

**The Administration's response to concerns raised on the
FIU (Medical Examinations) Regulation
at the meeting of the Subcommittee on Regulations relating to
Occupational Safety and Health on 10 November 1999**

I) Arrangement and payment for medical examination of worker

- a) The legal liabilities of proprietors to arrange and pay for examinations of workers under Section 6.**

Under Section 6, a proprietor is required to arrange and pay for medical examinations for workers engaged in the designated occupations in his workplace. Failure to comply with this Section constitutes an offence, and the proprietor concerned is liable upon conviction to a fine at level 5 i.e. up to \$50,000.

- b) The suggestion of a central levy system to pay for the medical examinations of the remaining 40,000 workers who are not covered by CITA.**

The remaining 40,000 workers not covered by the CITA are employed in various industries but we expect the majority would come from Chinese restaurants, printing, textile, metal work, electronics, garment and ship repairing industries. The Administration does not consider a central levy system to pay for the medical examinations of these workers is feasible as it is difficult to devise an administratively simple, fair and convenient mechanism to collect levy from the industries concerned. It should be noted that even among the industries concerned, not every worker is required to undergo medical examinations, e.g. only kitchen workers in Chinese restaurants are exposed to excessive noises. The existing Employees' Compensation Insurance Levy (ECIL) is also not a viable substitute as the ambit of the Levy is different. Furthermore, the ECIL is contributed by all employers in both industrial and non-industrial sectors and it would not be fair to use it to pay for the medical examinations of the 40,000 non-construction industry workers in question.

- c) **The resources implications and any difficulties/considerations in arranging free or subsidized medical examinations for replacement/casual workers in specified trades other than the construction industry.**

We estimate that some \$20 million per year is required for meeting the cost of medical examination of 40,000 workers in industries other than the construction industry. As we do not have any concrete figures on the number of replacement/casual workers in the industries involved, we are not in a position to make a realistic estimate. However, if we assume that such workers would constitute 20% of the total, the yearly expenditure on medical examination for them would be \$4 million. We consider that medical examination expenses should be borne by employers of the workers requiring examination. In the case of construction workers, including the casual workers, the medical examination fees are paid by the construction industry through a levy, although in the actual implementation, the arrangements are made by the CITA.

II) **Issues requiring clarification of legislative intention and improvement in the drafting aspect**

- a) **Whether Section 3 will prohibit a proprietor from continuing the employment of an existing worker who has not been medically checked.**

No. This section has no application in the case of workers who are already in employment in a designated occupation when the Regulation becomes effective. If, after commencing employment, a worker is subsequently found unfit to be employed, the provisions in Sections 8 to 13 of the Regulation apply.

- b) **Whether Section 10(a) should be moved to Section 3 to reflect the policy intention.**

No. Section 10(a) deals with the protection of the health and safety of a worker after he has commenced employment. The periodic medical examination may reveal that while the state of his health is such that, although not unfit to be employed, it is nevertheless advisable for him to work only in accordance with particular conditions or limitations. Section 3 deals with the protection of the health and safety of a worker before he has commenced employment. In certifying his medical fitness for the job, on occasions, the appointed medical practitioner may impose specific conditions to be observed. Even so, the worker is still medically fit and

can be employed in that occupation, as with one who is fit without limitations. For better understanding of the term "certified fit" under Section 3, we will elaborate its meaning in a guidance note, i.e. it refers to medical fitness both with and without conditions and limitations.

c) The definition of "investigations" in Section 6 and whether the costs to be borne by employers also cover those recommendations of the medical report in Sections 9, 10 and 12.

The term "medical examinations" in Section 6 refers to both general medical examinations and medical investigations specified in Schedule 2. Moreover, certification is naturally part and parcel of a medical examination. These medical examinations should be arranged and conducted at the expense of a proprietor or, in the case of the construction industry, the CITA. As for expenses incurred in relation to the implementation of a recommendation under Section 12, these should be borne by the proprietors. In order to clarify this legislative intention, we will a) delete "investigations and certifications" from Section 6; and b) add a new clause to Section 12 to require that all reasonable and lawful means taken under this section by a proprietor to implement a recommendation shall be taken at the expense of the proprietor.

d) Whether "from time to time" in Section 8 covers "first-time" medical check of serving workers after the proposed Regulation comes into operation.

