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**Subcommittee on Minimum Wage (Criteria for Approved Assessors) Notice
and Minimum Wage (Assessment Methods) Notice**

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper summarizes past discussions by the Bills Committee on Minimum Wage Bill ("the Bills Committee") and the Panel on Manpower ("the Panel") on the productivity assessment of persons with disabilities under the statutory minimum wage ("SMW") regime.

Background

2. The Minimum Wage Ordinance (Ord. No. 15 of 2010) ("MWO") provides a special arrangement whereby persons with disabilities and whose productivity may be impaired by their disabilities may choose to have their productivity assessed to help determine whether they should be remunerated at not lower than the SMW level or at a rate commensurate with their productivity. A person with disabilities is defined as a person who holds a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation. Under the special arrangement, a trial period of employment not exceeding four weeks is provided for an assessment to be made of the productivity of a person with disabilities in performing his work in the actual workplace to help determine whether SMW should be discounted.

3. On 7 January 2011, the Administration published in the Gazette the Minimum Wage (Criteria for Approved Assessors) Notice and Minimum Wage (Assessment Methods) Notice. The Minimum Wage (Criteria for Approved Assessors) Notice specified the kinds of persons and the lengths of experience in the provision of vocational rehabilitation or other services in relation to the employment of persons with disabilities for the purposes of the definition of approved assessor in Schedule 2 to MWO. The Minimum Wage (Assessment Methods) Notice specified the methods for assessing the degree of productivity

of a person with disabilities in performing the work required under his/her contract of employment. These Notices would come into operation on the day on which Schedule 2 came into operation.

Deliberations of the Bills Committee

4. Some members of the Bills Committee were of the view that the cost of assessment of the degree of productivity of a person with disabilities should be borne by the Administration. The Administration advised that there were views from some stakeholders that persons with disabilities and whose productivity was affected by their disabilities and thus need to invoke the special arrangement were a vulnerable group and should not be asked to bear the assessment cost. Neither should the employers shoulder the cost, as this might dampen their incentive to employ persons with disabilities. There were thus calls for the Government to take up this responsibility and pay for the assessment cost. While the Administration would consider this suggestion, it would have to ensure that the assessment cost, if paid from the public coffers, should be reasonable in quantum and would not inadvertently provide a financial incentive for possible abuse of the special arrangement. The Administration undertook to finalize the arrangement for the assessment cost and advise the Panel on Manpower of the party responsible for bearing the costs for assessment of the degree of persons with disabilities' productivity before the enacted Ordinance came into operation.

5. Members noted that the degree of productivity that could be achieved by a person with disabilities in performing his work would be stated in a certificate of assessment, which should be signed by the person with disabilities, the employer and the approved assessor. Some members queried the need for the certificate to be signed by a person with disabilities and his employer. The Administration advised that a person with disabilities and his employer should be well aware of the outcome of assessment to avoid unnecessary misunderstanding and disputes over computation of the minimum wage to which the employee with disabilities was entitled. Thus, the certificate of assessment must be signed by the three parties concerned, including the person with disabilities, the employer and the approved assessor.

6. Members were concerned about the status and effect of the certificate of assessment in the event that an employer or a person with disabilities refused to sign the certificate.

7. The Administration advised that an approved assessor must provide a certificate of assessment after conducting an assessment of a person with disabilities' productivity in performing the work, and the certificate must be

signed by the person with disabilities, the employer and the approved assessor. As a matter of fact, in the event that the certificate of assessment was not signed by the employer and/or the employee with disabilities owing to disagreement over the outcome of the assessment, it was unlikely that the parties would continue their employment relationship. Nonetheless, if their employment relationship continued for various reasons, the employee with disabilities should be paid wages at or above the SMW rate with effect from the following day after the assessment was conducted, given that the assessed rate could not take effect if the certificate of assessment was not signed by the employer and/or the employee with disabilities.

8. Some members were concerned about the qualifications required of an approved assessor who would carry out the productivity assessment. The Administration explained that an approved assessor should hold the profession or occupation or qualification as specified by the Commissioner for Labour and possess the experience in providing vocational rehabilitation or other services in relation to the employment of persons with disabilities. It was the Administration's intent that the approved assessors should be eligible persons, such as registered social workers, registered occupational therapists and registered physiotherapists, with experience in providing vocational rehabilitation or other services in the employment of persons with disabilities. Information on the assessors approved by the Commissioner for Labour would be included in a list of approved assessors. A person with disabilities who decided to invoke the assessment mechanism was entitled to select any of the approved assessors from the list to conduct his productivity assessment.

