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Report of the Bills Committee on Employment (Amendment) Bill 2018

Purpose

This paper reports on the deliberations of the Bills Committee on Employment (Amendment) Bill 2018 ("the Bill").

Background

2. Following the coming into operation of the Employment (Amendment) Ordinance 2014 from February 2015, an eligible male employee is entitled to three days' statutory paternity leave ("PL") for each confinement of his spouse/partner at a rate of four-fifths of his average daily wages. A male employee is entitled to PL if he fulfils the following requirements:

- (a) he is the father¹ of a new born child or a father-to-be;
- (b) he has been employed under a continuous contract;² and
- (c) he has given the required notification.³

¹ The employee is not required to be married to the mother of the new born child for entitlement to statutory PL. There is also no restriction on the birthplace of the newborn.

² Under the Employment Ordinance, an employee who has been employed continuously by the same employer for four weeks or more and has been working for at least 18 hours each week is regarded as being employed under a continuous contract.

³ The employee must notify his employer of: (a) his intention to take PL at least three months before the expected date of delivery of the child (exact date of leave not required at this stage); and (b) the date of his PL before taking the leave. If the employee fails to give the aforesaid three months' advance notice to the employer, he must notify the employer of his date of PL at least five days before that date.

The employee is further entitled to PL pay if he fulfils the following requirements:

- (a) he has been employed under a continuous contract for not less than 40 weeks immediately before the day of PL; and
- (b) he has provided the required document⁴ to the employer within the specified period⁵.

An eligible male employee may take statutory PL at any time during the period from four weeks before the expected date of delivery of the child to 10 weeks beginning on the actual date of delivery of the child. He may take all three days of PL in one go or on separate days. An employer who fails to grant statutory PL or PL pay to an eligible employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

3. The Administration has undertaken to review the implementation of statutory PL one year after its coming into operation. According to the Administration, the Labour Department ("LD") has conducted a total of three questionnaire surveys and eight focus group discussion sessions during the period between July and December 2016 and reported the outcome of the review to the Labour Advisory Board ("LAB") in November 2017. Having considered the views of employees, the affordability of employers and the operation of statutory PL since 2015, the Administration recommends that (a) statutory PL be increased from three to five days; (b) the current statutory PL pay rate be maintained; and (c) no changes be made to the other areas of PL, including requirements on notification, the specified timeframe for taking statutory PL and required documentary proof.

The Bill

4. The Bill seeks to amend the Employment Ordinance (Cap. 57) ("EO") to increase PL entitlement from three days to five days in respect of a child born on or after the commencement date to be appointed by the Secretary for Labour and Welfare ("SLW") for the enacted Ordinance if the Bill is passed.

⁴ For birth in Hong Kong, the employee must provide the birth certificate of the child on which the employee's name is entered as the child's father. The law also specifies the document required for birth outside Hong Kong and if the child is born dead.

⁵ The employee must provide the required document to the employer (i) within 12 months after the first day of paternity leave taken, or (ii) if he ceases to be employed, within 6 months after cessation of employment, whichever period expires first.

The Bills Committee

5. At the House Committee meeting on 22 June 2018, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon WONG Ting-kwong, the Bills Committee has held two meetings with the Administration. The membership of the Bills Committee is in the **Appendix**.

Deliberations of the Bills Committee

Duration of statutory PL

6. Members generally welcome the proposal to increase statutory PL from three days to five days. Some members, however, have expressed concern that the proposed increase in the number of statutory PL days to five days is still inadequate for fathers to take care of their newborns and partners. They have pointed out that during the deliberations of the former Bills Committee on the Employment (Amendment) Bill 2014,⁶ members had already urged for extending the duration of statutory PL to seven days. These members take a strong view that the Administration should seriously consider further increasing the duration of statutory PL to seven days to help facilitate male employees in taking up their family responsibilities around the time of their children's birth. Mr HO Kai-ming has expressed the view that while it is the ultimate aim of the Hong Kong Federation of Trade Unions to call for the extension of the duration of statutory PL to seven days, he is supportive of the Bill such that the proposal to increase statutory PL to five days would come into effect as early as practicable.

7. Some other members, however, have cautioned that with the increase of statutory PL from three days to five days, small and medium enterprises ("SMEs"), in particular micro enterprises, would face operational difficulties in manpower deployment. Moreover, it would be more likely for establishments to engage substitute workers if the duration of PL is to be further increased to seven days. These members have enquired whether the Administration has conducted any cost impact assessment in the event of further enhancing the statutory PL benefits. They have called on the Administration to strike a proper balance in enhancing the PL benefits, having regard to employers' affordability and employees' interest.

