

For discussion on  
31 July 2013

## **Legislative Council Panel on Manpower**

### **Review of continuous contract requirement under the Employment Ordinance**

#### **Purpose**

This paper seeks Members' views on the approaches to deal with the continuous contract requirement under the Employment Ordinance (Cap. 57) (EO).

#### **Background**

2. There have been calls in recent years for the Government to review the continuous contract requirement (i.e. an employee employed by the same employer for four weeks or more and worked for 18 hours or more each week, commonly referred to as the "4-18" requirement) under the EO.

#### **Existing legislation**

3. Currently, employees are accorded different levels of protection and benefits under labour legislation depending on their length of employment or weekly working hours with the same employers. For employees covered by the EO, irrespective of their duration of employment or hours of work per week, protection is accorded to areas such as payment of wages, restriction on deductions from wages, entitlement to statutory holidays and protection against anti-union discrimination. Regardless of their length of employment or number of working hours, the Employees' Compensation Ordinance (Cap. 282) provides compensation to employees who sustain work injuries or suffer from prescribed occupational diseases, while the Minimum Wage Ordinance (Cap. 608) accords protection of statutory minimum wage to employees covered by the Ordinance. The Mandatory Provident Fund Schemes Ordinance (Cap. 485) requires employers to arrange enrolment on a mandatory provident fund scheme for employees covered by the Ordinance and employed for a period of 60 days or

more.

4. Under the EO, employees engaged under a continuous contract, whether working full-time or part-time, are further entitled to other employment benefits, such as rest days, paid statutory holidays, annual leave, sickness allowance, severance payment and long service payment, etc. subject to their meeting the relevant eligibility criteria.

#### **Number of employees not engaged under a continuous contract**

5. According to the results of a special topic enquiry on employees engaged under employment contracts with short duration or working hours as published by the Census and Statistics Department in July 2011, some 2 873 200 employees were employed in the non-government sector. Among them, some 2 724 900 employees (94.8%) were working under a continuous contract at the time of enumeration; the remaining 148 300 (5.2%) were engaged under employment contracts with short duration or working hours (hereinafter referred to as “SDWH employees”), instead of a continuous contract, at the time of enumeration. Among these SDWH employees, 51.8% were male and 48.2% female. It is noteworthy that among these SDWH employees, 50 200 usually worked 18 hours or more per week and were employed in their present jobs for less than four weeks at the time of enumeration, but they expected to continue working in their present jobs for four weeks or more and may become continuous contract employees after enumeration.

6. Excluding the above-mentioned 50 200 employees who were employed in their present jobs for less than four weeks at the time of enumeration though they expected to continue working in their present jobs for four weeks or more, the actual number of employees not engaged under a continuous contract would become 98 100, accounting for 3.4% of employees in the non-government sector. They comprised:

- (a) 56 300 employees who usually worked less than 18 hours per week (hereinafter referred to as “part-time workers”);
- (b) 25 600 employees who usually worked 18 hours or more per week but with less than four weeks’ employment (hereinafter referred to as “short-term workers”); and

- (c) 16 200 employees who had worked for their employers for four weeks or more and usually, but had not continuously worked at least 18 hours per week (hereinafter referred to as “non-continuous workers”).

Category (a): Part-time workers who usually worked less than 18 hours per week

7. Of the 56 300 part-time workers who usually worked less than 18 hours a week, some 42 600 (75.7%) did not choose to work longer hours for personal reasons, including 36.0% having to take care of housework or household members (including children/elders/sick members) at home, 26.2% still in education, 10.9% having health problem or at old age and 2.7% having no financial need to work for longer hours. The remaining 13 700 part-time workers indicated that they were willing to work longer hours but were somehow denied the chance of doing so.

Category (b): Short-term workers who usually worked 18 hours or more per week but with less than four weeks' employment

8. These 25 600 short-term workers who usually worked 18 hours or more per week quoted the following reasons to explain why they did not expect to work in their present jobs continuously for four weeks or more:

- 49.7% mentioned custom of trade/ norm of company/ business arrangement of company;
- 26.0% mentioned insufficient job of company;
- 7.4% said that they could not find a permanent job;
- 7.1% said that their work was of a casual/ seasonal nature; and
- 9.8% cited other reasons, such as “old age/ partially retired”, “health problem (ill/ health deteriorating)”, “need to take care of housework/ children/ elders/ sick members at home”, etc.

