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Paper for the House Committee

**Report of the Bills Committee on
Protection of Wages on Insolvency (Amendment) Bill 2011**

Purpose

This paper reports on the deliberations of the Bills Committee on Protection of Wages on Insolvency (Amendment) Bill 2011.

Background

2. Established in 1985 under the Protection of Wages on Insolvency Ordinance (Cap. 380) ("PWIO"), the Protection of Wages on Insolvency Fund ("PWIF"), provides timely relief in the form of ex gratia payment to employees of insolvent employers. It is administered by the PWIF Board which consists of employer and employee representatives as well as public officers. The Labour Department ("LD") is responsible for processing applications and the operation of PWIF.

3. The maximum amount of ex gratia payment which an employee can receive from PWIF has increased from \$8,000, covering only wages, in 1985 to the current level of \$278,500, comprising -

- (a) wages for last four months' service (including outstanding pay for annual leave and statutory holidays taken by the employee in the period) up to \$36,000;
- (b) one month's wages in lieu of notice up to \$22,500; and
- (c) severance payment up to \$50,000 plus 50% of the remainder of the entitlement under the Employment Ordinance (Cap. 57) ("EO").

The Bill

4. The Bill proposes to amend PWIO to expand the scope of the ex gratia payment under PWIF to cover untaken statutory holidays and untaken annual leave subject to certain limitations.
5. Regarding the ex gratia payment for untaken statutory holidays, the proposed limitations include -
 - (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 of pay for untaken statutory holidays must not exceed the amount calculated at the daily rate of holiday pay specified under section 41 (Rate of holiday pay) of EO or \$10,500, whichever is the lesser.
6. The ex gratia payment for untaken annual leave is subject to the following proposed limitations -
 - (a) the pay for untaken annual leave must be payable under section 41D (Payment of annual leave pay on cesser of employment) of 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 pay for the applicant's full statutory entitlement under section 41AA (Annual leave) of 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.
7. Further, the Bill proposes that the total amount of the ex gratia payment for both untaken annual leave and untaken statutory holidays must not exceed \$10,500. In line with other items of ex gratia payment under PWIO, the application for the payment of these two categories of pay must be made not more than six months after the applicant's last day of service (in the case of pay for untaken statutory holidays) or the due date for the payment (in the case of pay for untaken annual leave). The Bill also provides that the amendments will not apply to a contract of employment

terminated before the commencement of the Bill, if enacted, and the payment ceiling of \$10,500 may be amended by the Legislative Council by resolution.

The Bills Committee

8. At the House Committee meeting on 7 October 2011, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

9. Under the chairmanship of Hon WONG Ting-kwong, the Bills Committee has held four meetings with the Administration, and received the views of deputations at one of the meetings. A list of deputations which have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Limitations on the period for untaken annual leave and untaken statutory holidays

10. Some members are of the view that the proposals in the Bill are not adequate to protect the interests of employees. These members are concerned that with the limit on period of untaken annual leave and the payment ceiling of \$10,500 to cover the pay for untaken annual leave and untaken statutory holidays, some employees may not be able to receive from PWIF the full amount payable to them by the employer for untaken annual leave and untaken statutory holidays. Given the accumulated surplus in PWIF and the payment ceiling, the limit on period imposed on pay for untaken annual leave should be relaxed. They have pointed out that in the motion passed by the Panel on Manpower at its meeting on 18 June 2009, the Administration was urged to amend the scope of PWIF to cover the full amount of pay for untaken statutory holidays and annual leave, while maintaining the ceiling at \$10,500. There was no mention in the motion about the restrictions on the number of days for untaken annual leave and statutory holidays.

11. The Administration has explained that the initial proposal considered by the Panel on Manpower in June 2009 covered only pay for untaken annual leave not exceeding the employee's full statutory entitlement in the last leave year under EO. In 2010, the PWIF Board had considered the motion as stated in paragraph 10 above and revised the proposal to cover pay for untaken annual leave not exceeding the employee's full statutory entitlement in the last leave year and pay for untaken statutory holidays within four months before the employee's last day of service, subject to a payment ceiling of \$10,500 (i.e. proposals under the Bill). With the support of the Labour Advisory Board ("LAB") and endorsement by the Panel on

Manpower in 2010, the Administration has taken forward the legislative amendments as presently proposed.