The phrase "from time to time" in Section 8 covers the initial periodic medical examination of serving workers when the proposed Regulation becomes effective. In order to clarify this legislative intention, we will a) delete the phrase "from time to time" from Section 8; and b) add a new clause to Section 3 to set out the transitional arrangement for serving workers, i.e. if, immediately before the commencement of this section, a person engaged in an occupation listed in Schedule 1 was employed by a proprietor without that person having been medically examined in accordance with this section and that person is or remains so engaged on or after that commencement, the proprietor must, within 3 months after that commencement, ensure that that person is medically examined by an appointed medical practitioner as provided in this section.

- e) **How the recommendations in Section 10, particularly (a) and (d) concerning "employment subject to conditions" and "permanent suspension from employment in a particular trade" will be implemented.**

It cannot be stressed enough that the paramount consideration is the health and safety of the worker. An appointed medical practitioner will make a recommendation as to any of the limitations on or for suspension from employment as referred to in Section 10(a), (b), (c) or (d) only if he "is of the opinion that the interests of the health and safety of the employee being the subject of the report so require".

Under Section 10, an appointed medical practitioner may recommend that a worker either (a) continues to be employed in his present occupation subject to certain conditions and limitations; (b) be temporarily suspended from that occupation for a specified period; (c) be temporarily suspended from that occupation until certified medically fit again; or (d) be permanently suspended from that occupation.

Under scenario a), the worker should continue his employment, but the specified conditions and limitations have to be met. For example, a worker may be required to use hearing protectors for continuing employment in a noisy occupation. In this case, the proprietor concerned should provide appropriate hearing protectors to the worker and, as far as practicable, ensure that they are properly used.

Under scenarios (b), (c) or (d) where a worker is temporarily or permanently suspended from employment in his present occupation, in most cases, he will be granted sick leave by the appointed medical practitioner, and may be seeking compensation under the various compensation ordinances if so entitled. In this circumstance, the proprietor concerned is prohibited under the Employment Ordinance and the Employees' Compensation Ordinance respectively to terminate that worker's employment while he is on paid sick leave and before his compensation case is settled.

On occasions when a worker is not granted sick leave whilst being temporarily suspended, or when a permanently suspended worker is not granted further sick leave, the proprietor may redeploy him to another job if a suitable one exists and subject to his agreement on the redeployment arrangement. Insofar as a permanently suspended worker is concerned, if there is no suitable job or agreement on redeployment arrangement cannot be reached, the proprietor can terminate his employment in accordance

with the contractual terms and the provisions of the Employment Ordinance.

f) The reasons for proposing Section 10 and how it is related to the Occupational Safety and Health Ordinance.

The legislative intention of proposing Section 10 is to state clearly that an appointed medical practitioner should, after examining a worker employed in a specified occupation, make a recommendation as to any conditions and limitations on or suspension from employment, as are referred to in subsections (a), (b), (c) or (d), only if he is of opinion that the interests of the health and safety of the worker concerned so require. This is to ensure that the paramount consideration in making such recommendation is for the protection of the health and safety of the worker, and that any restrictions on or suspension from employment in the context of the proposed Regulation would not contravene the Disability Discrimination Ordinance. The proposed Regulation and its section 10 apply to industrial workers who are employed in certain specific occupations and are, in this respect, unrelated to the Occupational Safety and Health Ordinance although the latter is for the general purpose of ensuring and improving the safety and health of all employees at work.

g) Whether ex-gratia payments or any form of compensation are payable to employees who are temporarily or permanently suspended from employment in a particular trade.

A worker who is temporarily or permanently suspended from employment in a designated occupation because of incapacity arising from an occupational disease can seek compensation under the Employees' Compensation Ordinance, the Pneumoconiosis (Compensation) Ordinance or the Occupational Deafness (Compensation) Ordinance in the normal way.