8. The Administration has advised that the Office of Government Economist has, based on the data of 2015, conducted a broad-brush assessment of the cost

⁶ The Employment (Amendment) Bill 2014 mainly sought to amend EO to provide for a male employee's entitlement to PL of up to three days and PL pay at a daily rate of four-fifths of the employee's average daily wages.

impact to facilitate consideration of the proposal of enhancing PL benefits. Based on the number of eligible male employees (i.e. number of working fathers in establishments other than the Government who are Hong Kong residents with their babies born in Hong Kong and recorded in the Birth Registry), it is roughly estimated that if statutory PL is increased to five days, the additional cost impact per annum would be around \$84 million if the rate of PL pay is maintained at four-fifths of an employee's wages. The cost impact would increase to around \$137 million per annum if employers are required to pay full pay. If statutory PL is increased to seven days, the additional cost impact per annum would be around \$168 million and \$242 million for PL pay at four-fifths and full pay respectively.

9. Some members have expressed queries about the Administration's cost impact assessment of increasing PL days. They consider that the cost is overestimated as the actual number of male employees taking PL would be small because of the low fertility rate. Moreover, the additional staff cost of seven-day statutory PL per annum would represent only an insignificant proportion to the total staff cost per annum.

10. The Administration has further advised that in considering the duration of PL, it has made reference to the outcome of the review of the implementation of statutory PL conducted by LD. In formulating the legislative proposal to increase the duration of statutory PL, the Administration has taken into account the views of employees, the affordability of employers including SMEs, and the operation of PL since its inception in 2015. Nonetheless, the Administration would encourage individual enterprises to offer more favourable PL and related benefits than those required by EO, having regard to their operational needs and own circumstances.

11. Members note that Mr LEUNG Yiu-chung, Dr Fernando CHEUNG, Mr HUI Chi-fung and Mr Gary FAN have indicated their respective intention to propose amendments to the Bill to increase the duration of statutory PL from three days to seven days. Dr Helena WONG has also indicated her intention to amend the Bill to the effect that the duration of PL would be increased to seven days one year after the coming into commencement of the enacted Ordinance.

12. The Administration, however, does not consider it appropriate to further extend the duration of PL to seven days in the current legislative exercise. The attention of the Bills Committee has been drawn to the fact that the proposed increase of statutory PL from three days to five days is a hard-earned consensus between the labour and business sectors as represented by LAB and is also supported by the Panel on Manpower. Since the consensus reached between the employers and employees is hard to come by, it should therefore be upheld and respected. Moreover, the proposed amendments which seek to change the

increase in PL entitlement to more than five days deviate from the sole purpose of the Bill, i.e. increasing the duration of statutory PL from three days to five days. The Administration has stressed that the current legislative proposal is considered the only acceptable option.

Review of the PL duration

13. To further enhance PL benefits, some members including Mr HO Kai-ming are of the view that the Administration should undertake to review the number of PL days in one year's time after the commencement of the enacted Ordinance. The Administration has advised that it has been, from time to time, reviewing the labour legislation in the light of the socio-economic development in Hong Kong, and does not see the need to provide a concrete timetable for the review of statutory PL.

14. In the light of the Administration's response, Mr HO Kai-ming has provided for the consideration of the Bills Committee his proposed amendment which seeks to amend the proposed section 15E of EO in clause 3 of the Bill to impose a statutory obligation on the Government to review the number of PL days at least once in every year after the commencement of the enacted Ordinance. The Bills Committee has agreed with a majority vote of eight to six that the Chairman will move the above amendment on behalf of the Bills Committee.

15. The Administration has pointed out that the proposed amendment seeks to impose a statutory obligation on the Government to conduct reviews at specific intervals. Such reviews are not a subject matter of the Bill, nor are they contained in the existing legislation. In the view of the Administration, the proposed amendment is outside the scope of the Bill and may have a charging effect as it imposes a new and distinct function on the Government.

16. The legal adviser to the Bills Committee has advised that the admissibility of the proposed amendment is a matter to be decided by the President of Legislative Council ("LegCo"), including whether it is in compliance with Rules 57(4)(a) and 57(6) of the Rules of Procedure if the proposed amendment is opposed by the Administration on the grounds that it is not relevant to the subject matter of the Bill and the amendment has a charging effect for the purpose of Rule 57(6).

17. The Administration has reiterated its view that the above proposed amendment to the Bill is unnecessary as it has been reviewing the labour legislation from time to time, and improving the employee's benefits on the premise of balancing the interests of employees and the affordability of employers. SLW will review PL as with other employee benefits as and when

appropriate, and it is therefore not necessary to achieve this purpose by way of legislation.

Rate of PL pay

18. The Bills Committee notes that the Administration has proposed no change to the rate of PL pay, which is pitched at four-fifths of the employee's average daily wages as in the case of maternity leave ("ML") and sick leave. Some members have expressed the view that it is inappropriate to pitch the rate of PL pay as in the case of ML and sick leave, which have been in force for many years. These members have urged the Administration to conduct reviews of the relevant pay rates.

