains the Committee Stage amendments (CSAs) to the Protection of Wages on Insolvency (Amendment) Bill 2011 (the Bill) proposed by the Administration.

**Background information**

2. Over the past three meetings, the Bills Committee has scrutinised the objectives, functions and principles of the Bill and completed the clause-by-clause examination of the Bill. All in all, Members were in general support of the Bill, while most proposing, under the \$10,500 payment ceiling, to extend the limit on the period in respect of pay for untaken annual leave from the last one leave year to the last two leave years. At the same time, some Members proposed to remove all limits on the period in respect of pay for untaken annual leave and untaken statutory holidays<sup>1</sup>. Some other Members echoed the principle to gradually extend the scope of the Protection of Wages on Insolvency Fund (the Fund) and supported the proposal under the Bill.

3. Regarding the removal of all limits on the period in respect of pay for untaken annual leave and untaken statutory holidays<sup>2</sup>, the Administration reported the outcome of consulting the Protection of Wages on Insolvency Fund Board (the Fund Board) and the Labour Advisory Board (LAB) to the Bills Committee at the meeting on 9 January 2012. The Fund Board had given due regard to the relevant

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<sup>1</sup> At the same time maintaining the \$10,500 payment ceiling

<sup>2</sup> On 29 November 2011, the Bills Committee passed a relevant motion, the content being: 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.

requirements under the Employment Ordinance (EO) so as to avoid the Fund from shouldering the liability arising from contravention committed by employers and sending a wrong message to society that defaults in sums payable to employees were tolerable. As such, the Fund Board did not agree to the total abolition of the ceiling on the numbers of days or periods for calculating ex gratia payment for pay for untaken annual leave and untaken statutory holidays under the Bill. As statutory holidays must be granted within 90 days under the EO and the proposed four months' coverage had been set with reference to the four months' wages currently covered by the Fund, the relevant limit should be upheld. On the other hand, having actively considered that an employee might be entitled to pay for untaken annual leave for over one leave year but not exceeding two leave years upon termination of employment contract under the EO, the Fund Board came to the view that the limit of entitlement for one leave year on the period in respect of pay for untaken annual leave might be changed so that an employee may receive ex gratia payment in respect of untaken annual leave earned in a period not exceeding two leave years. That means 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. LAB also agreed with the Fund Board's view and the revised proposal.

4. At the meeting, the Bills Committee had no objection to the revised proposal of the Fund Board as stated in paragraph 3 and Members did not propose other amendments. On the basis of the above understanding, the Administration agreed to propose CSAs to give effect to the revised proposal of the Fund Board.

### **Proposed CSAs on extending the limit on period in respect of pay for untaken annual leave**

5. According to the existing section 16(2)(h)(i) of the Bill, pay for untaken annual leave covers the payment under section 41D of the EO for untaken annual leave to which an employee is entitled upon termination of his employment contract, including: (1) pay for any annual leave which has not yet been taken by an employee earned in the employee's last full leave year; and (2) in addition to (1), pro rata annual leave pay for the last leave year<sup>3</sup> in which the employee has at least 3 but less than

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<sup>3</sup> if the last leave year is not a full year

12 months' service that he is entitled to upon termination of his employment contract. According to the existing section 16(2)(h)(ii), the above amount is capped by the pay for the applicant's full number of days of annual leave to which the employee would have been entitled in respect of the last leave year under the EO, and the number of days of annual leave ranges from 7 to 14 days depending on his length of service<sup>4</sup>.

6. In the draft CSAs, the proposed section 16(2)(h)(ii) is revised by deleting the existing sub-paragraph (A) (i.e., the cap by the full number of annual leave days to which the employee would have been entitled in respect of the last leave year). Section 16(2)(h)(i) has stipulated that pay for untaken annual leave payable by the Fund must be the pay for untaken annual leave to which an employee is entitled upon termination of his employment contract under section 41D of the EO. As mentioned in paragraph 3 above, the payment should not exceed pay for annual leave accumulated but not yet taken by an employee for the last two leave years<sup>5</sup>. In the earlier Bills Committee meetings, we noted that when proposing to extend the limit on period in respect of pay for untaken annual leave, some Members also suggested to simplify the provisions.

7. The paper submitted by the Administration in November 2011 (LC Paper No. CB(2)387/11-12(01)) has stipulated that in most cases, employees would have their full entitlement under section 41D of the EO covered by the payment from the Fund under the proposed cap of the last leave year under the Bill. However, for some employees having more than a year's service, with at least 3 but less than 12 months' service in the last leave year, if they have not taken any or part of their paid annual leave accumulated in the previous complete leave year before termination, their entitlements may exceed the cap of the full number of days in respect of the last leave year. Subsequent to the proposed amendments of the CSAs, the Fund could grant ex gratia payment in full to such employees, thus providing coverage to all employees' pay for untaken

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<sup>4</sup> Under section 41AA of the EO, an employee is entitled to annual leave with pay after having been employed by the same employer under a continuous contract for 12 months. An employee's entitlement to annual leave with pay increases progressively from 7 days (for the first and second year of service) to a maximum of 14 days (from the ninth year of service onwards) according to his length of service.

<sup>5</sup> Under section 41AA of the EO, an employee is entitled to a maximum of 14 days of annual leave for one leave year. For two leave years, the maximum number of annual leave is 28 days.

annual leaves entitled under section 41D of the EO. Examples to illustrate the calculation of pay for untaken annual leave under the CSAs are provided at Annex 1.

