

立法會
Legislative Council

LC Paper No. CB(2)129/11-12(03)

Ref : CB2/BC/10/10

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

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper summarizes past discussions of the Panel on Manpower ("the Panel") on the Administration's proposal to extend the scope of the Protection of Wages on Insolvency Fund ("PWIF") to cover pay for annual leave and statutory holidays accrued but not yet taken by employees in insolvency cases.

Background

2. PWIF, set up in 1985 under the Protection of Wages on Insolvency Ordinance (Cap. 380), 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 ("the 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 PWIF.

3. PWIF is mainly financed by an annual levy currently at the rate of \$450 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.

Financial position and coverage of PWIF

4. Amidst the financial turmoil bringing soaring applications, PWIF

recorded a recurrent deficit for seven consecutive years from 1997-1998 to 2003-2004. In 2002 alone, PWIF received an all-time high number of applications of 23 023. The accumulated surplus of PWIF rapidly depleted in just a few years. In November 2002, a stand-by loan of \$695 million was provided by the Government to PWIF.

5. During late 2008 to early 2009, Hong Kong experienced a difficult time in the wake of the global financial tsunami. In 2009, under the impact of the global financial tsunami which resulted in the increase in business cessation, the number of PWIF applications received by LD increased by 13% over 2008 from 6 448 to 7 260. The amount of ex gratia payment made from PWIF in 2009 increased sharply by 81% over 2008 to \$174.2 million. With the economy regaining its momentum and recovering continuously afterwards, the number of PWIF applications accorded with the falling trend of labour disputes and claims in recent years. In 2010, while the number of applications received by LD stood at 4 453, representing a decrease of 39% when compared with 2009, the payment from PWIF also dropped by 43% to \$99.3 million. As at the end of 2010, the accumulated surplus of PWIF was \$2,152.7 million.

6. With gradual improvement to PWIF's coverage over the years, the maximum amount of ex gratia payment which an employee can receive from PWIF has increased from \$8,000, covering only wages, in 1985 to the current level of \$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 under the Employment Ordinance (Cap. 57) ("EO").

Proposal to extend the scope of PWIF and relevant discussions of the Panel

The initial proposal

7. There were requests from the labour sector to expand the scope of PWIF to cover pay for untaken annual leave and untaken statutory holidays under EO. At its meeting of April 2008, the Fund Board agreed to the proposal of extending the scope of PWIF to cover annual leave pay under EO for annual leave accumulated and not yet taken by an employee of insolvent cases, not

exceeding the employee's full statutory entitlement in the last leave year (ranging from seven to 14 days' pay depending on an employee's length of employment) and a payment ceiling of \$10,500. The proposal was endorsed by the Labour Advisory Board at its meeting of May 2009.

8. When briefed on the Administration's proposal at the Panel meeting on 18 June 2009, 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. Some other members requested the Administration to consider extending the scope of PWIF to cover contribution to the Mandatory Provident Fund ("MPF") on the part of the insolvent employer who had defaulted payment.

9. According to the Administration, 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 Fund Board was cautious of any proposals to extend the scope of PWIF in the wake of the financial tsunami. It considered that the proposal had struck a balance between protecting the interests of employees on the one hand and ensuring a prudent use of PWIF on the other.

10. Concerns were raised over workers' untaken annual leave and statutory holidays in their first year of employment. There were concerns 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, would be forfeited. As PWIF had an accumulated surplus of \$1.583 billion as at May 2009, there was a suggestion that the Fund 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.

11. According to the Administration, 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 Fund Board had reached a consensus on the proposal on the basis that the untaken annual leave pay would cover one leave year only. LD 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 PWIF applicants.

12. Members were informed 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 by the Fund Board before a consensus was reached.

13. Concern was raised as to whether the proposal could protect the interests of low-income workers. Members generally 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 years 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. There was a suggestion that a limit should be imposed on the number of days of untaken annual leave and the payment ceiling for annual leave pay should be maintained at \$10,500.

14. According to the Administration, the Fund 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. The Fund 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 prevailing economic environment.

15. The Panel passed a motion at the meeting on 18 June 2009 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.

The revised proposal

16. The Administration subsequently assessed the financial implications of members' suggestion and consulted the Fund Board again on the Panel's proposal in February 2010. The Fund Board reached a consensus that the

scope of PWIF should be expanded to cover the following two types of leave/holiday pay subject to the payment ceiling of \$10,500 -

- (a) annual leave pay under 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; and
- (b) holiday pay under EO for statutory holidays not yet taken by an employee within four months prior to his last day of service.

17. The Administration briefed members on the Fund Board's revised proposal at the Panel meeting on 26 April 2010. Some members remained of the view that the revised proposal was inadequate to protect employees. They pointed out that at the request of employers and for the purpose of keeping their jobs, many employees had agreed to defer taking their entitled annual leave and statutory holidays. It would be unfair if they could not claim their entitlements in full when their companies became insolvent. In these members' views, an employee should be entitled to claim all untaken annual leave and statutory holiday pay in full, given that the claim would be capped at \$10,500 and PWIF had a large accumulated reserve of \$1.749 billion at the end of 2009.

18. According to the Administration, members' proposal might result in all claims awarded with the maximum amount of \$10,500, which was not the intent of the Fund Board's revised proposal. In addition, an increasing number of PWIF applications were received in recent years from white collar employees, resulting in higher ex gratia payments made. For instance, the average amount of ex gratia payment in 2008 was \$19,600 per case, and the amount was increased by around 30% to \$25,900 per case in 2009. The Fund Board therefore considered that a prudent approach should be adopted in considering improvements to the coverage of PWIF.

19. Members were informed that employers were required at all times to keep a record setting out wages and employment history of each employee covering the period of his employment during the preceding 12 months only. When an employer became insolvent, it would be difficult to verify claims of annual leave accumulated by an employee before his last year of service. As regards statutory holidays, it was required by law that if an employer required an employee to work on a statutory holiday, the employer should arrange an alternative holiday within 60 days before or after the statutory holiday. If both parties agreed, any day within 30 days before or after the statutory or alternative holiday might be taken by the employee as a substituted holiday. An employer who did not arrange an alternative or a substituted holiday for an employee within three months after the statutory holiday would have had breached the law.

The Administration stressed that should an employer preclude employees from taking their annual leave or statutory holidays entitled, employees should report the case to LD. The obligation of granting annual leave and statutory holiday pay should not be shifted to PWIF upon business closure.

20. Members noted that the Fund Board had undertaken to review again the coverage of PWIF in the light of operational experience and PWIF's financial position after the revised proposal was put in place for one year. Given that any further delay in the implementation of the legislation would not be in the interest of enhancing the protection for workers, members in general supported the Fund Board's revised proposal.

Relevant papers

21. A list of the relevant papers available on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
24 October 2011

**Relevant papers on
proposed amendments to the
Protection of Wages on Insolvency Ordinance**

Committee	Date of meeting	Paper
Panel on Manpower	18.6.2009 (Item III)	<u>Agenda</u> <u>Minutes</u>
Panel on Manpower	26.4.2010 (Item IV)	<u>Agenda</u> <u>Minutes</u>
Panel on Manpower	20.1.2011 (Item III)	<u>Agenda</u> <u>Minutes</u>

Council Business Division 2
Legislative Council Secretariat
24 October 2011