

## **LEGISLATIVE COUNCIL BRIEF**

### **Employees' Compensation Ordinance (Chapter 282)**

#### **Employees' Compensation (Amendment) (No. 2) Bill 2000**

### **INTRODUCTION**

At the Executive Council meeting on 22 February 2000, the Council ADVISED and the Chief Executive ORDERED that, the Employees' Compensation (Amendment) (No. 2) Bill 2000, at **Annex A**, should be introduced into the Legislative Council.

### **BACKGROUND**

#### **Existing Provisions for Settlement of Fatal Compensation Cases**

2. Under the existing provisions of the Employees' Compensation Ordinance, where a person dies as a result of an accident arising out of and in the course of employment, compensation is payable to his/her dependants (i.e. those family members who were dependent wholly or in part upon the employee's earning at the time of his/her death). Application for compensation has to be made to the Court which will determine-

- (a) who the dependants are;
- (b) the degree of their dependency;
- (c) the amount of compensation payable; and
- (d) how compensation should be apportioned.

3. At present, compensation is not payable if a deceased employee leaves no dependant. In such case, the employer is only liable to pay the reasonable expenses for the burial of and medical attendance on the deceased employee, subject to a maximum amount (currently set at \$16,000), to any person to whom such expenses are due.

4. The existing provisions and arrangement for compensation for death have the following drawbacks-

- (a) determination by the Court is the only avenue for settlement of a claim. The average time taken through the legal process to settle

fatal claims ranges between 18 and 24 months. Legal costs are incurred even in straightforward and uncontested cases;

- (b) as compensation payable is assessed on the degree of dependency, family members who were not dependent on the earnings of the deceased employee will receive no compensation;
- (c) an employer will be liable to pay less compensation if he can successfully argue that the dependants are only partially dependent on the deceased employee. Dependency therefore often becomes a point of contention and delays settlement;
- (d) immediate financial relief is not available to the families of the deceased. During the lengthy period of legal proceedings, they may have difficulty in making ends meet; and
- (e) the employer is not liable to pay for funeral expenses if the deceased employee is survived by dependants, thus causing additional financial hardship to the latter.

### **The proposal**

5. To improve the system of settling compensation claims for fatal cases under the Ordinance, we propose to -

- (a) provide an additional avenue to settle straightforward cases (i.e. where the employer's liability to pay compensation and the relationship of the family members are not in dispute). It is estimated that about 50% of the cases (i.e. about 110 cases per year) would fall within this category. Under the proposed settlement mechanism, parties to the claim may agree to submit a claim to the Commissioner for Labour (the Commissioner) for compensation. The Commissioner, as he thinks fit, will assess the compensation payable and apportion the compensation amount according to the schedule mentioned in (b) below and issue a certificate for this purpose. It is estimated that the processing time for apportionment of compensation under the proposed settlement system can be reduced by nine to 15 months. If any party to the claim is not satisfied with the determination of the Commissioner, he/she could either object to the determination of the Commissioner, who will review his determination upon receipt of such objection, or could lodge an appeal against the determination in Court;
- (b) make compensation for death payable to family members instead of dependants of a deceased employee so as to enable the proposed settlement mechanism at (a) to operate and to simplify the determination process by removing any potential dispute over the

degree of dependency. With the dependency criterion being taken away, which signifies a fundamental change to the basis for awarding compensation in fatal cases, the full amount of compensation as calculated according to the formula laid down under the Ordinance will be payable in each case. We propose to make the full amount of compensation payable because the full earning capacity of an employee would be forgone with his death, and it is not feasible to delineate the proportional amount of compensation to be paid in each individual claim when the dependency criterion is abolished. The amount of compensation will be apportioned according to a schedule which will provide a larger share of compensation to the core members of the family such as the spouse, the child(ren) and parent(s) of a deceased employee. An illustration of the payment of compensation under the existing and the proposed provisions is given in the **Annex B**;

- (c) require the employer to make interim payments to the spouse of the deceased employee pending the issue of the certificate of compensation assessment in respect of claims which are to be determined by the Commissioner. It is proposed to make interim payments available to the spouse only because the spouse is easy to identify and is normally the one who looks after the family. On the other hand, making advance payments to the other family members will be difficult to administer. Verification of identity will take time and there will be problems of apportionment, guardianship for minors, etc. The aggregate amount of such payments will be subject to a ceiling and deductible from the total amount of compensation payable; and
- (d) require the employer to pay funeral expenses in all fatal cases subject to a maximum amount currently provided under the Ordinance.

### **Levels of fine and other proposed amendments**

6. In addition to the proposed improvements to the system of settling compensation claim for fatal cases, it is proposed that the levels of fines under some provisions of the Ordinance be updated and the liability of the principal contractor be clarified under section 24.

#### **(A) Levels of Fine**

7. There are different levels of maximum fine under various sections of the Ordinance on offences committed by an employer against -

- (i) non-payment of compensation as stated in a certificate issued by the Commissioner;

- (ii) failure to comply with the requirements relating to compulsory insurance; and
- (iii) failure to comply with a written demand from the Commissioner for producing a policy of insurance for inspection.