Category (c): Non-continuous workers who had worked for four weeks or more and usually, but had not continuously worked at least 18 hours per week

9. These 16 200 non-continuous workers were mainly employed in the industries of construction (33.0%), retail, accommodation and food services (32.0%), public administration, social and personal services (11.6%), transportation, storage, postal and courier services, information and

communications (11.1%) and financing, insurance, real estate, professional and business services (8.3%). It is noted that some of these industries are well known for their frequent fluctuation in business cycles which probably would affect the consistency in the amount of work an employer is able to provide to his employees.

## **Regulations, measures and experiences in other places**

10. In reviewing the continuous contract requirement, we have made reference to the relevant regulations, measures and experiences in other places. Our observations are set out in paragraphs 11 to 16 below.

### *Setting certain standards or threshold for entitlements to employment benefits*

11. It is not uncommon in other places to have certain standards or threshold to differentiate employment benefits of full-time and non full-time employees. Taking Singapore as an example, in order to be entitled to full employment benefits, an employee is required to work for not less than 35 hours a week. In Japan, for full entitlement to paid annual leave, an employee must work for not less than 30 hours weekly, or not less than 5 days a week (if weekly working hours are less than 30), or not less than 217 days a year (where working days are determined other than on a weekly basis). In order to be entitled to partial paid annual leave, a part-time employee who works for less than 30 hours weekly must work at least one day a week or 48 days a year.

12. It is also not uncommon in other places that casual/transient workers and regular employees are accorded different statutory employment benefits. In the United Kingdom (UK), “workers” (including casual and irregular workers) are entitled to core employment rights and benefits like national minimum wage, standard working time, paid annual leave and protection against unlawful deductions from wages, etc. subject to their meeting the relevant eligibility criteria. In addition to these core employment rights and benefits, “employees” are further entitled to notice period for termination of employment, statutory redundancy pay and protection against unfair dismissal, etc. under the law.

*Pro-rata calculation of employment benefits of part-time employees in other places*

13. We have also studied how employment benefits of part-time employees are calculated on a pro-rata basis in places which have regulations for part-time employees. In Singapore, the entitlement of a part-time employee (i.e. defined as one who is required under his contract of service with an employer to work for less than 35 hours a week) to annual leave, sick leave and public holidays, etc. is pro-rated, by comparing his working hours with that of a similar full-time employee (a similar full-time employee is an employee who is employed by the same employer of the part-time employee and performs similar duties; where there is no similar full-time employee, it shall be deemed that the similar full-time employee works 8 hours a day and 44 hours a week). If Hong Kong were to adopt the Singaporean model, in determining the working hours of full-time employees, we would need to take into consideration the huge varieties of working hour patterns of full-time employees in different industries and occupations as well as the outcome of the ongoing deliberations on the working hours policy in Hong Kong.

14. In Japan, the treatment of part-time workers, in theory, must be on par with that of ordinary workers. However, the legislation in Japan does not explicitly stipulate how the various employment benefits are granted to part-time employees. In Korea, the working conditions of part-time workers shall be determined on the relative ratio of their working hours to those of full-time workers engaged in the same kind of job at the same workplace. However, the legislation in Korea does not elaborate on the calculation method. Our EO in Hong Kong sets out clearly the statutory civil and criminal liabilities of employers. If Hong Kong were to adopt the Japanese or Korean models in granting part-time employees employment terms without stipulating how to calculate part-time employees' employment benefits, this would give rise to the fundamental question of how to determine whether an employee is entitled to relevant benefits and how the benefits should be calculated.