### **Proposed CSAs on technical refinements to the Bill**

8. The Administration also proposes CSAs to make technical refinements to the proposed section 16(2)(g)(i) which stipulates the 4-month limit on untaken statutory holidays as well as sections 16(2)(g)(iv) and 16(2)(h)(iii) which stipulate a 6-month limit on making applications in respect of pay for untaken statutory holidays and untaken annual leave for better alignment with the existing relevant provisions on payment items being covered under the Protection of Wages on Insolvency Ordinance<sup>6</sup>.

9. The draft CSAs are at Annex 2. Members are invited to note and consider the proposed CSAs to be moved by the Administration.

Labour and Welfare Bureau  
Labour Department  
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<sup>6</sup> Under the Protection of Wages on Insolvency Ordinance, the Commissioner for Labour shall not make any payment in respect of wages under section 16(2)(d)(i) “for services rendered more than 4 months prior to an applicant’s last day of service” and under section 16(2)(d)(ii) “for which an application is made to the Fund more than 6 months after the applicant’s last day of service”.

**Protection of Wages on Insolvency (Amendment) Bill 2011**  
**Proposed Committee Stage Amendments (CSAs)**  
**Examples to illustrate Calculation of Pay for Untaken Annual Leave**

**Cases with full payment from the Fund both under the Bill and the proposed CSAs**

Example (1) (An employee having less than one year's service):

The employee's employment commenced on 1 July 2009 and was terminated on 31 March 2010.

- According to section 41D of the EO, the number of annual leave days to which he was entitled is 5.25 days (7 days x 274 / 365).
- Ex gratia payment payable to the applicant: 5.25 days of pay for untaken annual leave

Example (2) (An employee having more than one year's service, with less than 3 months' service in the last leave year):

The employee's employment commenced on 1 February 2009 and was terminated on 31 March 2010. Assuming that he has not taken any annual leave during his employment:

- According to section 41D of the EO, the number of days of annual leave which he has accumulated is:
  - For the first leave year (1 February 2009 to 31 January 2010): 7 days
  - 1 February 2010 to 31 March 2010: 0 days (as the employee has been employed for less than 3 months in this leave year)
- Ex gratia payment payable to the applicant: 7 days of untaken annual leave pay

Example (3) (An employee having more than one year's service, with at least 3 months to less than 12 months' service in the last leave year; and having fully taken his paid annual leave accumulated in the previous complete leave year, or partially taken his paid annual leave of that leave year while the outstanding accumulated untaken annual leave not exceeding the full number of days of annual leave entitled for the last leave year):

The employee's employment commenced on 1 December 2005 and was terminated on 31 March 2010. Assuming that he has taken 3 days' annual leave accumulated in the previous complete leave year:

- According to section 41D of the EO, the number of days of annual leave he has accumulated and not yet taken is:
  - For the fourth leave year (1 December 2008 to 30 November 2009): 6 days (9 days – 3 days)
  - 1 December 2009 to 31 March 2010: 3.32 days (10 days x 121 / 365)
  - Total number of days is 9.32.
- Ex gratia payment payable to the applicant: 9.32 days of untaken annual leave pay

### **Cases with full payment from the Fund upon amendment under the proposed CSAs**

Example (4) (An employee having more than one year's service, with at least 3 months to less than 12 months' service in the last leave year; and having partially taken his paid annual leave accumulated in the previous complete leave year while the outstanding accumulated untaken annual leave exceeding the full number of days of annual leave entitled for the last leave year):

The employee's employment commenced on 1 December 2005 and was terminated on 31 March 2010. Assuming that he has taken 1 day's annual leave accumulated in the previous complete leave year:

- According to section 41D of the EO, the number of days of annual leave he has accumulated and not yet taken is:
  - For the fourth leave year (1 December 2008 to 30 November 2009): 8 days (9 days – 1 day)
  - 1 December 2009 to 31 March 2010: 3.32 days (10 days x 121 / 365)
  - Total number of days is 11.32.
  
- Ex gratia payment payable to the applicant :
  - Under the Bill: 10 days of untaken annual leave pay
  - Under the proposed CSAs: 11.32 days of untaken annual leave pay

Example (5) (An employee having more than one year's service, with at least 3 months to less than 12 months' service in the last leave year; and not yet taken any paid annual leave accumulated in the previous complete leave year):

The employee's employment commenced on 1 May 2000 and was terminated on 31 March 2010. Assuming that he has not taken any annual leave accumulated in the previous complete leave year:

- According to section 41D of the EO, the number of days of annual leave he has accumulated and not yet taken is:
  - For the ninth leave year (1 May 2008 to 30 April 2009): 14 days
  - 1 May 2009 to 31 March 2010: 12.85 days (14 days x 335/ 365)
  - Total number of days is 26.85
  
- Ex gratia payment payable to the applicant :
  - Under the Bill: 14 days of untaken annual leave pay
  - Under the proposed CSAs: 26.85 days of untaken annual leave pay

Protection of Wages on Insolvency (Amendment) Bill 2011

**COMMITTEE STAGE**

Amendments to be moved by the Secretary for Labour and Welfare

<u>Clause</u>	<u>Amendment Proposed</u>
5(4)	In the proposed section 16(2)(g) (a) in subparagraph (i), by deleting “within the 4-month period immediately” and substituting “not more than 4 months”; (b) in subparagraph (iv), by deleting “within” and substituting “not more than”.
5(4)	In the proposed section 16(2)(h)- (a) by deleting subparagraph (ii) and substituting – “(ii) subject to paragraph (i), the payment is of an amount not exceeding \$10,500; and”; (b) in subparagraph (iii), by deleting “within” and substituting “not more than”..
5(5)	In the proposed section 16(3A), by deleting “(h)(ii)(B)” and substituting “(h)(ii)”.