

立法會
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**Paper for the House Committee Meeting
on 14 January 2011**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 7 January 2011**

Date of tabling in LegCo : 12 January 2011

Amendment to be made by : 26 January 2011 (or 2 March 2011 if extended by resolution)

Minimum Wage Ordinance (Cap. 608)

Minimum Wage (Criteria for Approved Assessors) Notice (L.N. 1)

Minimum Wage (Assessment Methods) Notice (L.N. 2)

Background

The Minimum Wage Bill (enacted as the Minimum Wage Ordinance (15 of 2010)) was passed by the Legislative Council on 17 July 2010 and the enacted Ordinance was gazetted on 23 July 2010. By the Minimum Wage Ordinance (Commencement) Notice 2010 (L.N. 146 of 2010) and the Minimum Wage Ordinance (Commencement) (No. 2) Notice 2010 (L.N. 147 of 2010) gazetted on 17 November 2010, the Minimum Wage Ordinance (the Ordinance) will come into full operation on 1 May 2011. By the Minimum Wage Ordinance (Amendment of Schedule 3) Notice 2010 (L.N. 145 of 2010), the minimum hourly wage rate which will become effective on 1 May 2011 is prescribed to be \$28.

2. In relation to persons with disabilities, the Ordinance provides for a mechanism for determining their remuneration upon the implementation of the statutory minimum wage. The Ordinance refers to a person with disability as a "PWD" which is defined as "a person who holds a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation established by the Government"¹. Under Schedule 2 to the Ordinance, a PWD who is or proposes to be engaged under a contract of employment may seek to have his or her degree of productivity assessed for the purpose of determining whether he or she should be remunerated at the prescribed minimum hourly wage rate (currently fixed at \$28) or at a rate commensurate with his or her

¹ See section 2 of the Ordinance.

assessed degree of productivity. Under section 9(1)(b) of the Ordinance, the minimum hourly wage rate for an employee with a disability is the hourly rate derived by multiplying the prescribed minimum hourly wage rate by the employee's assessed degree of productivity as stated in the certificate of assessment issued under Schedule 2.

3. Section 6 of Schedule 2 provides that an assessment must be made by an "approved assessor" to determine the degree (if any) to which the productivity of a PWD in performing the work required under the contract of employment is affected by a disability. Under section 1 of Schedule 2, to be an approved assessor, a person must be of a kind specified by the Commissioner for Labour (Commissioner) by notice published in the Gazette and have the requisite length of experience in the provision of vocational rehabilitation or other services in relation to the employment of persons with a disability (relevant services) as may be specified by the Commissioner by notice published in the Gazette.

Minimum Wage (Criteria for Approved Assessors) Notice (L.N. 1)

4. L.N. 1 is made by the Commissioner pursuant to section 1 of Schedule 2 to the Ordinance to provide that the following categories of persons may become approved assessors if they have completed the training arranged by the Commissioner for the purpose of making productivity assessments for PWDs:

- (a) a registered occupational therapist entitled to practise without supervision who:
 - (i) holds a valid practising certificate; and
 - (ii) has gained not less than 3 years' experience in providing relevant services during the 7 years immediately before the date on which he or she seeks the Commissioner's approval as an approved assessor (relevant date);
- (b) a registered physiotherapist entitled to practise without supervision who:
 - (i) holds a valid practising certificate; and
 - (ii) has gained not less than 3 years' experience in providing relevant services during the 7 years immediately before the relevant date;
- (c) a registered social worker who has gained not less than 3 years' experience in providing relevant services during the 7 years immediately before the relevant date; and

- (d) a person who:
 - (i) has worked for one or more recognized person² in providing relevant services for not less than 5 years in the aggregate during the 10 years immediately before the relevant date; and
 - (ii) is recommended by any recognized person(s) (for whom he or she has worked in providing relevant services during the 10 years immediately before the relevant date) to become an approved assessor.