15. In the UK, part-time workers are entitled to pro-rata annual leave, the calculation of which is based on the number of days a worker works in a week. For example, a worker who consistently works a five-day week would have full entitlement to 28 days' annual leave, i.e. 5.6 weeks for a five-day-work week, per annum. A part-time worker who works two days a week will be entitled to 11.2 days' annual leave a year (2 days x 5.6 = 11.2 days). A straight

application of this model to Hong Kong is not practicable as Hong Kong's weekly working days vary among industries and occupations. Besides, the pro-rating arrangement in the UK is only applicable to annual leave but not to other types of benefits. In the United States, the Fair Labor Standards Act does not require payment for time not worked, such as vacations, sick leave or holidays. These benefits are a matter of agreement between an employer and an employee which falls beyond statutory stipulations.

*Certain employment benefits funded by collective contributions or insurance systems in other places*

16. In Japan, sickness and maternity allowances are provided to employees through the Employees' Health Insurance which is financed by premiums contributed by both employers and employees. In the UK, statutory maternity and sickness benefits are met from the National Insurance. Generally speaking, the majority of employees who are aged 16 or above and whose weekly income reaches a specified income floor are liable for insurance contributions. In Canada, an employment insurance programme is also in place. In Ontario, both employees and employers are required to pay premiums for employment insurance on the basis of the employee's earnings. Eligible employees will receive maternity and sickness benefits, etc. under the employment insurance programme. Since the cost of providing employees with certain employment benefits in these places is funded by collective contributions or insurance systems instead of individual employers, the provision of employee benefits is less restricted by the mode of employment of the employee, be it permanent or temporary.

**Factors to be considered in dealing with the continuous contract requirement**

17. All along, the EO requires Hong Kong employers to grant benefits to employees who have been employed continuously for a certain period with a prescribed number of working hours. The continuous contract requirement has unequivocally laid down the statutory liability of the employers. Any proposal to amend the continuous contract requirement for enhancement of employee protection should take into account the following important factors:

- (a) Some employees, owing to job arrangements by their employers,

have their working hours falling just short of the 4-18 requirements and hence fail to enjoy full employment benefits. This situation warrants attention;

- (b) Whether the proposed changes are in line with the legislative intent of the provision which is to cover employees in relatively regular employment and rendering substantial service consistently;
- (c) Any change to the current arrangements must satisfy the test of reasonableness, clarity, simplicity and proportionality. It should also strike a reasonable balance between the interests of employees and employers;
- (d) In considering the various approaches to the issue, we have to ensure that they would be able to provide clear and well-defined delineations in determining whether certain employees in short-term or sporadic employment are entitled to the relevant benefits. This is important in forestalling unnecessary disputes between employers and employees, or employers contravening the law inadvertently;
- (e) The calculation of employee benefits should be simple, easy to understand and practicable. This is particularly important for those households employing non-continuous contract employees for performing household work (mainly part-time or short-term domestic helpers);
- (f) For employees working for different employers simultaneously, we have to consider whether it will give rise to double-benefit when the employee applies for benefits like pay for a statutory holiday and sickness allowance. Simply relaxing or removing the continuous contract requirement will cover more casual or short-term jobs and part-time jobs with very short working hours, making such abnormality more frequent; and
- (g) Whether the proposed change will have adverse effects.

### **Possible approaches to dealing with the continuous contract requirement**

18. In dealing with the issue, various suggestions have been made by

different labour groups. The following approaches are set out for Members' deliberation.

*Approach 1: Removing the continuous contract requirement*

19. There are views that all employees, irrespective of their working hours, should be entitled to all rights and benefits under the EO and thus the continuous contract requirement should be removed entirely.

20. If this approach is preferred, it will benefit all part-time and non-continuous workers. For those short-term workers, given the short duration of their employment, even though the requirement for continuous contract is removed, they may not stand to gain, as the EO requires a minimum employment period as a qualifying condition for many of the benefits, such as three months' employment for entitlement to paid statutory holiday; 12 months' employment (or three months' employment upon termination of contract) for annual leave; and 24 months' employment upon contract termination for severance payment.

