



Statutory Minimum Wage:

Reference Guidelines for Employers and Employees

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1 Introduction

- The statutory minimum wage (SMW) comes into force on 1 May 2011 and the initial SMW rate is \$28 per hour.
- In the course of scrutinizing the Minimum Wage Bill, some Members of the Legislative Council and stakeholders pointed out that because of the wide application of this completely new SMW system, there was a need for the Administration to formulate detailed reference guidelines to explain to employers and employees in simple terms, supplemented by examples, the relevant provisions and the application of the Ordinance. We have adopted this suggestion and prepared this set of Reference Guidelines.
- We have endeavoured to include some relatively common examples to cover different situations in the Reference Guidelines to facilitate employers and employees in understanding the Minimum Wage Ordinance and its application. We believe that these examples already cover most of the situations in the computation of minimum wage. Nonetheless, given the large varieties of mode of employment, there is difficulty listing out all situations exhaustively in the Reference Guidelines. Employers and employees who wish to enquire about their individual situation can contact us by calling 2717 1771 (handled by the 1823 Call Centre) which operates round-the-clock.
- It should be noted that the interpretation of the Minimum Wage Ordinance (Cap. 608) would be based on its original text. For the full text of the Minimum Wage Ordinance which has been uploaded to the Bilingual Laws Information System of the Department of Justice, please refer to <http://www.legislation.gov.hk/eng/index.htm>.

March 2011

2 Legislative aim, principles and spirit

- The Minimum Wage Ordinance establishes an SMW regime aimed at striking an appropriate balance between forestalling excessively low wages and minimising the loss of low-paid jobs while sustaining Hong Kong's economic growth and competitiveness.
- SMW is expressed as an hourly rate. In essence, wages payable to an employee in respect of any wage period should be no less than the SMW rate **on average** for the total number of hours worked. The existing employment and wage payment mode (i.e. employed and remunerated at monthly-rated, daily-rated, weekly-rated, or piece-rated, etc) formulated between employers and employees in accordance with their employment contracts and the Employment Ordinance need not be changed with the implementation of SMW.
- The major provisions of the Minimum Wage Ordinance - e.g. definition of wages - are aligned as closely as possible with those of the Employment Ordinance to ensure consistency and effective enforcement, avoid confusion to employers and employees and minimise the compliance cost for employers.
- Neither the Minimum Wage Ordinance nor the Employment Ordinance prescribes that meal break and rest days should be paid. Whether meal break and rest days are with pay or otherwise are matters to be agreed between employers and employees. Whether meal breaks are hours worked and/or with pay, whether rest days are with pay, wage period, wage calculation, reckoning and payment arrangement of commission, etc are relevant in the computation of minimum wage. If existing employment terms in these respects need to be clarified or renewed because they are unclear and/or employers have genuine problems in shouldering the financial burden, there should be thorough staff consultation with a view to reaching consensus on lawful, sensible and reasonable grounds through labour-management communication and negotiation. According to the Employment Ordinance, employers should not unilaterally vary the employment terms and conditions of employees. The Labour Department stands ready to assist employers and employees to resolve their problems and reach consensus. If employees suspect that their employment rights have been undermined, they could seek help from the Labour Department. The Labour Department will actively follow up such cases. Any provision in the contract of

employment seeking to reduce the employee's SMW entitlement shall be void under the law.

- Employees are an enterprise's valuable asset. We appeal to employers to treat their employees well so as to maintain harmonious labour relations. Employers should carefully assess the impact both on themselves and on the employees, in contemplating any change to the employment terms. Where feasible, employers should not reduce employees' existing remuneration and employment benefits upon the implementation of SMW, and should not give employees a monthly pay lower than what they get before the implementation of the legislation. Sufficient communication between employers and employees is necessary during SMW implementation. Employees will always have a greater commitment to work as well as a stronger sense of belonging when employers respond positively and sincerely to their reasonable requests. This in turn will be beneficial to the operation and business of the enterprise and ultimately achieve a win-win situation for both employers and employees.

3 Coverage of the Ordinance

- SMW applies to all employees, whether they are full-time, part-time or casual employees, and regardless of whether or not they are employed under a continuous contract ¹ as defined in the Employment Ordinance, with the following exceptions :
 - persons to whom the Employment Ordinance does not apply ²
 - live-in domestic workers

This refers to domestic workers (including domestic helpers, carers, chauffeurs, gardeners, boat-boys or other personal helpers) who dwell free of charge in their employing household, irrespective of their sex or race.

Points to note :

The following persons are not live-in domestic workers and SMW applies to them :

- domestic workers not dwelling free of charge in their employing household
- live-in employees who are not domestic workers

- student interns as well as work experience students during a period of exempt student employment (Please refer to **Appendix 1** for details)

1 According to the Employment Ordinance, an employee engaged 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 each week (i.e. the so-called “4-18” requirement).

2 These include: (a) a family member who lives in the same dwelling as the employer; (b) an employee as defined in the Contracts of Employment Outside Hong Kong Ordinance; (c) a person serving under a crew agreement under the Merchant Shipping (Seafarers) Ordinance, or on board a ship which is not registered in Hong Kong; (d) an apprentice whose contract of apprenticeship has been registered under the Apprenticeship Ordinance. As for (d), while certain provisions of the Employment Ordinance apply to registered apprentices, SMW is not applicable.