12. Some members consider that with the payment capped at \$10,500, the limit on period in respect of pay for untaken annual leave should be relaxed to cover pay for untaken annual leave for the last two leave years payable upon termination of employment contract under EO. Some other members consider that as a payment ceiling of \$10,500 has already been laid down in the Bill, all limits on the period in respect of pay for untaken annual leave and for untaken statutory holidays should be removed.

13. Other members, however, express support for the proposed cap at the employee's annual leave entitlement in the last leave year. In their view, the early enactment of the Bill would be in the best interest of affected employees. They consider that any proposal should be made in line with the prudent management of PWIF. As the Bill has been drawn up on the basis of the consensus reached through the tripartite mechanism of the PWIF Board and LAB and should be respected, the present proposals in the Bill should be maintained so that employee protection could be enhanced without delay. Further expansion could be considered in a review after the Bill, if enacted, has been implemented for one year.

14. The Administration has stressed that -

- (a) a progressive approach is important in improving the coverage of PWIF, especially in respect of a new item;
- (b) as with other items currently covered by PWIF, a payment ceiling should be set to ensure the sustainability of PWIF;
- (c) the shifting of the liability for prolonged default of pay for untaken annual leave from employers to PWIF should be avoided; and
- (d) the PWIF Board has also agreed to conduct a review one year after the implementation of the Bill, if enacted, based on the actual experience of operation and the financial position of PWIF.

15. At its meeting on 29 November 2011, the Bills Committee passed a motion requesting the Administration to amend the Bill so as to abolish the ceiling on the number of days for calculating the amounts of pay for untaken annual leave and the pay for untaken statutory holidays, and to immediately consult the PWIF Board and LAB on the matter.

16. The Administration has subsequently informed the Bills Committee that LD consulted the PWIF Board on 12 December 2011 pursuant to the motion passed by

the Bills Committee. After thorough deliberation on the content of the motion and the various guiding principles of PWIF, the PWIF Board considers that the original cap on the pay for untaken annual leave payable to an employee under the Bill in respect of the employee's full statutory entitlement for the last leave year (ranging from seven to 14 days' pay depending on the employee's length of employment) may be changed so that an employee may receive ex gratia payment in respect of untaken annual leave earned in a period not exceeding two leave years (ranging from 14 to 28 days' pay depending on the employee's length of employment) ("the revised proposal"). However, the coverage of pay for untaken statutory holidays (i.e. pay for statutory holidays under EO not yet taken by an employee within four months before his last day of service) should remain unchanged.

17. The Administration has further advised members that the PWIF Board considers that the revised proposal in response to the motion passed by the Bills Committee has been made with due regard to the relevant requirements under EO so as to avoid PWIF from shouldering the liability arising from employer's contravention of the law and sending the wrong message to the community that such breaches are tolerable. As such, the PWIF Board does not agree to totally abolish the ceiling on the numbers of days or period for pay for untaken annual leave and untaken statutory holidays under the Bill. Regarding the pay for untaken annual leave, an employee may be entitled to such pay for the last full leave year and pro rata annual leave pay for the last leave year in which the employee has at least three but less than 12 months' service upon termination of employment contract under EO. Having considered these, the PWIF Board has come to the view that the pay for untaken annual leave may be increased to cover the untaken annual leave earned in the last two leave years so that some employees who are entitled to pay for untaken annual leave for more than one leave year could be fully granted ex gratia payment from PWIF to cover pay for untaken annual leave payable upon termination of employment contract under EO. However, as statutory holidays must be granted within 90 days under EO and the four months' coverage has been set with reference to the pay for taken statutory holidays within four months' wages currently covered by PWIF, the PWIF Board considers that the limit on untaken statutory holidays should be upheld. LAB agrees with the views and the revised proposal of the PWIF Board.

18. After considering the views of the PWIF Board and LAB, the Administration proposes to extend the ex gratia payment to cover pay for untaken annual leave upon termination of employment contract to the employee's untaken annual leave earned in the last two leave years. The Administration agrees with the PWIF Board's view that the limits on the number of days or period in respect of pay for untaken annual leave and pay for untaken statutory holidays should not be abolished.

19. While some members are in support of the revised proposal, some other members remain of the view that given the payment ceiling of \$10,500, the limits on

the period in respect of pay for untaken annual leave and untaken statutory holidays should be removed.