21. It is noteworthy that if the threshold for continuous contract were to be removed, it would be critical to address the issue as to how to reckon the employment period of an employee, in particular those who work intermittently for the same employer. If there is a gap of a few months or even a year between two periods of employment, should his service be counted as two separate employment relationships or a single one? If his service is to be counted as one single employment, the employer's cost of providing employment benefits will greatly increase. In another scenario, if an employee only works for an employer for four days every month and hence 48 days a year, should he still be entitled to 19 days' paid leave (7 days' paid annual leave plus 12 days' paid statutory holidays)? Given that his holiday entitlement equals to some 40% of his total number of working days in a year, how should such holidays be taken? Whether such level of benefits is equitable as compared to full-time employees is another issue that would need to be considered.

*Approach 2: Pro-rating employees' benefits*

22. There are views that a more reasonable approach is to calculate an employee's benefits on pro-rata basis with reference to his working hours. Under this approach, we have to consider how the proportion of benefits for an employee should be determined. Should working hours be counted on a weekly basis? Should the working-hour benchmark be based on the working hours of a full-time employee or 18 hours?



23. If we were to set the working-hour benchmark with reference to the working hours of a full-time employee, in the case of a full-time employee working for 48 hours per week in an industry, an employee working 18 hours would only be entitled to 37.5% ( $18 \div 48 = 37.5\%$ ) of the benefits, this would result in a drastic reduction in benefits for an employee who currently works 18 hours per week and enjoys the full benefits under EO. If we were to adopt 18 hours as the benchmark, an employee working 9 hours per week would be eligible for 50% ( $9 \div 18 = 50\%$ ) of the EO benefits. In this case, for an employee who does not work every week, or only works for a few days every month, how should the weekly working hours and hence the pro-rated benefits be calculated? There is no easy solution to all these practical issues.

24. Pro-rating employee benefits is also by no means straightforward. For example, an employee working for an employer for one day every week and 9 hours each day would be entitled to 50% of employment benefits (which is proportionate to the full entitlement of an employee who currently works 18 hours per week for four continuous weeks). In other words, the employee may be entitled to 3.5 days' paid annual leave (or 7 days with half-pay), and 6 days' paid statutory holidays (or 12 days with half-pay). This 9.5 days' holiday pay is equivalent to more than his two months' wages. Would such benefits be more generous than full-time employees' and would this be unfair?

25. Let us further take sickness allowance as an example to illustrate that pro-rata calculation of the benefit would be a very complicated matter. Under the EO, an employee employed under a continuous contract can accrue 2 paid sickness days for each completed month of service during the first 12 months of employment, and 4 paid sickness days for each such month thereafter; and his sickness days may be accumulated up to a maximum of 120 days. An employee shall be entitled to four-fifths of his average daily wages as sickness allowance for sickness days of not less than four consecutive days if he has accumulated sufficient number of paid sickness days and the sick leave is supported by an appropriate medical certificate. If the benefit is to be calculated on pro-rata basis, we need to determine how to prorate items such as the accrument of paid sickness days, the entitlement to paid sickness days, and the amount of sickness allowance. For employees with irregular weekly working hours and hence varying ratio of pro-rata entitlements from time to time, the calculation of benefits would be even more complicated.

Approach 3: Changing 4-18 to, say 4-72, calculating on a four-weekly basis

26. If the above approaches of removing the continuous contract threshold entirely or pro-rating employee benefits are considered too drastic and difficult

to administer, there are also views to accord more flexibility to the current 4-18 threshold. Under this proposal, the basis of calculation will be changed from a weekly to a four-weekly basis. As long as an employee works 72 hours or more within four weeks, he is considered to have fulfilled the continuous contract requirement and is entitled to full employment benefits. For example, an employee who currently works 20-20-20-12 hours consecutively in four weeks will be able to meet the continuous contract requirement under this approach.

27. This approach will enable workers who work longer hours intermittently to meet the continuous contract requirement. However, it will not benefit part-time workers or short-term workers who work less than 72 hours or less than four weeks respectively.