5. According to paragraph 4 of the LegCo Brief (File Ref.: LD SMW 1-10/8(C)) issued by the Labour and Welfare Bureau in January 2011, the approval granted to an approved assessor may be withdrawn owing to the assessor's poor performance or any sufficient cause. As there is no provision in L.N. 1 providing for the power to withdraw the approval and the relevant criteria and procedures, the Legal Service Division (LSD) is asking the Administration to clarify whether express provisions will be made to cover these matters.

Minimum Wage (Assessment Methods) Notice (L.N. 2)

6. L.N. 2 is made by the Commissioner pursuant to section 6(5) of Schedule 2 to the Ordinance to specify the methods for assessing the degree of productivity capable of being achieved by a person with a disability in performing the work required under his or her contract of employment.

7. According to paragraph 5 of the LegCo Brief, L.N. 2 merely stipulates the broad principles and major elements of the assessment methods, leaving operational procedures and other details to be set out in the form of administrative guidelines which will be provided to the approved assessors. The general principles and major elements set out in L.N. 2 are summarized below:

- (a) An approved assessor must be objective and impartial, and ensure that there is no actual or potential conflict of interest;
- (b) At the beginning of an assessment, the approved assessor must explain to the PWD and the employer their respective rights and obligations, and the assessment procedures;

² According to the LegCo Brief, recognized persons include non-governmental organizations subvented by the Social Welfare Department (SWD) and training bodies appointed by the Employees Retraining Board to provide relevant services, SWD, the Hospital Authority, the Vocational Training Council, and self-help groups etc.

- (c) In conducting the assessment, the approved assessor must acquire sufficient understanding of the PWD's work and make the productivity assessment by reference to the PWD's performance at his or her place of employment, having regard to the details of the work and all the circumstances of the case. Relevant factors that the approved assessor may consider in the assessment include the quality and quantity of work done by the PWD, his or her speed of work and/or ability to meet other requirements of the work; and
- (d) The approved assessor may make an upward adjustment to the PWD's degree of productivity on being satisfied that, due to particular circumstances, the PWD failed to demonstrate his or her full potential in the assessment.

8. According to paragraph 15 of the LegCo Brief, the productivity assessment of PWDs under the Ordinance has been devised after discussion involving PWDs, parent groups, rehabilitation organizations, employers of PWDs, relevant professional associations of approved assessors and the Equal Opportunities Commission. According to the Administration, the Labour Advisory Board unanimously supported the proposals at its meeting on 6 December 2010.

9. The Panel on Manpower was consulted on the proposals in L.N. 1 and L.N. 2 at its meeting on 16 December 2010. At that meeting, members raised various concerns including whether the proposed categories of approved assessors would be adequate for assessing the various trades of PWDs, the possibility of misconduct and conflict of interest on the part of the assessors, and the lack of an appeal or re-assessment mechanism. In response, the Administration advised as follows:

- (a) All eligible assessors should possess the relevant experience in vocational rehabilitation and satisfactorily complete the training arranged by the Labour Department;
- (b) An approved assessor should be objective and impartial throughout the process of conducting an assessment, and must ensure that no conflict would arise between his duties involved in conducting the assessment and his other interests. Approved assessors would not be allowed to conduct assessments for PWDs who worked for the same employers as the assessors; and
- (c) The provision of an appeal or re-assessment mechanism might discourage some employers from employing PWDs. However, the approved assessor might make a reasonable upward adjustment

to a PWD's degree of productivity if satisfied that on the day of assessment the PWD's ability to demonstrate his full potential was adversely affected by any reasons.

10. L.N. 1 and L.N. 2 are to come into operation on the day on which Schedule 2 to the Ordinance comes into operation, i.e. 1 May 2011.

Concluding observation

11. Apart from the issues referred to in paragraph 5 above, LSD is also seeking clarification from the Administration on other technical matters in relation to the above items of subsidiary legislation. We will issue a further report after considering the Administration's reply.

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