20. The Administration has stressed that the PWIF Board has undertaken to review the coverage of PWIF in respect of pay for untaken annual leave, pay for untaken statutory holidays and the payment ceiling of \$10,500 one year after the implementation of the Bill, if enacted. The Administration has also undertaken to convey to the PWIF Board Hon Li Fung-ying' s suggestion of including in the review the other items covered by PWIF and reporting the outcome of the review to the Panel on Manpower at an appropriate time.

21. Given the review by the PWIF Board to be conducted referred to in paragraph 20 above, no members raise objection to the revised proposal. On the basis of the above understanding, the Administration will introduce Committee Stage amendments ("CSAs") to extend the ex gratia payment for pay for untaken annual leave payable to an employee upon termination of employment contract under EO from not exceeding the employee's full statutory entitlement for the last leave year to the untaken annual leave earned in the last two leave years.

22. Noting that the total amount of the pay for both untaken annual leave and untaken statutory holidays from PWIF must not exceed \$10,500, members have sought information on the apportionment between the payment for these two categories of entitlement should the total amount exceed the ceiling payment.

23. The Administration has responded that the computation will not affect the employees' claims to be registered as priority debts and detailed computation will be worked out and discussed by LD with the Official Receiver's Office and the Legal Aid Department after the enactment of the Bill.

Computation of the number of days of untaken annual leave

24. Members have sought information on the method of computation of the number of days of untaken annual leave for payment under the proposals in the Bill.

25. The Administration has explained that according to the initially proposed section 16(2)(h) to be added to PWIO, pay for untaken annual leave covers the payment under section 41D of EO for untaken annual leave to which an employee is entitled upon termination of his employment contract, including pay for any annual leave which has not yet been taken by an employee who has been employed for a full year; and pro rata annual leave pay for a leave year in which the employee has at least three but less than 12 months' service (an employee is entitled to that pro rata annual leave pay on termination of his employment contract). The amount of pay must not exceed pay for the applicant's full number of days of annual leave to which the employee would have been entitled in respect of the last leave year under EO,

and the number of days of annual leave ranges from seven to 14 days depending on his length of service as prescribed in section 41AA of EO. Upon termination of an employment contract, cases with regard to the pay for annual leave accumulated but not yet taken by an employee under section 41D of EO include -

- (a) the employee has a year's service or less;
- (b) the employee has more than a year's service, with less than three months' service in the last leave year;
- (c) the employee has more than a year's service, with at least three but less than 12 months' service in the last leave year, and has taken part or all of his paid annual leave accumulated in the previous complete leave year before termination of his contract; and
- (d) the employee has more than a year's service, with at least three but less than 12 months' service in the last leave year, and has not taken any paid annual leave accumulated in the previous complete leave year before termination of his contract.

26. The Administration has explained that in situations referred to in paragraph 25 (a), (b) and some of the cases in (c) above, the employees would have their full entitlement covered by the ex gratia payment from PWIF under the proposed pay for untaken annual leave, as capped by the full number of annual leave days to which the employee would have been entitled in respect of the last leave year (ranging from seven to 14 days) under the Bill. At the request of the PWIF Board, LD has conducted a study on the applications received by PWIF in the third quarter of 2009 for considering a proposal to expand the scope of PWIF to cover pay for untaken annual leave and pay for untaken statutory holidays. According to the findings of the study, the above cases accounted for 75% of the applicants claiming for pay for untaken annual leave. The remaining applicants could receive ex gratia payment up to 80% and not less than 50% of their annual leave entitlement. The Administration has further explained that under section 16(2)(h) as proposed to be revised by CSAs, an applicant could receive ex gratia payment for the applicant's untaken annual leave entitlement earned in the last two leave years. Examples provided by the Administration to illustrate the computation of annual leave pay in cases with full payment from PWIF both under the Bill and the revised proposal are in **Appendix III**.

Time limit for submission of an application for payment

27. Members have sought clarification on the time limit for an employee to submit an application for payment in respect of pay for untaken statutory holidays

and untaken annual leave in the proposed section 16(2)(g)(iv) and 16(2)(h)(iii) of PWIO respectively.

28. According to the Administration, at present, applications for payment in respect of outstanding wages, wages in lieu of notice and severance payment covered by PWIF must be made within the time limit of six months. This is to ensure that employees will file their applications within a reasonable time, otherwise it will be difficult to verify the employee's entitlement. Detailed provisions for individual items are worked out with regard to their respective nature and the relevant requirements under EO and PWIO. Similarly, appropriate provisions on time limit are made as required for the proposed pay for untaken annual leave and pay for untaken statutory holidays under the Bill.

