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

Contents

Clause Page

Part 1

Preliminary

1. Short title and commencement C3715

Part 2

Amendments to Protection of Wages on Insolvency Ordinance

2. Protection of Wages on Insolvency Ordinance amended C3717

3. Section 2 amended (Interpretation) C3717

4. Section 15 amended (Entitlement to apply for ex gratia
payment) C3719

5. Section 16 amended (Payment) C3721

6. Section 23 amended (Proof by certificate) C3727

7. Section 24 amended (Subrogation) C3727

Part 3

Consequential and Related Amendments

Division 1

Enactments Amended

8. Enactments amended C3729

Clause	Page
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Division 2

Amendments to Bankruptcy Ordinance (Cap. 6)

9.	Section 38 amended (Priority of debts) C3729
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Division 3

Amendments to Companies Ordinance (Cap. 32)

10.	Section 178 amended (Definition of inability to pay debts).... C3731
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11.	Section 265 amended (Preferential payments)..... C3733
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Part 1

Clause 1

A BILL

To

Amend the Protection of Wages on Insolvency Ordinance to provide for payment, not exceeding a specified amount, in respect of untaken statutory holidays falling within a specified period and in respect of untaken annual leave not exceeding the employee's full annual leave entitlement under the Employment Ordinance for a specified period, and to make consequential and related amendments to the Bankruptcy Ordinance and the Companies Ordinance.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Protection of Wages on Insolvency (Amendment) Ordinance 2011.
 - (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.
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Part 2

Amendments to Protection of Wages on Insolvency Ordinance

2. Protection of Wages on Insolvency Ordinance amended

The Protection of Wages on Insolvency Ordinance (Cap. 380) is amended as set out in sections 3 to 7.

3. Section 2 amended (Interpretation)

(1) Section 2, definition of *applicant*—

Repeal

“(ca) or (cc)” (wherever appearing)

Substitute

“(ca), (cc) or (cd)”.

(2) Section 2—

Add in alphabetical order

“*pay for untaken annual leave* (未放年假薪酬) means any pay for untaken annual leave in respect of which an applicant—

(a) would, on the winding up of a company, be entitled to priority under section 265(1)(cd) of the Companies Ordinance (Cap. 32); or

(b) would, on a bankruptcy, be entitled to priority under section 38(1)(cd) of the Bankruptcy Ordinance (Cap. 6);

pay for untaken statutory holidays (未放法定假日薪酬) means any pay for untaken statutory holidays in respect of which an applicant—

Part 2
Clause 4

- (a) would, on the winding up of a company, be entitled to priority under section 265(1)(cd) of the Companies Ordinance (Cap. 32); or
- (b) would, on a bankruptcy, be entitled to priority under section 38(1)(cd) of the Bankruptcy Ordinance (Cap. 6);”.

4. Section 15 amended (Entitlement to apply for ex gratia payment)

- (1) Section 15(1)(b)—

Repeal

“or”.

- (2) Section 15(1)(c)—

Repeal

“due,”

Substitute

“due;”.

- (3) After section 15(1)(c)—

Add

“(d) pay for untaken statutory holidays is due and unpaid;
or

(e) pay for untaken annual leave is due and unpaid,”.

- (4) Section 15(1)—

Repeal

“notice or the severance payment,”

Substitute

“notice, the severance payment, the pay for untaken statutory holidays or the pay for untaken annual leave,”.

- (5) After section 15(5)—

Part 2
Clause 5

Add

“(6) An applicant may not apply for payment from the Fund in respect of any pay for untaken statutory holidays or pay for untaken annual leave that arises out of a contract of employment terminated before the date of commencement of the Protection of Wages on Insolvency (Amendment) Ordinance 2011 (of 2011).”.

5. Section 16 amended (Payment)

(1) Section 16(1)—

Repeal

“notice or severance payment,” (wherever appearing)

Substitute

“notice, severance payment, pay for untaken statutory holidays or pay for untaken annual leave,”.

(2) Section 16(2)(e)(ii)—

Repeal

“or”.

(3) Section 16(2)(f)(ii)—

Repeal the full stop

Substitute a semicolon.

