

立法會
Legislative Council

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**Subcommittee on
Mandatory Provident Fund Scheme Ordinance
(Amendment of Schedule 2) Notice 2011**

Note on potential criminal liability under the Employment Ordinance

In the subcommittee meeting held on 23 June 2011, a member raised concern that in the situation where an employer, especially for an employer under the industry scheme prescribed under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (the MPFS Ordinance), is not aware that the minimum relevant income level (Min RI) prescribed under the proposed amendment (i.e.HK\$6,500) has come into operation and made deductions on the employee's wages in accordance with the existing Min RI (i.e.HK\$5,000) for contribution purpose under the MPFS Ordinance, whether such an employer would incur any criminal liability under the Employment Ordinance (Cap. 57) (the Ordinance).

2. Section 32 of the Ordinance provides for deductions from wages of an employee that an employer may lawfully make. Further, no deduction from wages or from any other sum due to an employee shall be made by an employer other than those provided under the Ordinance. Section 32(2)(h) of the Ordinance provides that deductions which are required or authorized under any enactment to be made from the wages of an employee can be made by an employer.

3. Section 63B(1) of the Ordinance provides that any person who contravenes section 32 of the Ordinance commits an offence and under section 63B(3) of the Ordinance is liable to a fine at level 6 (i.e.HK\$100,000) and imprisonment for 1 year. However, under section 64(1) of the Ordinance, the consent in writing of the Commissioner for Labour¹ (the Commissioner) is required before a prosecution under a section 63B offence is to commence. Further, section 64(2) of the Ordinance provides that the Commissioner shall

¹ Under the Ordinance, the Commissioner is defined to include a Deputy Commissioner for Labour and an Assistant Commissioner for Labour.

hear from the material employer or give him an opportunity to be heard before the Commissioner gives his consent to prosecute the latter.

4. Under the situation described in paragraph 1 above, if the deduction was based on a mistaken information about the operative Min RI under the MPFS Ordinance, that deduction (if it was in excess of what could be lawfully deducted) would not be covered by section 32(2)(h) of the Ordinance and could amount to a contravention of section 32(1) of the Ordinance. Should it be considered that the employer in question is to be prosecuted, he must be given an opportunity to be heard by the Commissioner in accordance with section 64(2) of the Ordinance. It would then be for the Commissioner to decide whether to give his consent to a prosecution of the employer in question after having heard from him.

5. Members may wish to note that it had been suggested at the meeting of the subcommittee held on 23 June 2011 that the Administration should promote publicity of the proposed amendment to help drawing the attention of employers to deduct the proper amount from the wages under the MPFS Ordinance.

Prepared by

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