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**Paper for the House Committee meeting
on 23 June 2000**

**Report of the Subcommittee on
Regulations relating to Occupational Safety and Health**

Purpose

This paper reports on the deliberations of the Subcommittee on the proposed Factories and Industrial Undertakings (Medical Examinations) Regulation and the consequential amendments to four related Regulations made under the Factories and Industrial Undertakings Ordinance (FIUO) on carcinogenic substances, asbestos, and work in underground and in compressed air.

The Subcommittee

2. The Subcommittee had previously submitted two reports on the deliberations of the Factories and Industrial Undertakings (Confined Spaces) Regulation and Construction Sites (Safety) (Amendment) Regulation 1998.

3. Chaired by Hon Andrew CHENG Kar-foo, the Subcommittee has held a total of ten meetings to discuss the proposed Factories and Industrial Undertakings (Medical Examinations) Regulation. The Subcommittee has considered the views of some 40 organizations and discussed with 22 of them on the new requirements proposed in the Regulation.

4. The membership list of the Subcommittee is in **Appendix I**. The list of organizations consulted is in **Appendix II**.

Background

5. For early detection and prevention of occupational diseases, employees who are exposed to asbestos and certain carcinogenic substances or who work underground or in compressed air environment are at present required by

various regulations under FIUO to undergo pre-employment and regular medical examinations. Radiation workers are also required to undergo similar medical examinations under the Radiation Ordinance. Except for radiation workers who are examined by a medical panel appointed by the Radiation Board, any registered medical practitioner can at present perform the medical examinations for these workers.

6. In addition to the five types of occupations which are covered by existing legislation, the Administration proposes to extend the statutory medical examinations to workers who are exposed to other specified hazardous substances and physical agents, and to require medical examinations to be carried out by Appointed Medical Practitioners (AMPs) only.

The Regulations

7. The Factories and Industrial Undertakings (Medical Examinations) Regulation (the Regulation) proposes that workers employed in the 17 occupations (as specified in Schedule 1 to the Regulation) should undergo pre-employment and regular medical examinations. The Regulation will cover 23 industries involving a total of 195 000 workers.

8. The Regulation requires that a proprietor should not employ a person who has not been medically examined and certified fit to work in the 17 specified occupations. The employee in the specified occupations must also attend periodic medical examinations. Such medical examinations are to be carried out by AMPs who will make recommendations on the medical fitness of the employee to continue employment in that occupation as well as measures to prevent the latter's further exposure to hazardous substances. Contravention of the Regulation may lead to a fine at level 5 (\$25,001-\$50,000) for the proprietor, or a fine at level 2 (\$2,501- \$5,000) for the employee. Employees who are aggrieved by a recommendation can appeal to a board which may require the employee to be medically examined again if necessary.

Deliberations of the Subcommittee on the Factories and Industrial Undertakings (Medical Examinations) Regulation

9. The Subcommittee and deputations are generally in support of the objective of the Regulation which is to enhance the protection of workers' health through early detection and treatment of occupational diseases with regular medical examinations. Nevertheless, members have expressed grave concern that the Regulation would have implications on the employment of those workers who are found to have contracted occupational diseases and considered medically unfit to continue employment in the specified occupation. The Subcommittee therefore has detailed discussion on the proposed

arrangements and ways to address the concerns expressed by employers, employees and professional bodies.

Coverage of the Regulation

10. Members note that the great majority of the employees affected by the Regulation, i.e about 182 000 workers, are exposed to the hazard of excessive noise, and 16 000 of them are working in kitchens in Chinese restaurants. The Chairman has questioned why western restaurants and karaoke establishments are not covered by the Regulation since these establishments are also subject to excessive noise. The Administration has responded that the noise level in the kitchens of western restaurants normally does not exceed 85dB while karaoke establishments are outside the ambit of the principal ordinance (FIUO).

