

LEGISLATIVE COUNCIL BRIEF

Protection of Wages on Insolvency Ordinance
(Chapter 380)

PROTECTION OF WAGES ON INSOLVENCY **(AMENDMENT) BILL 1999**

INTRODUCTION

At the meeting of the Executive Council on 30 March 1999, the Council ADVISED and the Chief Executive ORDERED that the Protection of Wages on Insolvency (Amendment) Bill 1999, at Annex, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

2. Under the Protection of Wages on Insolvency Ordinance (PWIO), an employee who is owed arrears of wages, wages in lieu of notice or severance payment by his insolvent employer may apply for ex-gratia payment from the Protection of Wages on Insolvency Fund (the Fund). The Fund is administered by the Protection of Wages on Insolvency Fund Board and is financed mainly by an annual levy of \$250 on each business registration certificate. At present, the maximum coverage of the Fund is -

- (a) wages of an employee for services rendered during the four-month period prior to the last day of service up to \$36,000;

- (b) wages in lieu of notice up to one month's wages or \$22,500, whichever is the less; and
- (c) severance payment up to \$50,000, plus 50 per cent of that part of the employee's entitlement in respect of severance payment in excess of \$50,000.

3. Under the PWIO, the amount of an ex-gratia payment for severance payment from the Fund is based on an employee's entitlement to severance payment under the relevant provisions of the Employment Ordinance, Cap. 57 (EO). Under the EO, severance payment is calculated on the basis of the employee's last month's wage before termination of service or if the employee so chooses, the average wage over the preceding 12-month period. In other words, where a wage reduction takes place before termination of service, the previous (higher) wage level will not be fully taken into account.

4. To improve the protection to employees who are owed severance payments by their insolvent employers, we propose to amend the PWIO to enable ex-gratia severance payment from the Fund to be calculated on the basis of an employee's wage level before wage reduction or a wage level in between the employee's reduced wages and his pre-reduction wages if his employer had undertaken to do this **in writing** before the wage reduction.

5. Some labour groups have suggested that verbal undertakings given by employers should also be recognised (given that under the EO, a contract of employment may be in writing or oral, express or implied). We do not support this proposal as it may give rise to abuse. There would also be difficulty in

establishing whether an employer had actually given such a verbal undertaking particularly in those insolvency cases involving small and medium enterprises where employers sometimes cannot be located.

THE BILL

6. **Clause 2** empowers the Commissioner for Labour to make an ex-gratia payment in respect of a severance payment on the basis of an employee's wage level before wage reduction or any other wage level above that immediately before termination of employment, whichever is the less, if his employer had undertaken to do so in writing before the wage reduction, and that the wage reduction took place within 12 months immediately before the date of termination of employment. **Clause 3** provides a transitional arrangement where if an employer has given a verbal undertaking to pay severance payment on the basis referred to in the verbal undertaking prior to the bill coming into effect, and he confirms such undertaking in writing within two months after the commencement of the Amendment Ordinance, such written undertaking shall be deemed to have been made before the wage reduction for the purposes of the PWIO.

PUBLIC CONSULTATION

7. Both the Protection of Wages on Insolvency Fund Board and the Labour Advisory Board have endorsed the proposal.

BASIC LAW IMPLICATIONS

8. The Department of Justice advises that the Bill is consistent with the Basic Law.

HUMAN RIGHTS IMPLICATIONS

9. The Department of Justice advises that the Bill has no human rights implications.

FINANCIAL AND STAFFING IMPLICATIONS

10. The Fund is self-financing with income coming mainly from an annual levy of \$250 on each business registration certificate. We estimate that the financial implications of the proposed amendments on the Fund are unlikely to be significant as the amendment covers only the situation where an employer has given a written undertaking to pay severance payment on the basis of the pre-reduced wage level and subsequently becomes insolvent. The proposal would not affect the maximum amount of ex-gratia payment that an applicant can receive from the Fund. Although we estimate that the Fund will have an operating deficit of \$160 million in 1998-99 in the light of the present economic situation, the financial position of the Fund is still healthy with a balance of \$692.2 million as at 28 February 1999. This is more than enough to cover the operating deficit. There are no financial or staffing implications for Government.

ECONOMIC IMPLICATIONS

11. As the additional payment involved represents only a small fraction of the Fund balance, the proposal will not result in an increase in the levy rate. Thus there will not be any additional cost burden on employers.

