

立法會
Legislative Council

LC Paper No. LS97/10-11

**Paper for the House Committee Meeting
on 7 October 2011**

**Legal Service Division Report on
Protection of Wages on Insolvency (Amendment) Bill 2011**

I. SUMMARY

- 1. Objects of the Bill** To amend the Protection of Wages on Insolvency Ordinance (Cap. 380) to provide for ex gratia payment from the Protection of Wages on Insolvency Fund (the Fund) in respect of untaken statutory holidays and untaken annual leave subject to certain limitations.
- 2. Comments** At present, in respect of annual leave and statutory holidays that have been taken by the employees but not paid by their insolvent employer, employees may apply for ex gratia payment from the Fund as part of due and unpaid wages. The Bill proposes to expand the scope of entitlements to cover untaken statutory holidays and untaken annual leave subject to a payment ceiling of HK\$10,500 and other conditions of eligibility. The proposed amendments are mainly technical.
- 3. Public Consultation** According to the Administration, both the Protection of Wages on Insolvency Fund Board and the Labour Advisory Board supported the proposal.
- 4. Consultation with LegCo** The Panel on Manpower was consulted on the Administration's proposal on 26 April 2010. Members expressed support for the proposal to expand the scope of entitlements under the Fund while some members considered the proposal inadequate in view of the limitations imposed.
- 5. Conclusion** In view of the concerns expressed by members of the Panel on the proposal, Members may wish to consider setting up a Bills Committee to study the Bill in detail.

II. REPORT

Objects of the Bill

- (a) To amend the Protection of Wages on Insolvency Ordinance (Cap. 380) (PWIO) to provide for ex gratia payment from the Protection of Wages on Insolvency Fund (the Fund) in respect of untaken statutory holidays and untaken annual leave, subject to certain limitations; and
- (b) To make consequential and related amendments to the Bankruptcy Ordinance (Cap. 6) and the Companies Ordinance (Cap. 32).

LegCo Brief Reference

- 2. LD WS 1/380/200 issued by the Labour and Welfare Bureau in June 2011.

Date of First Reading

- 3. 13 July 2011.

Comments

4. Currently, employees who are owed wages, wages in lieu of notice and severance payment by their insolvent employers are eligible to apply for ex gratia payment from the Fund which is established under the PWIO and administered by the Protection of Wages on Insolvency Board. Regarding taken statutory holidays and taken annual leave, employees may apply for ex gratia payment from the Fund as part of due and unpaid wages. However, the existing PWIO has not provided for ex gratia payment in respect of the statutory holidays and annual leave not yet taken.

5. The Bill proposes to amend the PWIO to expand the scope of the entitlements under the Fund to cover untaken statutory holidays and untaken annual leave subject to certain limitations.

6. Regarding the payment for untaken statutory holidays, the limitations are as follows -

- (a) the statutory holidays concerned must fall within the four-month period immediately before the applicant's last day of service;
- (b) the applicant must have been employed under a continuous contract* for a period of three months immediately before the statutory holidays; and
- (c) the amount must not exceed the pay for the number of days of the untaken statutory holidays calculated at the daily rate of holiday pay specified under section 41 (Rate of holiday pay) of the Employment Ordinance (Cap. 57) (EO) or \$10,500, whichever is the lesser.

7. Regarding the payment for untaken annual leave, the limitations are as follows -

- (a) the amount claimed must be payable under section 41D (Payment of annual leave pay on cesser of employment) of the EO, 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; and
- (b) the amount must not exceed the employee's full statutory entitlement under section 41AA (Annual leave) of the EO for the last leave year (ranging from seven to 14 days' pay depending on the length of the employee's service) or \$10,500, whichever is the lesser.

8. In addition, the total amount of the pay for both untaken annual leave and untaken statutory holidays must not exceed HK\$10,500. In line with other entitlements under the PWIO, the application for the payment of these two categories of pay must be made within six months after the applicant's last day of service. The Bill also provides that the amendments will not apply to a contract of employment terminated before the date of the commencement of the Bill, if enacted and the payment ceiling of HK\$10,500 may be amended by the Legislative Council by resolution.

* Under Schedule 1 to the EO, an employee employed under a continuous contract is defined as one who has been employed under a contract of employment by the same employer for four weeks or more and has worked for 18 hours or more in each week.

9. The Bill also makes consequential amendments to the Bankruptcy Ordinance (Cap. 6) (BO) and the Companies Ordinance (Cap. 32) (CO).

10. Under the existing section 16 of the PWIO, ex gratia payment may only be paid to an applicant when a bankruptcy or winding up petition has been presented against the employer concerned. Under section 24 of the PWIO, once ex gratia payment has been made to the applicant, all the rights and remedies including the priority to which he/she would be entitled on the bankruptcy or winding up of the employer shall be transferred to the Protection of Wages on Insolvency Fund Board. The Bill accordingly amends section 24 of the PWIO to include pay for untaken statutory holidays and untaken annual leave. Section 38 of the BO and section 265 of the CO, which provide for, among other matters, payment of employees' accrued holiday remuneration in priority to other debts, are respectively amended to include untaken statutory holidays and untaken annual leave in the definition of "accrued holiday remuneration". The two expressions "pay for untaken annual leave" and "pay for untaken statutory holidays" are also further defined in the respective sections.

11. The existing section 178(2) of the CO allows that claims in respect of unpaid wages and certain other employee entitlements by two or more creditors of a company may be aggregated for establishing the company's inability to pay its debts. The Bill proposes to amend section 178(2) to include the pay for untaken statutory holidays and untaken annual leave as indebtedness of a company.

Commencement

12. If enacted, the Bill shall come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

Public Consultation

13. According to the Administration, both the Protection of Wages on Insolvency Fund Board and the Labour Advisory Board were consulted and they were supportive of the proposal.

Consultation with LegCo

14. The Panel on Manpower was consulted on the Administration's proposal on 26 April 2010. While members were supportive of the proposal to expand the scope of the entitlements under the Fund, some members considered the proposal inadequate as a payment ceiling was imposed on the untaken annual leave and statutory holiday pay covered by the Fund. They considered that an employee should be entitled to the pay for all untaken annual leave and untaken statutory holiday. Despite the concern raised, members urged the Administration for an early introduction of the legislative proposal into the Legislative Council for its scrutiny and for a review after one year of the implementation of the Bill.

Conclusion

15. In view of the concerns expressed by members of the Panel on the legislative proposal, Members may wish to consider setting up a Bills Committee to study the Bill in detail.

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