

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

**Administration's Response to Issues Raised
at the Bills Committee Meeting Held on 25 October 2011**

Purpose

This paper sets out the Administration's response to the issues raised by Members of the Bills Committee at its meeting on 25 October 2011 regarding the Protection of Wages on Insolvency (Amendment) Bill 2011 (the Bill).

Limit of period covered by the proposed pay for untaken annual leave

2. At the meeting, some Members requested the Administration to consider expanding the proposal to cover pay for all untaken annual leave while maintaining the ceiling of \$10,500 to increase employee protection. At the same time, some Members supported the proposed cap at the employee's annual leave entitlement in the last leave year and considered that the early passage of the proposal would be in the affected employees' best interest. As some Members expressed concern about the calculation of the number of days of untaken annual leave for payment under the proposal, the Administration also provides the following elaboration.

3. According to the proposed section 16(2)(h), pay for untaken annual leave covers the payment under section 41D of the Employment Ordinance (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 who has been employed for a full year ; and (2) pro rata annual leave pay for a leave year in which the employee has at least 3 but less than 12 months' service (an employee is entitled to that pro rata annual leave pay on termination of his employment contract). The amount of pay must not exceed 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 service¹.

4. Upon termination of an employment contract, cases with regard to the pay for annual leave accumulated but not yet taken by an employee under section 41D of the EO include: (1) the employee has a year's service or less; (2) the employee has more than a year's service, with less than 3 months' service in the last leave year; (3) the employee has more than a year's service, with at least 3 but less than 12 months' service in the last leave year, and has taken part or all of his paid annual leave accumulated in the previous complete leave year² before termination of his contract; and (4) the employee has more than a year's service, with at least 3 but less than 12 months' service in the last leave year, and has not taken any paid annual leave accumulated in the previous complete leave year before termination of his contract.

5. In situations (1), (2) and some of the cases of (3) mentioned in paragraph 4 above, the employees would have their full entitlement covered by the ex gratia payment from the Protection of Wages on Insolvency Fund (the Fund) under the proposed pay for untaken annual leave, as capped by the full number of annual leave days to which the employee would have been entitled in respect of the last leave year (ranging from 7 to 14 days). At the request of the Protection of Wages on Insolvency Fund Board (the Fund Board), the Labour Department (LD) has conducted a study on the applications received by the Fund in Q3 2009 for considering a proposal to expand the scope of the Fund to cover pay for untaken annual leave and pay for untaken statutory holidays. According to the findings of the study, the above cases accounted for 75% of the applicants claiming for pay for untaken annual leave. The remaining applicants could receive ex gratia payment up to 80% and not less than 50% of their annual leave entitlement. Some examples to illustrate the calculation of annual leave pay are provided at Annex.

6. The obligation to pay employee compensation rests with employers. The Fund aims to provide timely relief to employees of insolvent employers in the form of ex gratia payment. According to paragraph 5, the proposal under the Bill can cover pay for all untaken

¹ 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 every 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.

² Under section 41AA of the EO, annual leave with pay should be granted for an unbroken period. If the employee so requests, it may be granted in the following manner: (a) for leave entitlement not exceeding 10 days, up to 3 days can be granted separately and the balance should be granted consecutively; (b) for leave entitlement exceeding 10 days, at least 7 days should be granted consecutively and the balance can be granted separately.

annual leave for most applicants.

7. When the Administration submitted the proposal to expand the scope of the Fund to cover pay for untaken annual leave to the Legislative Council Panel on Manpower in June 2009, a member raised a similar request as in paragraph 2 to extend from the employee's annual leave entitlement of the last leave year to all untaken annual leave, subject to the ceiling of \$10,500. In 2010, the Fund Board and LD came to the view that the relevant limitation to untaken annual leave should be maintained having regard to various factors, which included (1) a progressive approach should be adopted in improving the coverage of the Fund, especially in respect of a new item; (2) as with other items currently covered by the Fund, a payment ceiling should be set to ensure the sustainability of the Fund; and (3) should avoid the shifting of the liability for prolonged default of pay for untaken annual leave from employers to the Fund. The Fund Board also agreed to conduct a review one year after the implementation of the Bill based on the actual experience of operation and the financial position of the Fund. With the support of the Labour Advisory Board and endorsement by the Legislative Council Panel on Manpower, the Administration has taken forward the legislative amendments as presently proposed.

Supplementary data from the study on applications under the Protection of Wages on Insolvency Fund in the third quarter (Q3) of 2009

8. Among the 1 456 applications received by LD in Q3 2009 for the Fund, 441 applicants (30%) had lodged claims at LD, the Labour Tribunal or the Minor Employment Claims Adjudication Board to recover pay for untaken annual leave and pay for untaken statutory holidays. The total amount of these claims was \$3.05 million, with 374 applicants (85%) claiming sums not exceeding \$10,500 (i.e. the payment ceiling proposed by the Bill). As regards the remaining 67 applicants (15%), their claims for pay for untaken annual leave and pay for untaken statutory holidays amounted to \$1.83 million. Such claims included pay for annual leave and statutory holidays that were not granted, in contravention of the EO, and pay for annual leave in excess of that stipulated in the EO. These claims accounted for 60% of the total amount claimed and the expenditure of ex gratia payments would have increased by 59%³, if the payment ceiling of \$10,500 were not set.