Points to note :

- SMW also applies to employees with disabilities. In order to strike a balance between providing wage protection to persons with disabilities and safeguarding their employment opportunities, special arrangement is provided under the Minimum Wage Ordinance so that persons with disabilities have the right to choose to undergo a productivity assessment to determine whether they should be remunerated at not lower than the SMW level or at a rate commensurate with their productivity. To avoid abuse, the right to invoke such an assessment is vested in the employees with disabilities rather than the employers. The Labour Department has separately published a leaflet on *Special Arrangement for Persons with Disabilities under the Minimum Wage Ordinance* to explain the details of this special arrangement.
- SMW is aligned closely with the Employment Ordinance and does not apply to contractors and self-employed persons. For information about the difference between an “employee” and a “contractor or self-employed person”, please refer to the leaflet on *Know your Identity and Rights – Employee? Contractor / Self-employed person?*
- Even though a worker is called or described as a contractor or self-employed person in the contract, the employer is still required to fulfil his responsibilities under the relevant legislation if in essence there exists an employer-employee relationship between the parties. The employer may also be liable to criminal sanctions for contravention of the relevant legislation.
- If an employer unilaterally changes the status of the employee to a contractor or self-employed person, the employee may lodge a claim for remedies against the employer under the Employment Ordinance and common law. If an employee intends to change his status to a contractor or self-employed person, he must carefully assess the pros and cons involved, including the employment rights and benefits that he may lose in such a change.

4 Application of the Ordinance

A. How to count hours worked

- An employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage.
- The minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate.
- For the purpose of computing minimum wage, hours worked include any time when the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer :
 - in attendance at a place of employment, irrespective of whether he is provided with work or training at that time; or
 - travelling in connection with his employment, excluding travelling (in either direction) between his place of residence and his place of employment, other than a place of employment that is outside Hong Kong and is not his usual place of employment.
- A place of employment means **any** place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training.

Time in attendance at a place of employment

Example 1 :

An employee works in the office from 9:00 a.m. to 1:00 p.m. and from 2:00 p.m. to 6:00 p.m. in accordance with the contract of employment. He also works overtime from 6:00 p.m. to 7:00 p.m. with the agreement or at the direction of the employer. The time from 9:00 a.m. to 1:00 p.m. and from 2:00 p.m. to 7:00 p.m. is hours worked for computing minimum wage. (**Note** : As for whether meal break is hours worked for computing minimum wage, [please refer to the section on “meal break” below.](#))

Example 2 :

Circumstances the same as [Example 1](#) above, but owing to personal reasons (e.g. to avoid busy traffic), the employee returns to the office at

8:30 a.m. As he is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the office for the purpose of doing work, the office from 8:30 a.m. to 9:00 a.m. is not his place of employment as defined under the Minimum Wage Ordinance for the purpose of computing minimum wage. Such time from 8:30 a.m. to 9:00 a.m. shall not be counted as hours worked for computing minimum wage.

Example 3 :

The working hours of an employee finish at 6:00 p.m. according to the contract of employment. However, he stays in the office from 6:00 p.m. to 6:15 p.m. for personal reasons, and is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the office for the purpose of doing work. Therefore, for the purpose of computing minimum wage, the office from 6:00 p.m. to 6:15 p.m. is not his place of employment as defined under the Minimum Wage Ordinance. As such the time from 6:00 p.m. to 6:15 p.m. shall not be counted as hours worked for computing minimum wage.

Example 4 :

At the direction of the employer, an employee works outside Hong Kong (for instance, at the company's factory in the Mainland). The employer provides free accommodation and/or meals for the employee during the period of stay. If the employee in a certain period of time during the stay is not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the contract of employment or with the agreement or at the direction of the employer - such as his sleeping time, personal recreation time - such time is not hours worked for computing minimum wage.

Example 5 :

An employee attends a 3-hour training course at the direction of the employer to enhance client service skills. Since the employee is, at the direction of the employer, in attendance for the purpose of receiving training, these 3 hours are hours worked for computing minimum wage.

Points to note :

- As illustrated in the above examples, whether a particular place is a place of employment as defined under the Minimum Wage Ordinance for computing minimum wage depends on whether the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance at

the place for the purpose of doing work or receiving training. This is a question of fact and must be determined by reference to the facts and circumstances of individual cases.

- Should the employer and the employee have different understanding on whether or not the employee is in attendance at a place of employment during a certain period of time (e.g. during the time beyond the working hours specified in the employment contract) and whether or not the employee is in attendance with the agreement or at the direction of the employer under various circumstances, they should clarify between themselves as soon as practicable in order to avoid dispute when computing minimum wage.

Travelling time

Example 6 :

An employee works in a company in Hong Kong. The travelling time between his place of residence and the company is not hours worked for computing minimum wage.

One day, this employee delivers some documents from the company to a client's office, and then returns to the company. With regard to the travelling time between his company and the client's office when he is, in accordance with the contract of employment or with the agreement or at the direction of the employer, travelling in connection with his employment, the time is hours worked for computing minimum wage.

Example 7 :

An employee works in the office in Hong Kong on Mondays, and in the company's factory in the Mainland from Tuesdays to Fridays. With regard to the travelling time between his place of residence and the office in Hong Kong, it is not hours worked for computing minimum wage. Since the company's factory in the Mainland is also his usual place of employment, the time he takes to travel between his place of residence and company's factory in the Mainland is generally not hours worked for computing minimum wage.

Example 8 :

An employee works in a factory in Hong Kong. One day, the employer assigns him to go to a client's office outside Hong Kong which is not his usual place of employment. The time he takes to travel, in accordance with the contract of employment or with the agreement or at the direction

of the employer, between his place of residence and the client's office outside Hong Kong is hours worked for computing minimum wage.

Example 9 :

An employee is directed by the employer to travel from the office to a training centre to attend a 2-hour training course. He is required to return to the office to continue working after training. The travelling time to and from his office and the training centre is hours worked for computing minimum wage.

Generally speaking, for computing minimum wage under the Minimum Wage Ordinance, the travelling time between an employee's place of residence and his place of employment **within** Hong Kong is not hours worked, irrespective of whether it is the usual place of employment.

Meal break

- When an employee during his meal break also falls under the circumstances of hours worked³ as specified in the Minimum Wage Ordinance, such meal break is hours worked for computing minimum wage. Hence, if an employee is, during his meal break, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at a place of employment, irrespective of whether he is provided with work or not, such time should be included in the hours worked for computing minimum wage (Example 10). On the contrary, meal break falling outside the provisions on hours worked in the Minimum Wage Ordinance is not included in the hours worked for computing minimum wage (Example 11).
- Besides, if meal break is regarded as hours worked by the employee according to his employment contract or agreement with the employer, such time must also be taken into account in computing

3 That is, the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer :

- in attendance at a place of employment, irrespective of whether he is provided with work or training at that time; or
- travelling in connection with his employment excluding travelling (in either direction) between his place of residence and his place of employment, other than a place of employment that is outside Hong Kong and is not his usual place of employment.