9. The Administration pointed out that while some assessors might currently work in the Government or the Hospital Authority, they would not be acting as a servant or an agent of the Government when they conducted a productivity assessment under the special arrangement, unless they were conducting the assessment in the capacity as a public officer. Approved assessors would act as independent persons in the course of conducting the productivity assessments. They should conduct the assessment impartially in order to determine the productivity of a person with disabilities in performing his work. In the event of misconduct on the part of an approved assessor, the Commissioner for Labour might consider withdrawing the approval, and the employee with disabilities or employer might also lodge a complaint with the professional authority concerned.

Deliberations of the Panel

10. At its meeting on 16 December 2010, the Panel was briefed by the Administration on the proposed criteria for appointment of approved assessors

and methods of assessment under the productivity assessment of persons with disabilities under the SMW regime.

11. Members noted that an approved assessor should either be a registered occupational therapist, a registered physiotherapist, a registered social worker or a vocational rehabilitation practitioner possessing not less than certain specified number of years of experience in the provision of vocational rehabilitation or other services in relation to the employment of persons with disabilities. The right to invoke an assessment was vested in the person with disabilities and not the employer. The operational details of the productivity assessment would be set out in the form of administrative guidelines to be provided to the approved assessors. The cost of assessment would be borne by the Administration.

12. Some members queried whether the proposed categories of approved assessors would be adequate for dealing with the various trades of persons with disabilities to be assessed. The Administration advised that all eligible assessors should possess the relevant experience in vocational rehabilitation or other services in relation to the employment of persons with disabilities, and satisfactorily complete the training arranged by the Labour Department. The Administration might withdraw the approval so granted to an assessor who was considered unable or unfit to carry out the duties of an approved assessor owing to poor performance or any sufficient cause.

13. Some members were concerned about the possibility of misconduct on the part of assessors, especially if the assessor worked in the same organization as the person with disabilities to be assessed.

14. The Administration advised that an approved assessor should be objective and impartial throughout the process of conducting an assessment. It was incumbent on the approved assessor to ensure that no conflict would arise between his duties involved in conducting the assessment and his other interests. Surprise inspections would be conducted and relevant statistics would be analyzed to monitor the mechanism of productivity assessments. The approved assessors were not allowed to conduct assessments for persons with disabilities who worked for the same employers of the assessors.

15. Some members considered that an opportunity for appeal or re-assessment should be provided to persons with disabilities. The Administration advised that the Bills Committee had also discussed the issue and the provision of such a mechanism might discourage some employers from employing persons with disabilities. The Administration also advised that if the approved assessor, having regard to all the facts and evidence available, was of the view that the performance of the person with disabilities and degree of productivity on the day of assessment was adversely affected by any reasons that caused him failing to

perform at full potential, the approved assessor might reasonably adjust upwards the degree of productivity of the person with disabilities. The Administration would review the special arrangement, including whether there was need for a second assessment, in the light of operational experience within two years after the implementation of SMW.

16. Some members were concerned about the number of persons with disabilities who would invoke assessments when the SMW rate came into force on 1 May 2011 and whether there would be sufficient number of approved assessors to carry out the assessments.

17. The Administration advised that according to statistics for 2007, there were about 10 000 persons with disabilities receiving wages less than \$28 per hour. A few hundred persons were eligible for becoming approved assessors. A person with disabilities who chose to be paid at no less than the SMW rate would not need to undergo any assessment of productivity. A serving employee with disabilities who had opted for undergoing assessment of productivity under the transitional arrangement provided in the SMW regime could invoke the assessment any time after the SMW rate came into force as long as they were still working for the same employer for the same work. Thus, the question of whether the pool of approved assessors for carrying out the assessments was sufficient would depend on the number of persons with disabilities invoking the special arrangement as well as the timing of individual serving employees with disabilities seeking the assessment after they had so opted for it.

Relevant papers

18. Members are invited to access the Legislative Council website at <http://www.legco.gov.hk> to view the relevant papers and minutes of meeting.