³ With a payment ceiling of \$10,500, the expenditure of ex gratia payments would be \$1.92 million. Without a payment ceiling, an additional expenditure of \$1.13 million (\$3.05 million - \$1.92 million) would be required, representing an increase of 59% ($\$1.13 \text{ million} \div \1.92 million).

Time limit for making an application in respect of pay for untaken annual leave and pay for untaken statutory holidays (proposed sections 16(2)(h)(iii) and 16(2)(g)(iv))

9. At present, applications for payment in respect of outstanding wages, wages in lieu of notice and severance payment covered by the Fund must be made within the time limit of 6 months⁴. This is to ensure that employees will file their applications within a reasonable time, otherwise it will be difficult to verify the employee's entitlement. Detailed provisions for individual items are worked out with regard to their respective nature and the relevant requirements under the EO and the Protection of Wages on Insolvency Ordinance (PWIO). Similarly, appropriate provisions on time limit are made as required for the proposed pay for untaken annual leave and pay for untaken statutory holidays under the Bill.

10. Regarding the proposed pay for untaken annual leave, the sum in respect of which an ex gratia payment can be made from the Fund must be one prescribed by section 41D of the EO, which stipulates that it is due upon termination of the employment contract. Therefore, the time limit for application in respect of the pay for untaken annual leave proposed in section 16(2)(h)(iii)⁵ is 6 months after it became due, which follows closely the requirement of section 41D of the EO that the amount is due upon termination of the employment contract. Such arrangement is also in line with the provision on the wages in lieu of notice currently covered by the Fund, as both are due upon termination of the contract.

11. As for the proposed pay for untaken statutory holidays, it covers the statutory holidays falling within the 4-month period immediately prior to the applicant's last day of service, which the applicant is entitled to but has not yet taken. Therefore, the time limit for application specified in the proposed section 16(2)(g)(iv)⁶ is 6 months after the applicant's last day of service. This arrangement is also in line with the provision on the arrears of wages currently covered by the Fund, as employee's

⁴ Under sections 16(2)(d)(ii), (e)(ii) and (f)(ii) of the Protection of Wages on Insolvency Ordinance (PWIO), the Commissioner for Labour shall not make any payment in respect of (a) wages for which an application is made more than 6 months after the applicant's last day of service; (b) wages in lieu of notice which became due more than 6 months prior to the date of application; and (c) a severance payment of which the liability for payment arose more than 6 months prior to the date of application.

⁵ The proposed section 16(2)(h)(iii) requires: the application for payment must be made within 6 months after the pay for untaken annual leave became due.

⁶ The proposed section 16(2)(g)(iv) provides that the application for payment must be made within 6 months after the applicant's last day of service.

entitlement is covered in each case if it arises during the 4 months before the applicant's last day of service.

12. As indicated above, the proposed sections 16(2)(h)(iii) and 16(2)(g)(iv) are drafted with reference to the relevant provisions of the PWIO and the EO to ensure consistency.

Labour and Welfare Bureau/Labour Department
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Protection of Wages on Insolvency (Amendment) Bill 2011
Examples to illustrate Calculation of Pay for Untaken Annual Leave

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).
- The ceiling as proposed under the Bill (the full number of annual leave days to which he would be entitled for the last leave year according to the EO) is 7 days.
- Ex gratia payment payable to the applicant : 5.25 days of pay for untaken annual leave (**i.e. full entitlement of annual leave pay according to section 41D of the EO**).

Example (2) (An employee having more than 1 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 and not yet taken 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)
- The ceiling as proposed under the Bill (the full number of annual leave days to which he would be entitled for the last leave year according to the EO) is 7 days.
- Ex gratia payment payable to the applicant : 7 days of pay for untaken annual leave (**i.e. full entitlement of annual leave pay according to section 41D of the EO**).

Example (3) (An employee having more than 1 year's service, with at least 3 months but less than 12 months' service in the last leave year; and having partially or fully taken his paid annual leave accumulated in the previous complete 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 before termination of employment:

- According to section 41D of the EO, the number of days of annual leave which 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.
- The ceiling as proposed under the Bill (the full number of annual leave days to which he would be entitled for the last leave year according to the EO) is 10 days.
- Ex gratia payment payable to the applicant : 9.32 days of pay for untaken annual leave (**i.e. full entitlement of annual leave pay according to section 41D of the EO**)

Example (4) (An employee having more than 1 year's service, with at least 3 months but 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 December 2005 and was terminated on 31 March 2010. Assuming that he has not taken any of the annual leave that is earned during his last two leave years:

- According to section 41D of the EO, the number of days of annual leave which he has accumulated and not yet taken is:
 - For the fourth leave year (1 December 2008 to 30 November 2009): 9 days
 - 1 December 2009 to 31 March 2010: 3.32 days (10 days x 121 / 365)
 - Total number of days is 12.32.
- The ceiling as proposed under the Bill (the full number of annual leave days to which he would be entitled for the last leave year according to the EO) is 10 days.
- Ex gratia payment payable to the applicant: 10 days of pay for untaken annual leave (i.e. 81% of annual leave pay to which he was entitled under section 41D of the EO).