(4) After section 16(2)(f)—

Add

“(g) in respect of pay for untaken statutory holidays unless—

- (i) the statutory holidays concerned fell within the 4-month period immediately before the applicant’s last day of service (whether or not any of those holidays was, by virtue of section 39(2), (2A), (3)

Part 2
Clause 5

- or (4) of the Employment Ordinance (Cap. 57), to be taken after the applicant's last day of service as an alternative holiday, a substituted holiday or a holiday under section 39(4) of that Ordinance);
- (ii) the statutory holidays concerned are those in respect of which holiday pay would have been payable to the applicant under section 40 of the Employment Ordinance (Cap. 57) had the applicant taken the holidays;
 - (iii) subject to paragraph (i), the payment is of an amount not exceeding the lesser of the following—
 - (A) the amount of the pay for untaken statutory holidays, as calculated at the daily rate of holiday pay specified in section 41 of the Employment Ordinance (Cap. 57);
 - (B) \$10,500; and
 - (iv) an application for the payment is made within 6 months after the applicant's last day of service;
- (h) in respect of pay for untaken annual leave unless—
- (i) the pay for untaken annual leave is payable under section 41D of the Employment Ordinance (Cap. 57), being payable on account of the applicant's employment in—
 - (A) his or her last leave year; and
 - (B) if the applicant's contract of employment terminates, or is terminated, otherwise than on the expiration of that last leave year, the leave year immediately preceding that last leave year;

Part 2
Clause 5

(ii) subject to paragraph (i), the payment is of an amount not exceeding the lesser of the following—

(A) the amount of the annual leave pay for the full number of days of annual leave to which the applicant would have been entitled in respect of the applicant's last leave year, as calculated in accordance with section 41AA of the Employment Ordinance (Cap. 57), had the applicant's employment continued until the applicant became entitled to be allowed the annual leave and had that pay been calculated in accordance with section 41C of that Ordinance;

(B) \$10,500; and

(iii) an application for the payment is made within 6 months after the pay for untaken annual leave became due; or

(i) of an amount exceeding in total \$10,500 in respect of both pay for untaken statutory holidays and pay for untaken annual leave.”.

(5) After section 16(3)—

Add

“(3A) The Legislative Council may by resolution amend the amount specified in subsection (2)(g)(iii)(B), (h)(ii)(B) or (i).”.

(6) Section 16—

Repeal subsection (4)

Substitute

“(4) For the purposes of this section—

Part 2
Clause 6

last day of service (服務的最後一天) means the last day on which an applicant renders services to the employer to whom the applicant's application relates;

last leave year (最後假期年) means the leave year in which the applicant's contract of employment terminates, or is terminated;

leave year (假期年) has the same meaning as in Part VIIIA of the Employment Ordinance (Cap. 57).”.

6. Section 23 amended (Proof by certificate)

Section 23(1)(b)—

Repeal

“notice or severance payment,”

Substitute

“notice, severance payment, pay for untaken statutory holidays or pay for untaken annual leave,”.

7. Section 24 amended (Subrogation)

Section 24(3)—

Repeal

“notice.”

Substitute

“notice, pay for untaken statutory holidays and pay for untaken annual leave.”.

Part 3

Consequential and Related Amendments

Division 1

Enactments Amended

8. Enactments amended

The enactments specified in Divisions 2 and 3 are amended as set out in those Divisions.

Division 2

Amendments to Bankruptcy Ordinance (Cap. 6)

9. Section 38 amended (Priority of debts)

(1) Section 38(10), definition of *accrued holiday remuneration*—

Repeal the semicolon

Substitute

“, and, without limitation, includes any pay for untaken statutory holidays and pay for untaken annual leave;”.

(2) Section 38(10)—

Add in alphabetical order

“*pay for untaken annual leave* (未放年假薪酬), in relation to any person, means any sum which, by virtue either of the person’s contract of employment or of any enactment (including any order made or direction given under any Ordinance), is payable—

Part 3—Division 3

Clause 10

- (a) in respect of annual leave to which the person has become entitled to be allowed but which the person has not taken; or
- (b) on account of the remuneration in respect of annual leave that would have become payable to the person if the person's employment had continued until the person became entitled to be allowed the annual leave,

and, without limitation, includes any sum payable under section 41D of the Employment Ordinance (Cap. 57);

pay for untaken statutory holidays (未放法定假日薪酬) means any sum payable under the Employment Ordinance (Cap. 57) or a contract of employment in respect of a statutory holiday (within the meaning of that Ordinance) that has not been taken as a holiday (within the meaning of that Ordinance);”.

Division 3

Amendments to Companies Ordinance (Cap. 32)

10. Section 178 amended (Definition of inability to pay debts)

(1) Section 178(2)—

Repeal

“notice or severance payments,”

Substitute

“notice, severance payments, pay for untaken statutory holidays or pay for untaken annual leave,”.

(2) After section 178(4)—

Add

“(5) In subsection (2)—

pay for untaken annual leave (未放年假薪酬), *pay for untaken statutory holidays* (未放法定假日薪酬) and *wages* (工資) have the same meaning as in section 265.”.

11. Section 265 amended (Preferential payments)

(1) Section 265(6), definition of *accrued holiday remuneration*—

Repeal the semicolon

Substitute

“, and, without limitation, includes any pay for untaken statutory holidays and pay for untaken annual leave;”.