A place of employment means any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training.

minimum wage ([Example 12](#)). Although the Employment Ordinance does not provide specific regulation for meal break, after an employer and his employee have included meal break as hours worked by the employee in accordance with their employment contract or agreement, the employer shall not unilaterally vary or remove such contractual terms or agreement concerning hours worked. The Employment Ordinance already accords protection to employees in this respect.

Example 10 :

An employee has his meal break from 1:00 p.m. to 2:00 p.m. At the same time, he remains in attendance at his post for the purpose of doing work in accordance with the contract of employment or with the agreement or at the direction of the employer. Such meal break is hours worked for computing minimum wage.

Example 11 :

An employee has his meal break from 1:00 p.m. to 2:00 p.m. Owing to personal reasons, he takes his meal in the workshop. Although he is in the workshop during the period from 1:00 p.m. to 2:00 p.m., he is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the workshop for the purpose of doing work or receiving training. For the purpose of computing minimum wage, the workshop from 1:00 p.m. to 2:00 p.m. is not his place of employment as defined under the Minimum Wage Ordinance, and the hours worked for computing minimum wage shall not count such meal break.

Example 12 :

Circumstances the same as [Example 11](#) above, but meal break is regarded as hours worked under the employment contract or agreement between the employer and the employee. In this case, the time from 1:00 p.m. to 2:00 p.m. shall be counted in computing minimum wage.

On-call or standby time

- On-call or standby arrangements depend on the terms in the contract of employment or the agreement between the employer and the employee. Thus, there is a diversity of on-call or standby arrangements for different industries and establishments.
- If an employee while being on-call or standby is in attendance at a

place of employment⁴ in accordance with the contract of employment or with the agreement or at the direction of the employer, such on-call or standby time is hours worked for computing minimum wage. On the other hand, if he is not in attendance at a place of employment during the on-call or standby time, such time is not hours worked for computing minimum wage.

- The employer and the employee may also agree to reckon on-call or standby time as the hours worked by the employee for computing minimum wage. Should on-call or standby time be regarded as hours worked by the employee under his employment contract or agreement with the employer, such on-call or standby time should also be counted in computing minimum wage. If the employer and the employee have included on-call or standby time as hours worked by the employee in accordance with their employment contract or agreement, the employer shall not unilaterally vary or remove such contractual terms or agreement concerning hours worked.

Example 13 :

An employee's working hours are from 9:00 a.m. to 6:00 p.m. According to the contract of employment, he and his colleagues are required to take turns for attendance at the workplace from 7:00 p.m. to 10:00 p.m. for on-call duties once a week in order to provide emergency services upon clients' calls. During the on-call time, he is not allowed to leave the workplace without permission. Since the employee in this example is, in accordance with the contract of employment, in attendance at the place of employment while being on-call, the on-call time from 7:00 p.m. to 10:00 p.m. is hours worked for computing minimum wage.

Other situations

- In addition to the more common patterns of working hours, different operational and work requirements may exist in various industries or establishments to cater for their sector-specific and operational needs. The job requirements also vary tremendously according to the multifarious terms of employment and agreements between employers and employees in different industries and scenarios.
- Hence, the Minimum Wage Ordinance does not seek to provide an exhaustive list of the circumstances of hours worked for the purpose

4 A place of employment means any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training.

of computing minimum wage. Apart from the Minimum Wage Ordinance, if the time in question is regarded as hours worked by the employee under the employment contract or agreement with the employer, such time should be included in computing minimum wage.

B. Employer to pay the balance to employee whose wages are less than minimum wage

- An employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage. The minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate. Even if the hour worked is less than one whole hour, the minimum wage should be computed based on the actual period of time worked.

Example 14 :

The total number of hours worked by an employee in a wage period, including overtime of eight hours and 15 minutes, is 208 hours and 15 minutes (i.e. 208.25 hours). The SMW rate is \$28. His minimum wage for that wage period shall be :

$$\begin{aligned} & 208.25 \text{ hours (total number of hours worked)} \times \$28 \text{ (SMW rate)} \\ = & \$5,831 \text{ (minimum wage)} \end{aligned}$$

- If the wages payable to the employee in respect of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. additional remuneration). The contract of employment of the employee must be taken to provide that the employee is entitled to additional remuneration in respect of that wage period. This also applies, among others, to the calculation of the following :
 - wages or any other sum payable under the Employment Ordinance
 - ex gratia payment under the Protection of Wages on Insolvency Ordinance
 - mandatory contributions under the Mandatory Provident Fund Schemes Ordinance
 - monthly earnings of the employee under the Employees' Compensation Ordinance or the Occupational Deafness (Compensation) Ordinance

- The definition of “wage period” in the Minimum Wage Ordinance is aligned with that under the Employment Ordinance. Unless the contrary is proved, a wage period is one month. No matter how the wage of an employee is calculated (e.g. piece-rated, daily-rated, weekly-rated, monthly-rated, etc), the minimum wage is still derived by multiplying the total number of hours worked in a wage period by the SMW rate. Taking a piece-rated employee as an example, with his total number of hours worked in a wage period multiplied by the SMW rate, this amount is his minimum wage for that wage period.
- Minimum wage is calculated with reference to the whole wage period. The basic principle is that wages payable to an employee in respect of any wage period should be no less than the SMW rate **on average** for the total number of hours worked in the wage period.
- Failure to pay minimum wage amounts to a breach of the wage provisions under the Employment Ordinance. According to the Employment Ordinance, an employer who wilfully and without reasonable excuse fails to pay wages to an employee when it becomes due is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for three years.
- The Labour Tribunal and the Minor Employment Claims Adjudication Board ⁵ have jurisdiction to deal with claims for sums of money arising from a breach of SMW.
- Since statutory entitlements under the Employment Ordinance (e.g. holiday pay, annual leave pay, sickness allowance, maternity leave pay, severance payment, long service payment, wages in lieu of notice, etc) are calculated according to the definition of wages, the amount of these statutory entitlements should also take into account the additional remuneration (where applicable). If these statutory entitlements under the Employment Ordinance are calculated and paid on the basis of wages less than the minimum wage, it would amount to under-payment of such statutory entitlements. For offences and penalties, please refer to the *Concise Guide to the Employment Ordinance*.
- As SMW is part of wages, principal contractors engaged in construction works must, in accordance with the Employment Ordinance, bear the liability of the first two months’ unpaid wages of