19. The Administration has advised that LD has conducted the review of the implementation of statutory PL on the basis of the scope and methodology endorsed by LAB. Having considered the views of employees, the affordability of employers including SMEs and the operational experience of statutory PL since 2015, it is recommended that except for the increase in the number of statutory PL days to five days, other features of the PL regime would remain unchanged, including the rate of PL pay. The proposal is supported by LAB.

20. Noting that the purpose of the Bill is to extend the duration of statutory of PL from three days to five days, some members have raised concern whether the long title of the Bill, as currently drafted, would restrict individual Members' right to propose amendments relating to the pay rate of PL. The legal adviser to the Bills Committee has advised that the admissibility of a proposed amendment to a bill is to be decided by the President. In considering the admissibility of amendments proposed by individual Members to a bill, the President would consider, among others, whether an amendment to a bill is relevant to the subject matter of the bill as laid down in Rule 57(4)(a) of the Rules of Procedure. When considering the subject matter of the bill, the President would take into account the long title, the Explanatory Memorandum and the provisions of the bill, the LegCo Brief on the bill and other relevant factors.

21. Members note that Mr HUI Chi-fung and Mr Gary FAN have indicated their respective intention to propose amendments to the Bill to increase the rate of PL pay to full pay. Dr Helena WONG has also indicated her intention to amend the Bill to the effect that the rate of PL pay would be increased to full pay one year after the commencement of the enacted Ordinance.

22. The Administration has subsequently advised that the rate of PL pay is prescribed in the existing section 15I of EO. As can be seen in the long title,

the clauses and Explanatory Memorandum of the Bill, amendment to the rate of PL pay is, however, not a subject matter of the Bill. The respective amendments proposed by members on section 15I on the PL pay are irrelevant to the subject matter of the Bill, and hence outside the scope of the Bill.

Whether statutory PL should be applicable to a miscarriage

23. Some members have expressed concern that statutory PL is not applicable to a miscarriage. They have enquired about the rationale for not providing PL to a miscarriage. The Administration has advised that in the case of a miscarriage, which is defined under EO as the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy, a female employee is entitled to sick leave for any day on which she is absent from work by reason of such miscarriage, rather than ML. Given that statutory PL is formulated with reference to the provisions on ML, miscarriage does not apply. Noting the recent concerns over various issues connecting with miscarriage, the Administration would look into the definition of miscarriage under EO when conducting the review on ML.

Amendments to the Bill

Amendments proposed by the Administration

24. In response to the legal adviser to the Bills Committee's enquiry, the Administration will propose an amendment to the Bill to rectify the discrepancy between the Chinese and English version of the proposed section 15E(2)(b)(i) of EO in clause 3. Members raise no objection to the Administration's proposed amendment.

Amendment proposed by the Bills Committee

25. The amendment to be proposed by Mr WONG Ting-kwong, Chairman of the Bills Committee, on behalf of the Bills Committee as elaborated in paragraph 14 above.

Amendments proposed by individual Members

26. The Bills Committee takes note that Mr LEUNG Yiu-chung, Dr Fernando CHEUNG, Dr Helena WONG, Mr HUI Chi-fung and Mr Gary FAN have indicated their respective intention to propose amendments to the Bill as detailed in paragraphs 11 and 21 above.

Resumption of Second Reading debate

27. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 24 October 2018.

Consultation with the House Committee

28. The Bills Committee reported its deliberations to the House Committee on 5 October 2018.

Council Business Division 2
Legislative Council Secretariat
10 October 2018

Bills Committee on Employment (Amendment) Bill 2018

Membership list

Chairman Hon WONG Ting-kwong, GBS, JP

Deputy Chairman Hon Kenneth LEUNG

Members

Hon LEUNG Yiu-chung
Hon WONG Kwok-kin, SBS, JP
Hon YIU Si-wing, BBS
Dr Hon KWOK Ka-ki
Hon KWOK Wai-keung, JP
Dr Hon Fernando CHEUNG Chiu-hung
Dr Hon Helena WONG Pik-wan
Hon IP Kin-yuen
Dr Hon Elizabeth QUAT, BBS, JP
Hon POON Siu-ping, BBS, MH
Hon HO Kai-ming
Hon Holden CHOW Ho-ding
Hon SHIU Ka-fai
Hon SHIU Ka-chun
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung
Hon LUK Chung-hung, JP
Hon Gary FAN Kwok-wai
Hon Tony TSE Wai-chuen, BBS

(Total : 21 members)

Clerk Miss Betty MA

Legal Adviser Mr Alvin CHUI