Since these levels of maximum fine have not been revised since 1984, there is a need to update them so as to restore their deterrent effect on offenders.

8. Whilst some of the penalty provisions under the Ordinance are expressed in terms of the penalty levels prescribed by section 113(c) of the Criminal Procedure Ordinance (Cap. 221), there are still a few which are expressed in monetary terms. For the sake of consistency, we propose that these provisions of fines should be converted into the corresponding penalty levels.

### **(B) Liability of Principal Contractor**

9. Section 24 of the Ordinance provides that when an employee of a sub-contractor is injured at work, the principal contractor shall be liable for any claim of compensation made by the employee. It also provides that where the principal contractor has made any payment for such claims, he shall be entitled to recover the payment from the sub-contractor, i.e. the direct employer of the injured employee. In order to facilitate the injured employee to claim compensation from the principal contractor, section 24 further provides that where compensation is claimed from or proceedings are taken against the principal contractor, then in the application of the Ordinance, references to the principal contractor shall be substituted for references to the employer.

10. In a number of cases, Labour Department assisted the injured employees who were engaged by a sub-contractor to claim compensation from the principal contractor concerned. Where a principal contractor has failed to pay compensation to the injured employee without reasonable excuse, Labour Department would prosecute him as if he were the employer.

11. Since the policy intent of section 24 was to regard a principal contractor as an employer for the purpose of assuming liability under the Ordinance, there is a need to amend this section to reflect more accurately the policy intent and to remove any ambiguity.

### **The proposal**

12. We propose to make the following amendments to the Ordinance-

- (a) increase the level of fine in section 16A(12) for non-payment of compensation as stated in a certificate issued by the Commissioner from \$50,000 (i.e. Level 5) to \$100,000 (i.e. Level 6);
- (b) increase the level of fine in section 40(2) for failure to comply with the requirements relating to compulsory insurance from \$50,000 upon conviction by indictment and \$25,000 upon summary conviction to \$100,000 (i.e. Level 6) in both circumstances; (the penalty clauses for the two types of conviction still carry a distinction in the imprisonment term, which is one year for summary conviction and two years for conviction by indictment);
- (c) increase the level of fine in section 45C(2)(a) for failure to comply with a written demand for producing a policy of insurance for inspection from \$50,000 upon conviction by indictment and \$25,000 upon summary conviction to \$100,000 (i.e. Level 6) in both circumstances; (the penalty clauses for the two types of conviction still carry a distinction in the imprisonment term, which is one year for summary conviction and two years for conviction by indictment);
- (d) amend sections 41(3), 45D(2), 47(1) and 49(2) by converting the penalty levels therein expressed in monetary terms into the corresponding levels of fine (Levels 1 to 6) in accordance with section 113(c) of the Criminal Procedure Ordinance (Cap. 221); and
- (e) amend section 24 by making it clear that where a principal contractor is liable to pay compensation to the employees of his sub-contractors, he shall be liable for the offences of non-payment of compensation as if he were an employer.

## **THE BILL**

13. The main provisions of the Bill are:

- (a) **Clause 3** introduces certain new definitions into the Ordinance, including a new definition of "member of the family" to substitute for the definition of "dependants" (the latter will be repealed).
- (b) **Clause 5** provides for the payment of compensation to family members and the reimbursement of funeral and medical attendance expenses by the employer in all fatal cases.
- (c) **Clause 6** adds:-

- (i) new section 6A which, together with the new Seventh Schedule at **Clause 27**, set out the manner in which the compensation is to be apportioned among family members;
  - (ii) new sections 6B and 6D to set out the procedure for making claims to the Commissioner and for making determination of claims by the Commissioner;
  - (iii) new section 6C to set out the procedure for application for interim payments by the spouse and for making determination of those payments by the Commissioner;
  - (iv) new section 6E to set out the procedure for making claims for reimbursement of funeral and medical attendance expenses and for making determination of those reimbursement by the Commissioner;
  - (v) new section 6F to provide that the Commissioner, for the purpose of making determination, may require production of supporting documents by any person;
  - (vi) new section 6G to set out the total liability of the employer and his insurer in respect of one deceased employee; and
  - (vii) new section 6H to provide for an avenue for appeal to the Court against a determination made by the Commissioner.
- (d) **Clauses 11, 18 to 22 and 24** revise the level of fines for offences committed under the Ordinance.
  - (e) **Clause 13** clarifies the criminal liabilities of principal contractors for failing to pay compensation in accordance with section 24 of the Ordinance.
  - (f) **Clauses 28 to 43** contain consequential amendments to other related Ordinances and subsidiary legislation.