5 The Minor Employment Claims Adjudication Board adjudicates employment claims involving not more than 10 claimants for a sum of money not exceeding \$8,000 per claimant. Employment claims falling outside the jurisdiction of the Board are heard by the Labour Tribunal.

their sub-contractors' employees if their sub-contractors fail to pay SMW in accordance with the Minimum Wage Ordinance.

How to determine

- In determining whether the wages meet the minimum wage, the following two factors should be considered :
 - (1) What is the minimum wage for the employee for the wage period?
(i.e. total number of hours worked × SMW rate)
 - (2) What is the wages payable to the employee in respect of the wage period?
(Please refer to the following section [C. Wages payable to employee in respect of wage period](#))

If (2) is not less than (1) ⇒ the minimum wage requirement is met
If (2) is less than (1) ⇒ employer has to pay additional remuneration additional remuneration = minimum wage – wages payable

C. Wages payable to employee in respect of wage period

- The definition of wages for SMW is aligned closely with that under the Employment Ordinance. Unless otherwise specified, the term “wages” in the Employment Ordinance means all remuneration, earnings, allowances including travelling allowances, attendance allowances, commission, overtime pay, tips and service charges ⁶, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done, subject to certain exclusions ⁷.

6 According to the Employment Ordinance, tips and service charges, in relation to wages, means sums of money received, directly or indirectly, by an employee in the course of and in connection with his employment which are -
➤ paid or derived from payments made by persons other than the employer; and
➤ recognised by the employer as part of the employee’s wages.

7 According to the Employment Ordinance, the following items are not wages:

- i. the value of any accommodation, education, food, fuel, water, light or medical care provided by the employer;
- ii. employer's contribution to any retirement scheme;
- iii. commission, attendance allowance or attendance bonus which is of a gratuitous nature or is payable only at the discretion of the employer;
- iv. non-recurrent travelling allowance or the value of any travelling concession or travelling allowance for actual expenses incurred by the employment;

- For the purpose of computing minimum wage, the Minimum Wage Ordinance sets out whether certain sums should be counted as **wages payable to an employee in respect of a wage period** in specific situations in order to determine whether the wages meet the minimum wage, as explained below.

(1) Payment made to an employee for any time that is not hours worked

- Minimum wage is derived by multiplying an employee's total number of hours worked in a wage period and the SMW rate. Since the calculation of minimum wage excludes the time that is not hours worked, payment made to the employee for any time that is not hours worked (e.g. holiday pay, annual leave pay, sickness allowance, maternity leave pay, rest day pay, etc) must **not** be counted as part of the wages payable to the employee.

Example 15 :

Assuming

- an employee with monthly salary of \$7,500 has worked 24 days in a wage period of 30 days with the total number of hours worked being 204 hours
- in this wage period, payments made to the employee for time that is not hours worked include rest day pay for 4 days (\$250 per day), statutory holiday pay for 1 day (\$250) and annual leave pay for 1 day (\$250)
- SMW rate : \$28

Calculation

(1) Minimum wage for this month : \$5,712 (204 hours × \$28)

(2) Wages payable to the employee in respect of this month :

\$6,000 (\$7,500 — (4 × \$250) — \$250 — \$250)

⇒ Since (2) is not less than (1), the minimum wage requirement is met.

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- v. any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;
 - vi. end of year payment, or annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer;
 - vii. gratuity payable on completion or termination of a contract of employment.

Examples on monthly-rated, daily-rated and piece-rated employees

Example 16 :

Assuming

- the following employment terms according to the contract of employment :
 - remuneration : \$7,000 per month with paid rest days on Sundays
 - working hours :
Monday to Saturday – 9:00 a.m. to 5:00 p.m. including 1-hour paid lunch break which is regarded as hours worked as agreed between the employer and the employee. The employee is entitled to an overtime pay of \$35 per hour.
- total number of hours worked in this month : 220 hours (including 4 hours of overtime) ⁸
- SMW rate : \$28

Calculation

- (1) Minimum wage for this month : **\$6,160** (220 hours × \$28)
 - (2) Wages payable to the employee in respect of this month :
\$6,237 (\$7,000 + (4 x \$35) – rest day pay of \$903 ⁹)
- ⇒ Since (2) is not less than (1), the minimum wage requirement is met.

Example 17 :

Assuming

- the following employment terms according to the contract of employment :
 - remuneration : \$6,500 per month with paid rest days on Sundays
 - working hours :
Monday to Friday – 9:00 a.m. to 5:00 p.m. excluding 1-hour lunch break which is regarded as paid according to the wage

8 Assumptions : There are 31 days (including 4 Sundays) in this month and the actual total number of hours worked is 220 hours (27 days from Monday to Saturday × 8 hours per day, and 4 hours overtime). In this example, as meal break is regarded as working hours of the employee in accordance with the contract of employment or agreement with the employer, it is included in computing minimum wage.

9 Assumptions : Rest day pay is the payment made to the employee for time that is not hours worked. Rest day pay for 4 Sundays is : \$7,000 ÷ 31 days × 4 days = \$903. For illustration purpose, figures are rounded to the nearest integers in these examples.

calculation method all along adopted by the employer and the employee; Saturday – 9:00 a.m. to 1:00 p.m. (same daily wages for Monday to Saturday)

- total number of hours worked in this month : 170 hours ¹⁰
- SMW rate : \$28

Calculation

- (1) Minimum wage for this month : **\$4,760** (170 hours × \$28)
 - (2) Wages payable to the employee in respect of this month :
\$5,037 (\$6,500 – rest day pay of \$867 ¹¹ – payment for lunch break of \$596 ¹²)
- ⇒ Since (2) is not less than (1), the minimum wage requirement is met.