29. Regarding the proposed pay for untaken annual leave, the Administration has explained that the sum in respect of which an ex gratia payment can be made from PWIF must be one prescribed by section 41D of EO, which stipulates that it is due upon termination of the employment contract. Therefore, the time limit for application in respect of the pay for untaken annual leave proposed in section 16(2)(h)(iii) of PWIO is six months after it became due, which follows closely the requirement of section 41D of EO that the amount is due upon termination of the employment contract. Such arrangement is also in line with the provision on the wages in lieu of notice currently covered by PWIF, as both are due upon termination of the contract.

30. As regards the proposed pay for untaken statutory holidays, the Administration has informed members that it covers the statutory holidays falling within the four-month period immediately prior to the applicant's last day of service, to which the applicant is entitled but has not yet taken. Therefore, the time limit for application specified in the proposed section 16(2)(g)(iv) of PWIO is six months after the applicant's last day of service. This arrangement is also in line with the provision on the arrears of wages currently covered by PWIF, as employee's entitlement is covered in each case if it arises during the four months before the applicant's last day of service.

Committee Stage amendments

31. Apart from the CSAs discussed in the above paragraphs, the Administration has proposed CSAs to make technical refinements to the proposed section 16(2)(g)(i) which stipulates the four-month limit on untaken statutory holidays as well as the proposed section 16(2)(g)(iv) and 16(2)(h)(iii) which stipulate a six-month limit on making applications in respect of pay for untaken statutory holidays and untaken annual leave for better alignment with the existing relevant provisions on payment items covered under PWIO. A full set of the draft CSAs to be moved by the Administration is in **Appendix IV**.

32. The Bills Committee will not propose CSAs to the Bill.

Resumption of Second Reading debate

33. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting of 18 April 2012, subject to the moving of the CSAs by the Administration.

Follow-up action by the Administration

34. The Administration has undertaken to convey to the PWIF Board, which has agreed to review the coverage of PWIF in respect of the pay for untaken leave, pay for untaken statutory holidays and the payment ceiling of \$10,500 one year after the implementation of the Bill (if enacted), the suggestion of including the other items covered by PWIF and reporting the outcome of the review to the Panel on Manpower at an appropriate time (paragraph 20 above refers).

Advice sought

35. Members are invited to note the deliberations of the Bills Committee and the date for resumption of the Second Reading debate on the Bill.

**Bills Committee on
Protection of Wages on Insolvency (Amendment) Bill 2011**

Membership list

Chairman Hon WONG Ting-kwong, BBS, JP

Members Hon LEE Cheuk-yan
Hon LEUNG Yiu-chung
Dr Hon Philip WONG Yu-hong, GBS
Hon LI Fung-ying, SBS, JP
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon Cyd HO Sau-lan
Hon WONG Sing-chi
Hon IP Wai-ming, MH
Hon IP Kwok-him, GBS, JP
Dr Hon PAN Pey-chyou

(Total: 14 Members)

Clerk Mrs Sharon TONG

Legal adviser Ms Clara TAM

Date 3 January 2012

**Bills Committee on
Protection of Wages on Insolvency (Amendment) Bill 2011**

A. Organizations which have given oral representation to the Bills Committee

1. Hong Kong Confederation of Trade Unions
2. The Hong Kong Federation of Trade Unions

B. Organizations which have provided written submissions only

1. Employers' Federation of Hong Kong
2. Federation of Hong Kong Industries
3. Labour Rights Committee of The Federation of Hong Kong & Kowloon Labour Unions
4. The Chinese General Chamber of Commerce
5. The Chinese Manufacturers' Association of Hong Kong

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Protection of Wages on Insolvency (Amendment) Bill 2011
Proposed Committee Stage Amendments (CSAs)
Examples to illustrate Calculation of Pay for Untaken Annual Leave

Cases with full payment from the Fund both under the Bill and the proposed CSAs

Example (1) (An employee having less than one year's service):

The employee's employment commenced on 1 July 2009 and was terminated on 31 March 2010.