28. Moreover, given that there is still a threshold under this approach, some employers may set the working hours of their part-time workers to less than 72 in every four weeks, making the working hours of employees shorter or more intermittent. Besides, because of the change in the basis of calculation from weekly to four-weekly, to avoid confusion or disputes, there is a need to clearly define how a four-weekly period is determined. For example, if an employee's working hours in eight consecutive weeks are 36-36-0-0-0-0-36-36, should the employment contract of the employee be regarded as broken after the sixth week, and should the employer be liable for granting statutory holiday pay for a statutory holiday falling in that intervening four-week period?

Approach 4: Changing 4-18 to, say 4-16

29. Lowering the threshold of 18 hours per week to, say, 16 hours represents an approach with less changes to legislation while enabling more employees with short working hours to be entitled to employment benefits. Given that this approach will continue to use the number of working hours in a week and four continuous weeks as the qualifying criteria, for both employers and employees, it is simple, easy to understand and administer. This approach does not affect employees who are already in receipt of relevant benefits while enabling more employees with short working hours to meet the continuous contract requirement.

30. This approach will enable some part-time workers to meet the continuous contract requirement. Among the 56 300 part-time workers, around 12 900 (or 22.9%) work 16 hours or above per week. However, this approach may not help those short-term workers and non-continuous workers who have already worked 18 hours or above but who have failed to fulfil the continuous contract requirement because they have been employed for less than four weeks

or not employed continuously in every week.

31. Similar to Approach 3, it is inevitable that some employers may set or reduce part-time workers' weekly working hours to that below the statutory threshold e.g. 15 hours per week, so as to avoid granting statutory employment benefits. That said, for employers who are in genuine need of manpower, reduction of employees' working hours to 15 per week merely for the sake of evading payment of employment benefits may not be cost effective and feasible as this will add to their administrative cost and they may face recruitment difficulty.

#### Approach 5: Maintaining the status quo

32. Given that the percentage share of continuous contract employees constantly remained at a high level (about 95% of employees) in the past 10 years or so and regular part-time workers who consistently work for at least 18 hours per week have been accorded the full range of employment protection and benefits, there are also views that the 4-18 continuous contract requirement should remain unchanged. Lowering the working hour threshold under the continuous contract requirement may not be entirely in the interest of employees. Specifically, some employers may further reduce part-time workers' weekly working hours to that below the new threshold in order to avoid granting statutory employment benefits. They may also employ fewer part-time workers, leaving those who need to work part-time with less employment opportunities. Apart from reduction in job opportunities, there may also be further casualisation and fragmentation of jobs.

### **The Labour Advisory Board's discussion and views**

33. The Administration has consulted the Labour Advisory Board (LAB) on the subject on 31 May and 16 July 2013. At these meetings, LAB Members had thorough deliberation on the above-mentioned approaches and provided their views on practical implementation, pros and cons of various approaches, as well as issues warranting further examination.

34. LAB Members took note that the legislative intent of continuous contract was to require employers to provide relevant employment benefits to employees with stable employment relationships and provision of certain level of service consistently. However, employee Members expressed concern over some employers' deliberate arrangement to set employees' working hours right

below the 4-18 requirement to bar the employees from enjoying full employment benefits. They were of the view that the continuous contract requirement under the EO should be amended, for example along the lines of Approaches 2 or 3, to plug such “loophole”.

35. On the other hand, employer Members were of the view that the ratio of SDWH employees had all along been maintained at a stable level. Although there should be no difficulty for employees to secure full-time employment at the present time, there was not much change in this ratio. This reflected that a considerable proportion of employees have chosen to work shorter hours out of their own volition. Employer Members opined that the current threshold of 18 hours per week for entitlement to full benefits on par with a full-time employee was already rather low. Lowering of the threshold may reduce employers’ incentive to hire part-time employees and hence affect the employment opportunities of those who wish to work part-time. Employer Members also emphasised that any legislative proposals must be clear, simple and easy to administer. It would be undesirable to introduce proposals that could involve complicated calculation or easily cause disputes between employers and employees.

36. Given the complexity of the subject and the considerable practical operational problems involved, LAB will need to continue to deliberate on individual approaches in greater detail with a view to reaching a consensus.

### **Advice sought**

37. Members’ views are sought on the above-mentioned approaches.

Labour and Welfare Bureau  
Labour Department  
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