Example 18 :

Assuming

- the following employment terms according to the contract of employment :
 - remuneration : \$250 per day, wage period is a calendar month, with no-pay rest days on Sundays
 - working hours :
Monday to Saturday – 9:00 a.m. to 5:00 p.m. including 1-hour paid lunch break
- total number of hours worked in this month : 216 hours ¹³
- SMW rate : \$28

10 Assumptions : There are 30 days (including 4 Saturdays and 4 Sundays) in this month and the actual total number of hours worked is 170 hours (22 days from Monday to Friday × 7 hours per day + 4 Saturdays × 4 hours per day).

11 Assumptions : Rest day pay is the payment made to the employee for time that is not hours worked. Rest day pay for 4 Sundays is : $\$6,500 \div 30 \text{ days} \times 4 \text{ days} = \867 .

12 Assumptions : Payment for lunch break is the payment made to the employee for time that is not hours worked. With the same hourly wages for working hours and lunch break in the 22 days from Monday to Friday, payment for lunch break is : $\$6,500 \div 30 \text{ days} \div 8 \text{ hours} \times 1 \text{ hour} \times 22 \text{ days} = \596 .

13 Assumptions : There are 31 days (including 4 Sundays) in this month and the actual total number of hours worked is 216 hours (27 days from Monday to Saturday × 8 hours per day). In this example, as meal break is regarded as working hours of the employee in accordance with the contract of employment or agreement with the employer, it is included in computing minimum wage.

Calculation

(1) Minimum wage for this month : **\$6,048** (216 hours × \$28)

(2) Wages payable to the employee in respect of this month :
\$6,750 (27 days × \$250 per day)

⇒ Since (2) is not less than (1), the minimum wage requirement is met.

Example 19 :

Assuming

- the following employment terms according to the contract of employment :
 - remuneration : piece-rated at \$100 per piece, with no-pay meal break; wage period is a calendar month; total remuneration for this month is \$5,500 (\$100×55 pieces)
- total number of hours worked in this month : 200.5 hours
- SMW rate : \$28

Calculation

(1) Minimum wage for this month : **\$5,614** (200.5 hours × \$28)

(2) Wages payable to the employee in respect of this month : **\$5,500**¹⁴

⇒ Since (2) is less than (1), the employer has to pay additional remuneration of \$114 (\$5,614 – \$5,500) to meet the minimum wage requirement.

Example 20 :

Assuming

- the following employment terms according to the contract of employment :
 - remuneration : \$8,000 per month with 1 rest day with pay per week
 - working hours :
6 days per week with 12 working hours per day including 1-hour paid lunch break which is regarded as hours worked as agreed between the employer and the employee
- total number of hours worked in this month : 324 hours¹⁵

14 As the employee in this example is not entitled to payment for time that is not hours worked, no deduction from his remuneration is required in computing his wages payable in respect of that month.

15 Assumptions : There are 31 days (including 4 rest days) in this month and the actual total number of hours worked is 324 hours (27 days × 12 hours per day). In this example, as meal break is regarded as working hours of the employee in

- SMW rate : \$28

Calculation

- (1) Minimum wage for this month : **\$9,072** (324 hours × \$28)
 - (2) Wages payable to the employee in respect of this month :
\$6,968 (\$8,000 — rest day pay of \$1,032¹⁶)
- ⇒ Since (2) is less than (1), the employer has to pay additional remuneration of \$2,104 (\$9,072 — \$6,968) to meet the minimum wage requirement.

Example 21 :

Assuming

- the following employment terms according to the contract of employment :
 - remuneration : \$6,000 per month with no-pay rest days on Sundays
 - working hours :
6 days per week with 7 working hours per day, excluding a 1-hour no-pay lunch break daily
- total number of hours worked in this month : 189 hours¹⁷
- SMW rate : \$28

Calculation

- (1) Minimum wage for this month : **\$5,292** (189 hours × \$28)
 - (2) Wages payable to the employee in respect of this month : **\$6,000**
- ⇒ Since (2) is not less than (1), the minimum wage requirement is met.

accordance with the contract of employment or agreement with the employer, it is included in computing minimum wage.

16 Assumptions : Rest day pay is the payment made to the employee for time that is not hours worked. Rest day pay for 4 days is: \$8,000 ÷ 31 days × 4 days = \$1,032.

17 Assumptions : There are 31 days (including 4 Sundays) in this month and the actual total number of hours worked is 189 hours (27 days from Monday to Saturday × 7 hours per day). In Examples 21 and 22, as there is no agreement between the employer and the employee that meal break is the employee's working hours and the employee's meal break does not fall under the circumstances of hours worked as specified in the Minimum Wage Ordinance, it is not necessary to include such meal break in computing minimum wage ([Please refer to the section on “meal break” above](#)).

Example 22 :

Assuming

- the following employment terms according to the contract of employment :
 - remuneration : \$8,000 per month with one no-pay rest day per week
 - working hours :
6 days per week with 11 working hours per day, excluding a 1-hour no-pay lunch break daily
- total number of hours worked in this month : 297 hours ¹⁸
- SMW rate : \$28

Calculation

- (1) Minimum wage for this month : **\$8,316** (297 hours × \$28)
 - (2) Wages payable to the employee in respect of this month : **\$8,000**
- ⇒ Since (2) is less than (1), the employer has to pay additional remuneration of \$316 (\$8,316 – \$8,000) to meet the minimum wage requirement.

(2) Deductions from wages

- Deductions from the wages of an employee made under the specified provisions of the Employment Ordinance in respect of any wage period **must be counted** as part of the wages payable in respect of that wage period. These specified provisions refer to section 25(3) and section 32(2)(b), (c), (d), (e), (f), (g), (h) and (i) of the Employment Ordinance. For these provisions, please refer to the text of the Employment Ordinance and the *Concise Guide to the Employment Ordinance*. There are some examples of application below.