(2) Section 265(6)—

Add in alphabetical order

“*pay for untaken annual leave* (未放年假薪酬), in relation to any person, means any sum which, by virtue either of the person’s contract of employment or of any enactment (including any order made or direction given under any Ordinance), is payable—

(a) in respect of annual leave to which the person has become entitled to be allowed but which the person has not taken; or

(b) on account of the remuneration in respect of annual leave that would have become payable to the person if the person’s employment had continued until the person became entitled to be allowed the annual leave,

and, without limitation, includes any sum payable under section 41D of the Employment Ordinance (Cap. 57);

Part 3—Division 3

Clause 11

pay for untaken statutory holidays (未放法定假日薪酬) means any sum payable under the Employment Ordinance (Cap. 57) or a contract of employment in respect of a statutory holiday (within the meaning of that Ordinance) that has not been taken as a holiday (within the meaning of that Ordinance);”.

Explanatory Memorandum
Paragraph 1

Explanatory Memorandum

The object of this Bill is to amend the Protection of Wages on Insolvency Ordinance (Cap. 380) (*PWIO*) to provide for payment from the Protection of Wages on Insolvency Fund (*Fund*) in respect of untaken statutory holidays and untaken annual leave, subject to certain limitations, and to make consequential and related amendments to the Bankruptcy Ordinance (Cap. 6) and the Companies Ordinance (Cap. 32).

2. Clause 4 expands the scope of entitlements in respect of which an application may be made for payment under the PWIO to cover pay for untaken statutory holidays and pay for untaken annual leave. The amendment does not apply to a contract of employment terminated before the date of commencement of the Bill.
3. Clause 5 specifies the conditions that must be met before such payment may be made—
 - (a) as far as the pay for untaken statutory holidays is concerned—
 - (i) the statutory holidays concerned must fall within the 4-month period immediately before the applicant's last day of service;
 - (ii) the applicant must have been employed under a continuous contract for a period of 3 months immediately before the statutory holidays;
 - (iii) the amount of pay for untaken statutory holidays must not exceed the amount calculated at the daily rate of holiday pay specified in the Employment Ordinance (Cap. 57); and
 - (iv) the application for the payment must be made within 6 months after the applicant's last day of service;

Explanatory Memorandum

Paragraph 4

- (b) as far as the pay for untaken annual leave is concerned—
 - (i) the pay for untaken annual leave must be payable under section 41D of the Employment Ordinance (Cap. 57), being payable on account of employment in the leave year in which the contract of employment terminates or is terminated and, if the termination occurs otherwise than on the expiration of that leave year, the immediately preceding leave year;
 - (ii) the amount must not exceed the annual leave pay for the full number of days of annual leave to which the applicant would have been entitled in respect of the applicant's last leave year under the Employment Ordinance had the applicant's employment continued; and
 - (iii) an application for the payment must be made within 6 months after the pay for untaken annual leave became due; and
- (c) neither the amount of pay for untaken statutory holidays, nor the amount of pay for untaken annual leave, nor the total amount of the two may exceed \$10,500

(proposed new section 16(2)(g), (h) and (i) of the PWIO).

The Legislative Council may by resolution amend the ceilings to the amounts referred to in the above subparagraph (c) (proposed new section 16(3A) of the PWIO).

- 4. Clause 6 expands existing section 23 of the PWIO to provide for the production of a certificate by the Commissioner for Labour as proof—
 - (a) of the amount of pay for untaken statutory holidays or pay for untaken annual leave owed by an employer to a person specified in the certificate; and

Explanatory Memorandum
Paragraph 5

(b) of payment from the Fund to the person.

5. Clause 7 expands existing section 24 of the PWIO to provide for the transfer to and vesting in the Protection of Wages on Insolvency Fund Board of an applicant's rights and remedies with respect to pay for untaken statutory holidays and pay for untaken annual leave, to the extent of the amount paid from the Fund.
6. The existing section 38 of the Bankruptcy Ordinance (Cap. 6) and existing section 265 of the Companies Ordinance (Cap. 32) provide for payment of employees' accrued holiday remuneration (among other matters) in priority to other debts in the event of bankruptcy or winding up. Those sections 38 and 265 are amended to specifically refer to pay for untaken statutory holidays and pay for untaken annual leave as categories of accrued holiday remuneration (clauses 9 and 11).
7. The existing section 178 of the Companies Ordinance (Cap. 32) provides that claims, in respect of unpaid wages and certain other employee entitlements, by 2 or more creditors of a company may be aggregated for the purpose of issuing a statutory demand for payment and for establishing the company's inability to pay its debts. That section 178 is expanded to cover pay for untaken statutory holidays and pay for untaken annual leave, and the latter 2 expressions and also wages are to have the same meaning as in section 265 of the Companies Ordinance (Cap. 32) (clause 10).