- According to section 41D of the EO, the number of annual leave days to which he was entitled is 5.25 days (7 days x 274 / 365).
- Ex gratia payment payable to the applicant: 5.25 days of pay for untaken annual leave

Example (2) (An employee having more than one year's service, with less than 3 months' service in the last leave year):

The employee's employment commenced on 1 February 2009 and was terminated on 31 March 2010. Assuming that he has not taken any annual leave during his employment:

- According to section 41D of the EO, the number of days of annual leave which he has accumulated is:
 - For the first leave year (1 February 2009 to 31 January 2010): 7 days
 - 1 February 2010 to 31 March 2010: 0 days (as the employee has been employed for less than 3 months in this leave year)
- Ex gratia payment payable to the applicant: 7 days of untaken annual leave pay

Example (3) (An employee having more than one year's service, with at least 3 months to less than 12 months' service in the last leave year; and having fully taken his paid annual leave accumulated in the previous complete leave year, or partially taken his paid annual leave of that leave year while the outstanding accumulated untaken annual leave not exceeding the full number of days of annual leave entitled for the last leave year):

The employee's employment commenced on 1 December 2005 and was terminated on 31 March 2010. Assuming that he has taken 3 days' annual leave accumulated in the previous complete leave year:

- According to section 41D of the EO, the number of days of annual leave he has accumulated and not yet taken is:
 - For the fourth leave year (1 December 2008 to 30 November 2009): 6 days (9 days – 3 days)
 - 1 December 2009 to 31 March 2010: 3.32 days (10 days x 121 / 365)
 - Total number of days is 9.32.
- Ex gratia payment payable to the applicant: 9.32 days of untaken annual leave pay

Cases with full payment from the Fund upon amendment under the proposed CSAs

Example (4) (An employee having more than one year's service, with at least 3 months to less than 12 months' service in the last leave year; and having partially taken his paid annual leave accumulated in the previous complete leave year while the outstanding accumulated untaken annual leave exceeding the full number of days of annual leave entitled for the last leave year):

The employee's employment commenced on 1 December 2005 and was terminated on 31 March 2010. Assuming that he has taken 1 day's annual leave accumulated in the previous complete leave year:

- According to section 41D of the EO, the number of days of annual leave he has accumulated and not yet taken is:
 - For the fourth leave year (1 December 2008 to 30 November 2009): 8 days (9 days – 1 day)
 - 1 December 2009 to 31 March 2010: 3.32 days (10 days x 121 / 365)
 - Total number of days is 11.32.

- Ex gratia payment payable to the applicant :
 - Under the Bill: 10 days of untaken annual leave pay
 - Under the proposed CSAs: 11.32 days of untaken annual leave pay

Example (5) (An employee having more than one year's service, with at least 3 months to less than 12 months' service in the last leave year; and not yet taken any paid annual leave accumulated in the previous complete leave year):

The employee's employment commenced on 1 May 2000 and was terminated on 31 March 2010. Assuming that he has not taken any annual leave accumulated in the previous complete leave year:

- According to section 41D of the EO, the number of days of annual leave he has accumulated and not yet taken is:
 - For the ninth leave year (1 May 2008 to 30 April 2009): 14 days
 - 1 May 2009 to 31 March 2010: 12.85 days (14 days x 335/ 365)
 - Total number of days is 26.85

- Ex gratia payment payable to the applicant :
 - Under the Bill: 14 days of untaken annual leave pay
 - Under the proposed CSAs: 26.85 days of untaken annual leave pay

Protection of Wages on Insolvency (Amendment) Bill 2011

Committee Stage

Amendments to be moved by the Secretary for Labour and Welfare

<u>Clause</u>	<u>Amendment Proposed</u>
5(4)	<p>In the proposed section 16(2)(g)—</p> <p>(a) in subparagraph (i), by deleting “within the 4-month period immediately” and substituting “not more than 4 months”;</p> <p>(b) in subparagraph (iv), by deleting “within” and substituting “not more than”.</p>
5(4)	<p>In the proposed section 16(2)(h)—</p> <p>(a) in subparagraph (i)(A), in the English text, by deleting “his or her” and substituting “the applicant’s”;</p> <p>(b) by deleting subparagraph (ii) and substituting— “(ii) subject to paragraph (i), the payment is of an amount not exceeding \$10,500; and”;</p> <p>(c) in subparagraph (iii), by deleting “within” and substituting “not more than”.</p>
5(5)	<p>In the proposed section 16(3A), by deleting “(h)(ii)(B)” and substituting “(h)(ii)”.</p>