Example 23 :

An employee has damaged the goods of the employer by neglect or default. The employer deducts \$100, equivalent to the value of the damage, from the wages of this employee in respect of January in accordance with the Employment Ordinance.

18 Assumptions : There are 31 days (including 4 rest days) in this month and the actual total number of hours worked is 297 hours (27 days × 11 hours per day).

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, this deducted amount of \$100 is counted as wages payable in respect of January.

Example 24 :

An employer has made a loan to an employee. With the employee's written consent, the employer deducts \$200 from the wages of this employee in respect of February for the recovery of the loan in accordance with the Employment Ordinance.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, this deducted amount of \$200 is counted as wages payable in respect of February.

Example 25 :

An employer deducts \$300 from an employee's wages in respect of March to make contributions to the Mandatory Provident Fund on behalf of the employee (i.e. employee's contributions for Mandatory Provident Fund).

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, this deducted amount of \$300 is counted as wages payable in respect of March.

Example 26 :

An employer deducts \$400 from an employee's wages in respect of April for the recovery of an over-payment of wages made to the employee in the wage period of March in accordance with the Employment Ordinance.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, this amount of \$400 is counted as wages payable in respect of April, not as wages payable in respect of March.

(3) Advance or over-payment of wages

- An advance or over-payment of wages made to an employee in any wage period must **not** be counted as part of the wages payable in respect of that wage period.

Example 27 :

In May, an employer has made an advance payment of wages of \$500 to an employee from his wages payable in respect of June. The employer

subsequently deducts such amount from the employee's wages payable in respect of June in accordance with the Employment Ordinance.

⇒ In determining whether the wages of this employee meet the minimum wage requirement, this amount of \$500 is counted as wages payable in respect of June, not as wages payable in respect of May.

(4) Payment of arrears of wages in respect of an earlier wage period

- A payment of arrears of wages in respect of an earlier wage period made to an employee in any wage period must **not** be counted as part of the wages payable in respect of the wage period in which it is paid.

Example 28 :

An employer has defaulted payment of wages of \$600 in respect of July to an employee, and pays such arrears of wages in the wage period of August.¹⁹

⇒ In determining whether the wages of this employee meet the minimum wage requirement, this amount of \$600 is counted as wages payable in respect of July, not as wages payable in respect of August.

(5) Counting of commission

- According to the Employment Ordinance, the definition of wages includes commission (except commission which is of a gratuitous nature or which is payable only at the discretion of the employer). Hence, other than commission which is gratuitous or payable only at the discretion of the employer, commission is wages and must be paid in accordance with the provisions of the Employment Ordinance. Subject to the provisions of other legislation, employers and employees may agree on how commission is calculated and payable in their employment contracts.
- In determining whether the wages of an employee meet the minimum wage requirement, commission payable under the contract of employment is counted as wages payable in respect of the wage period as specified in the employment contract (no matter the

19 According to the Employment Ordinance, an employer who wilfully and without reasonable excuse fails to pay wages to an employee when it becomes due is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for three years.

employer has paid it or not when it has been due ¹⁹) (Example 29). If commission is payable in respect of a number of wage periods according to the contract of employment, in determining whether the wages of an employee meet the minimum wage requirement, commission is counted as wages payable in respect of the corresponding wage period as provided in the contract of employment (Example 30).

- In addition, given the unique nature of commission, the Minimum Wage Ordinance sets out the following provision for employers and employees to apply in the counting of commission as wages payable :

For the purpose of computing minimum wage, any commission paid

- with the prior agreement of the employee
- at any time after the first 7 days of a wage period but before the end of the 7th day immediately after that wage period

must be counted as part of the wages payable in respect of that wage period irrespective of when the work is done or the commission is otherwise payable under the contract of employment.

Hence, in determining whether the wages of an employee meet the minimum wage requirement, if there is prior agreement of the employee, commission can be counted as part of the wages payable in respect of a wage period according to the timing when the commission is paid (Example 31, Example 32). Without the prior agreement of the employee, the above provision is not applicable. In applying the provision, employers have to comply with the provisions on wage payment and deductions under the Employment Ordinance. Please refer to the *Concise Guide to the Employment Ordinance* for details.

Example 29 :

An employee is entitled to a basic salary plus commission **according to the contract of employment**. His wage period is each calendar month.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, wages payable in respect of each month include the basic salary and commission, no matter whether the employer has paid it or not. ¹⁹

Example 30 :

An employee is entitled to a basic salary plus commission **according to the contract of employment**. His wage period is each calendar month. According to the contract of employment, commission is payable in respect of a number of wage periods.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, wages payable in respect of each month include the basic salary as well as the commission payable in respect of the corresponding month, no matter whether the employer has paid it or not.¹⁹

Example 31 :

An employer pays an employee commission of \$1,000 (which is originally payable in respect of the wage period of March) on 31 January with the **prior agreement** of the employee.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, this commission of \$1,000 is counted as wages payable in respect of January²⁰, not as wages payable in respect of March.

Example 32 :

An employer pays an employee commission of \$2,000 and \$3,000 on 8 April and 7 June respectively with the **prior agreement** of the employee. The commission is originally payable in respect of the wage period of July.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, the commission of \$2,000 is counted as wages payable in respect of April²¹ and the commission of \$3,000 is counted as wages payable in respect of May²², both not being counted as wages payable in respect of July.

20 Being paid in the period from 8 January to 7 February, the commission is counted as wages payable in respect of January.

21 Being paid in the period from 8 April to 7 May, the commission is counted as wages payable in respect of April.

22 Being paid in the period from 8 May to 7 June, the commission is counted as wages payable in respect of May.

D. Transitional provisions

- If the commencement date of SMW (i.e. 1 May 2011) falls within the wage period of an employee, any hours worked before the commencement date and wages payable for such hours should not be taken into account in calculating minimum wage. Specifically, only hours worked on or after 1 May 2011 and wages payable for such hours are relevant for the calculation of minimum wage.