## LEGISLATIVE TIMETABLE

14. The legislative timetable for the Bill is as follows:

Publication in the Gazette	25 February 2000
First Reading and commencement of Second Reading debate	1 March 2000
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

## **BASIC LAW IMPLICATIONS**

15. The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

## **HUMAN RIGHTS IMPLICATIONS**

16. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

## **BINDING EFFECT OF THE LEGISLATION**

17. The amendments will not affect the current binding effect of the Ordinance.

## **FINANCIAL AND STAFFING IMPLICATIONS**

18. There will be staffing implications for the Labour Department. Additional staff will be required to deal with the new responsibilities and workload arising from the proposed additional avenue for determining compensation. These additional responsibilities and workload include investigation and verification of relationship of family members as well as handling complaints of non-payment of compensation and prosecution where necessary. The additional annual recurrent cost is estimated to be around \$0.4 million and will be absorbed within Labour Department's existing resources.

19. The proposal to replace the "dependency" requirement by familial connection will have financial implications for the Government as an employer. However, the increase in liability is expected to be small. From 1997 to 1999, an average of seven fatal work injuries involving civil servants was settled each year. The proposal on payment of funeral expenses will not affect the Government because it is the standing practice of the Government to pay expenses of the funeral of civil servants who sustained fatal work injuries.

20. The proposals to revise the penalty provisions will not have any financial and staffing implications on the Government.

## **ECONOMIC IMPLICATIONS**

21. The Accident Insurance Association of Hong Kong has estimated that the proposed amendments to improve the settlement of fatal compensation cases would, prima facie, increase the premium payable by employers to insurance companies by 1 - 2%. Hence the proposal should have only

marginal impact on the insurance premium cost incurred by employers. With the additional option of settling the claim by certificates issued by the C for L, cases that need to go to the Court are likely to be reduced. This should bring about gains in efficiency of processing and savings in time and legal costs.

22. The proposal to amend the penalty provisions will not create additional liabilities for employers. There will be no economic implication arising from the proposal.

### **PUBLIC CONSULTATION**

23. The Labour Advisory Board has been consulted and endorsed the above proposals.

### **PUBLICITY**

24. A press release will be issued on 25 February 2000. A spokesman will be available to handle press enquiries.

Education and Manpower Bureau

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February 2000



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**An illustration of the compensation payable under the existing and proposed settlement mechanism for fatal compensation claims**

Case 1

*Injured person:* sales representative

*Age:* 19

*Year of injury:* 1998

*Earnings:* \$8,195 per month

*Family member:* Two parents, one brother and one sister-in-law

*Dependants:* two parents  
(as claimed)

*Compensation for death awarded:*

	<u>Under existing provisions</u>	<u>Under proposed provisions</u>
	Nil	\$688,380*(full compensation)
(a) dismissed by Court		*\$8,195 x 84 months of earnings
(b) dependency could not be established		<i>Apportionment of Compensation:</i>
		Father: \$326,980.50 (47.5% of the full compensation)
(c) only burial expenses not exceeding \$16,000 was payable		Mother: \$326,980.50 (47.5% of the full compensation)
		Elder brother living with the deceased employee: \$17,209.50 (2.5% of the full compensation)
		Sister-in-law living with the deceased employee: \$17,209.50 (2.5%

\* For the purpose of calculating compensation, the earning is subject to a maximum of \$21,000 per month.

of the full compensation)

\* For the purpose of calculating compensation, the earning is subject to a maximum of \$21,000 per month.

Case 2

*Injured person:* forklift operator

*Age:* 49

*Year of injury:* 1998

*Earnings:* \$11,000 per month

*Family members:* one wife, one son and one father

*Dependants:* one wife, one son and one father

*Compensation for death awarded:*

	<u>Under existing provisions</u>	<u>Under Proposed provisions</u>
	\$450,000	\$660,000* (full compensation)
(a)	settled at Court by consent summons	*\$11,000 x 60 months of earnings
(b)	Apportionment of Compensation	<i>Apportionment of Compensation:</i>
	Son: \$200,000	Son: \$297,000 (45% of the full compensation)
	Wife: \$200,000	Wife: \$297,000 (45% of the full compensation)
	Father: \$50,000	Father: \$66,000 (10% of the full compensation)

\* For the purpose of calculating compensation, the earning is subject to a maximum of \$21,000 per month.



Case 3

*Injured person:* computer programmer

*Age:* 28

*Year of injury:* 1996

*Earnings:* \$12,200 per month

*Family members:* two parents and three elder sisters (two of whom had already emigrated to Canada)

*Dependants:* two parents and one sister

*Compensation for death awarded:*

	<u>Under existing provisions</u>	<u>Under Proposed provisions</u>
	\$500,000	\$1,024,800* (full compensation)
(a) settled at Court by consent summons		*\$12,200 x 84 months of earnings <i>Apportionment of Compensation:</i>
(b) the dependants were only partially dependent on the deceased for financial support		Father: \$486,780 (47.5% of the full compensation)  Mother: \$486,780 (47.5% of the full compensation)  Elder sister living with the deceased employee: \$51,240 (5% of the full compensation)  Elder sisters emigrated to Canada: Nil

\* For the purpose of calculating compensation, the earning is subject to a maximum of \$21,000 per month.