LEGISLATIVE TIMETABLE

12. The legislative timetable is as follows –

Publication in the Gazette	9 April 1999
First Reading and commencement of Second Reading debate	21 April 1999
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

PUBLICITY

13. A press release explaining the proposed amendment will be issued on 9 April 1999, the same day the Bill is published in the Gazette.

ENQUIRIES

14. For enquiries, please contact Mr WONG Kwok-lun, Alan, Senior Labour Officer at 2923 5282.

Education and Manpower Bureau
9 April 1999

A BILL

To

Amend the Protection of wages on Insolvency Ordinance in relation to provisions concerning severance payment.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Protection of wages on Insolvency (Amendment) Ordinance 1999.

2. Payment

Section 16 of the Protection of Wages on Insolvency Ordinance (Cap. 380) is amended by adding-

“(2B) (a) Where it appears to the Commissioner that -

(i) an applicant’s wages have been reduced during the period of 12 months immediately before he is dismissed or laid off; and

(ii) before the wage reduction took effect, the employer of the applicant had given an undertaking in writing to the applicant to the effect that if the applicant was dismissed or laid off after the wage reduction, the severance payment payable to him would be calculated in a manner more favourable to him than that provided for in section 31G of the Employment Ordinance (Cap. 57),

then, for the purposes of subsection (2)(f)(i), the applicant’s entitlement to severance payment may, if it is more favourable to the applicant, be calculated -

- (A) subject to paragraph (c), in accordance with section 31G of the Employment Ordinance (Cap. 57); or
 - (B) in the manner specified in the undertaking, whichever results in a lesser amount.
- (b) If the calculation under paragraph (a)(A) and that under paragraph (a)(B) result in the same amount, the applicant's entitlement to severance payment for the purposes of subsection (2)(f)(i) shall be that amount.
- (c) For the purposes of paragraph (a)(A) and in relation to the applicant 1-
 - (i) "his last full month's wages" in section 31G(1)(a) of the Employment Ordinance (Cap. 57) shall be construed to mean his full month's wages immediately before the wage reduction took effect;
 - (ii) "his last 30 normal working days" in section 31G(1)(b) of that Ordinance shall be construed to mean his 30 normal working days immediately before the wage reduction took effect; and
 - (iii) "the relevant date" in section 31G(2) of that Ordinance shall be construed to mean the date when the wage reduction took effect.
- (d) If a wage reduction in respect of which an undertaking as described in paragraph (a)(ii) has been given has occurred in relation to an applicant more than once during the period of 12 months immediately before he is dismissed or laid off -
 - (i) "the undertaking" in paragraph (a)(B) shall be construed to mean the undertaking given

in respect of such a wage reduction that occurred nearest to the dismissal or lay-off of the applicant; and

- (ii) “the wage reduction” in paragraph (c)(i), (ii) and (iii) shall be construed to mean such a wage reduction that occurred nearest to the dismissal or lay-off of the applicant.”.

3. Transitional

(1) For the purposes of section 16(2B)(a)(ii) of the principal Ordinance if -

- (a) before the commencement of this Ordinance an applicant’s employer who before reducing the wages of the applicant had given him an oral undertaking to the effect that if he was dismissed or laid off after the wage reduction, the severance payment payable to him would be calculated in a manner more favourable to him than that provided for in section 31G of the Employment Ordinance (Cap. 57); and
- (b) within 2 months after the commencement of this Ordinance that oral undertaking is confirmed to the applicant by the applicant’s employer by an undertaking in writing to the same effect,

the undertaking in writing may be deemed by the Commissioner to have been given before the wage reduction to which the undertaking in writing relates took effect.

(2) This Ordinance shall not apply in respect of a severance payment the liability for payment of which arose before the commencement of this Ordinance.

(3) The principal Ordinance as in force immediately before the commencement of this Ordinance shall apply in respect of a severance payment the liability for payment of which arose before the commencement as if this Ordinance had not been enacted.

Explanatory Memorandum

The purpose of this Bill is to enable the Commissioner for Labour to, under certain circumstances, make an ex-gratia payment in respect of a severance payment under the Protection of Wages on Insolvency Ordinance (Cap. 380) on the basis of an employee's wage level before a wage reduction, or on a basis specified in a written undertaking given by his employer before the wage reduction, whichever results in a lesser amount.