E. No contracting out

- Any provision of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Minimum Wage Ordinance shall be void. In other words, any agreement made under the employment contract between an employer and an employee cannot reduce the latter's entitlement to SMW.
- Same as the Employment Ordinance, a contract of employment is an agreement on the employment conditions made between an employer and an employee. The agreement can be made orally or in writing and it includes both express and implied terms.

5 Employer to record the total number of hours worked by employee (where applicable)

- The wage and employment records kept by an employer under the Employment Ordinance should include the total number of hours (including any part of an hour)²³ worked by the employee in a wage period if :
 - SMW applies to the employee (Please refer to [3. Coverage of the Ordinance](#) above); **and**
 - wages payable in respect of that wage period (Please refer to [4. Application of the Ordinance](#) (the section on [C. Wages payable to employee in respect of wage period](#)) above) are **less than \$11,500 per month.**

Therefore, when wages payable in respect of a wage period are at **\$11,500 or above per month**, the wage and employment records kept by an employer according to the Employment Ordinance are not required to include the total number of hours worked by the employee in that wage period.

Points to note :

As regards the monthly monetary cap (\$11,500) in exempting employers from the requirement to keep records of the total number of hours worked by employees, the definition of wages is the same as that in the Minimum Wage Ordinance. Payment made to the employee in a wage period for any time that is not hours worked (e.g. holiday pay, annual leave pay, sickness allowance, maternity leave pay, rest day pay, etc) should not be counted as part of the wages payable in respect of the wage period. Therefore, in determining whether the wages payable to an employee in respect of a wage period are not less than the monthly monetary cap, these payments, where applicable, should not be included. In addition, the Minimum Wage Ordinance also sets out whether some other sums should be counted as wages payable in respect of a wage period in order to determine whether the wages meet the minimum wage. For details, please refer to [4. Application of the Ordinance](#) (the section on [C. Wages payable to employee in respect of wage period](#)) above.

23 This does not include hours worked before the commencement date of SMW (i.e. 1 May 2011).

Example 33 :

Assuming the following employment terms according to the contract of employment :

An employee's wage period is each calendar month and he is entitled to a monthly salary of \$13,000 with paid rest days. In the wage period of May, payments made to the employee for time that is not hours worked in the wage period are rest day pay for 4 days and statutory holiday pay for 1 day. Whether the wages payable meet the monthly monetary cap is calculated as follows :

monthly salary of \$13,000 — rest day pay for 4 days ($\$1,677$)²⁴ — statutory holiday pay for 1 day (\$419) = \$10,904

⇒ Since the amount calculated is **less than** the monthly monetary cap of **\$11,500**, the employer must keep records of the total number of hours worked by the employee in that wage period.

Example 34 :

Assuming the following employment terms according to the contract of employment :

An employee's wage period is each calendar month and he is entitled to a monthly salary of \$13,000 with no-pay rest days. In the wage period of May, payment made to the employee for time that is not hours worked in the wage period is statutory holiday pay for 1 day. Whether the wages payable meet the monthly monetary cap is calculated as follows :

monthly salary of \$13,000 — statutory holiday pay for 1 day (\$481) = \$12,519

⇒ Since the amount calculated is **not less than** the monthly monetary cap of **\$11,500**, the wage and employment records are not required to include the total number of hours worked in that wage period.

- If the wage period of an employee is not a calendar month, the monetary cap of **\$11,500 per month** on keeping records of the total number of hours worked is calculated on a proportional basis ([Example 35](#), [Example 36](#)).
- Neither the Employment Ordinance nor the Minimum Wage Ordinance specifies the form of recording the total number of hours

²⁴ Assumptions : Rest day pay is the payment made to the employee for time that is not hours worked. Rest day pay for 4 days is : $\$13,000 \div 31 \text{ days} \times 4 \text{ days} = \$1,677$. For illustration purpose, figures are rounded to the nearest integers in these examples.

worked. Officers of the Labour Department may inspect the wage and employment records and require the total number of hours worked and the following particulars in the wage and employment records (which are currently set out in the Employment Ordinance) to be produced in a single document :

- name and identity card number of the employee
 - wage period
 - wages paid in respect of each wage period
 - periods of annual leave, sick leave, maternity leave and holidays entitled and taken, together with details of payments made in respect of such periods
- While the employer is not required to keep the records of the total number of hours worked by the employee when wages payable in respect of a wage period are at **\$11,500** or above per month, it is pertinent to note that the employee is still entitled to be paid wages in respect of that wage period of not less than the minimum wage.

Example 35 :

The wage period of an employee is half-monthly, lasting from the 1st day to the 15th day and from the 16th day to the last day of a month. Taking the two wage periods in August as an example, the monetary cap applicable to this employee for the records of the total number of hours worked is calculated proportionally as follows –

(a) Wage period from 1 to 15 August :

\$11,500 × 15 days ÷ 31 days (i.e. the ratio that the period 1 to 15 August bears to August) = \$5,564.52

⇒ If wages payable in respect of the above wage period is at \$5,564.52 or above, the wage and employment records are not required to include the total number of hours worked in that wage period.

(b) Wage period from 16 to 31 August :

\$11,500 × 16 days ÷ 31 days (i.e. the ratio that the period 16 to 31 August bears to August) = \$5,935.48

⇒ If wages payable in respect of the above wage period is at \$5,935.48 or above, the wage and employment records are not required to include the total number of hours worked in that wage period.

Example 36 :

The wage period of an employee runs from the 16th day of each month to the 15th day of the following month. Taking the wage period of 16

August to 15 September as an example, the monetary cap applicable to this employee for the records of the total number of hours worked is calculated proportionally as follows –

$\$11,500 \times 16 \text{ days} \div 31 \text{ days}$ (i.e. the ratio that the period 16 to 31 August bears to August) + $\$11,500 \times 15 \text{ days} \div 30 \text{ days}$ (i.e. the ratio that the period 1 to 15 September bears to September) = \$11,685.48

⇒ If wages payable in respect of the above wage period is at \$11,685.48 or above, the wage and employment records are not required to include the total number of hours worked in that wage period.

Points to note :

- According to the Employment Ordinance, every employer must at all times keep a record setting out the wages and employment history of each employee covering the period of his employment during the preceding 12 months, including the total number of hours worked (where applicable). The wage records must be kept at the employer's place of business or at the place where the employee is employed, and they should also be kept for a period of another six months after the employee ceases to be employed. An employer who fails to keep the wage and employment records is liable to prosecution and, upon conviction, to a fine of \$10,000. For information on the provisions of the Employment Ordinance, please refer to the *Concise Guide to the Employment Ordinance*.
- If employers and employees can keep proper records in relation to attendance, hours worked, wages etc, this can safeguard their respective rights and benefits and help avoid unnecessary disputes.

Appendix 1 Exemption of student interns and specified work experience students

- SMW does not apply to student interns as well as work experience students during a period of exempt student employment.

A. Student interns

A student intern is :

- a student undergoing a period of work arranged or endorsed by a local education institution specified in Schedule 1 to the Minimum Wage Ordinance, and the work is a compulsory or elective component of the requirements of a full-time accredited programme being provided by the institution to the student; or
- a student resident in Hong Kong and undergoing a period of work arranged or endorsed by an institution, and the work is a compulsory or elective component of the requirements of a full-time education programme for a non-local academic qualification at degree or higher level being provided by the institution to the student.

B. Work experience students during a period of exempt student employment

A work experience student is :

- a student who is enrolled in a full-time accredited programme provided by a local education institution specified in Schedule 1 to the Minimum Wage Ordinance; or
- a student who is resident in Hong Kong and enrolled in a full-time education programme for a non-local academic qualification at degree or higher level

and is under the age of 26 years at the beginning of employment. The work experience student may agree with the employer to have a continuous period of up to 59 days²⁵ as exempt student employment if :

- (a) the student has not commenced another exempt student employment period within the same calendar year²⁵ (whether under the employment of the same employer or not) ([Example](#)

²⁵ This does not include any employment period before the commencement date of SMW (i.e. 1 May 2011).

37); **and**

- (b) the student has made a statutory declaration verifying the fact in (a) above and provided the declaration (or copy) to the employer.

Example 37 :

A work experience student is employed from 1 July 2012 and agrees with the employer on a period of exempt student employment up to 28 August 2012 (i.e. not exceeding a continuous period of 59 days).

- ⇒ The continuous period of up to 59 days as exempt student employment for a work experience student only applies to the employment period under the same employment contract in the same calendar year. In this example, even if the work experience student is having a period of exempt student employment of less than 59 days under one contract of employment, the remaining days are not allowed to be carried forward to another contract of employment for the purpose of exemption. As such, the work experience student in this example cannot have another exempt student employment period in 2012, regardless of whether the employment is with the same employer or not.

Local education institutions specified in Schedule 1 to the Minimum Wage Ordinance

- The Hong Kong Institute of Education
- University of Hong Kong
- The Hong Kong Polytechnic University
- The Chinese University of Hong Kong
- Hong Kong Baptist University
- City University of Hong Kong
- The Hong Kong Academy for Performing Arts
- The Hong Kong University of Science and Technology
- The Open University of Hong Kong
- Lingnan University
- Approved post secondary colleges registered under the Post Secondary Colleges Ordinance (Cap. 320)

- Bodies established under the Vocational Training Council Ordinance (Cap. 1130)
- Schools registered or provisionally registered under the Education Ordinance (Cap. 279) (**Note** : The programme should be at post secondary level, i.e. associate degree, higher diploma, professional diploma or equivalent or higher level)

Points to note :

- The Labour Department will publish guidelines on the details of the exemption for student interns, work experience students and employers under the SMW regime.
- Since internships undertaken by work experience students are not necessarily curriculum-related or arranged/endorsed by their institutions, the Minimum Wage Ordinance sets out the above restrictions on age, duration of exempt student employment and that the student may commence a period of exempt student employment at most once in a calendar year. These restrictions do not apply to student interns whose internships must be arranged/endorsed by their institutions and form a compulsory/elective component of their programmes.
- SMW applies if a work experience student does not agree with the employer to have a period of exempt student employment.

Appendix 2 Enquiries

Enquiry Hotline: 2717 1771 (the hotline is handled by the 1823 Call Centre)

Enquiry in person to Offices of the Labour Relations Division of the Labour Department

Hong Kong

Hong Kong East Office
34/F, Revenue Tower,
5 Gloucester Road,
Hong Kong.

Hong Kong West Office
3/F, Western Magistracy Building,
2A Pokfulam Road,
Hong Kong.

Kowloon

Kowloon East Office
Room 1206, 12/F, Stelux House,
698 Prince Edward Road East,
San Po Kong, Kowloon.

Kowloon West Office
Room 1009, 10/F,
Cheung Sha Wan Government Offices,
303 Cheung Sha Wan Road,
Shamshuipo, Kowloon.

Kowloon South Office
2/F, Mongkok Government Offices,
30 Luen Wan Street,
Mongkok, Kowloon.

Kwun Tong Office
6/F, Kowloon East Government Offices,
12 Lei Yue Mun Road,
Kwun Tong, Kowloon.

New Territories

Tsuen Wan Office
5/F, Tsuen Wan Government Offices,
38 Sai Lau Kok Road,
Tsuen Wan, New Territories.

Kwai Chung Office
6/F, Kwai Hing Government Offices,
166 - 174 Hing Fong Road,
Kwai Chung, New Territories.

Tuen Mun Office
Room 2720, 27/F,
Tuen Mun Parklane Square,
2 Tuen Hi Road, Tuen Mun,
New Territories.

Sha Tin & Tai Po Office
Rooms 304-313, 3/F,
Sha Tin Government Offices,
1 Sheung Wo Che Road,
Sha Tin, New Territories.



Set a wage floor and
protect grassroots employees