11. The Chairman and some members have enquired about the timetable for extending the mandatory medical examinations to employees exposed to hazardous substances in the non-industrial sector, and the possibility of having a comprehensive piece of legislation on occupational safety and health. The Administration has explained that this is a complicated issue requiring careful consideration and further consultation with various industries. In order not to delay the Regulation on mandatory medical examinations for employees in the 17 specified occupations, the Administration will consider the suggestion at a later stage as a separate exercise.

Arrangements for medical examinations

12. A majority of the workers covered by the Regulation, i.e. 153 000 workers, are employed in the construction industry. In view of the unique multi-layered sub-contracting system in the construction industry and the high mobility of construction workers, the Hong Kong Construction Industry (HKCA) has proposed entrusting the medical examination arrangements for construction workers to the Construction Industry Training Authority (CITA). An additional levy of 0.03% on the construction industry will be charged for the purpose. To empower CITA to collect the additional levy, an amendment bill will be submitted to the Legislative Council (LegCo).

13. While the Subcommittee in general has no objection to the proposed arrangement of CITA, some members are worried that it will create a cartel situation if only a small group of private practitioners is allowed to participate in the provision of services to construction workers. In this connection, members have urged the Administration to ensure a fair, open selection system providing competition for the provision of medical examination services to the construction industry.

14. The Administration has responded that the CITA's preliminary proposal is to invite tender for the provision of such services. It is possible that medical institutions equipped with the necessary equipment for occupational medical examination may stand a better chance of being selected. The list of CITA appointed doctors and the prescribed fees will be publicized for general information.

15. Some members have suggested a central levy system to provide funds for the medical examination of all non-construction workers covered by the Regulation, and the scheme should cover casual workers who do not work for any particular employer. These members consider that, since the legislative intent is to require a proprietor to pay the medical examination fees for his employees, the proprietor should also bear the medical examination costs for casual or replacement workers in his employ. However, a few other members point out that this will add financial burden to small and medium enterprises and the proprietor may then choose to employ a casual worker who is already in possession of a medical fitness certificate. The Administration is of the view that there will be practical difficulties in devising an equitable levy system for all non-construction industries as the number of workers covered by the Regulation varies from industry to industry and from employer to employer. For the protection of the worker's interest, the Administration considers that it will not be unreasonable for casual workers to pay their own medical examination cost which is estimated to be around \$400 a year.

16. As the employment of casual or replacement workers is more common in the catering industry than in the other specified occupations, a few members suggest establishing a central levy system specifically for the catering industry, based on information in the database of the Mandatory Provident Fund (MPF). The Administration has however advised that the information of the MPF database cannot be used for purposes other than those specified in the Mandatory Provident Fund Scheme Ordinance.

17. A member has suggested designating Government clinics to conduct medical examinations free of charge for all casual workers in the non-construction industries. Some other members however have reservation on the suggestion as this will have implications on public resources and the provision of medical services to the general public. In response to members, the Administration has advised that it is not possible to have an accurate assessment of the resources required in the absence of information on the number of casual workers employed in the specified occupations. The Administration also expresses worries about possible abuse of the arrangement.

Requirement for AMPs to conduct medical examinations

18. Some members are concerned that the limited supply of medical doctors with the requisite qualifications may push up the costs of medical examinations.

It is noted that there are currently only 25 or 30 medical doctors in the private sector with qualifications in occupational medicine. Some medical professional bodies have suggested that family physicians and other medical or nursing professionals with the necessary experience should also be allowed to conduct the general medical tests, since the majority of workers affected will only require auroscopic or audiometric examination. This can also ease the shortage of supply of AMPs.

19. The Administration has maintained its position that only those medical doctors in possession of the specialist qualifications in occupational medicine will be allowed to conduct the mandatory medical examinations under the Regulation, as the AMPs will need to recommend preventive measures to improve the safety of the working environment and on the worker's medical fitness to continue employment in that occupation. To address the concern about supply of AMPs, the Chinese University of Hong Kong has planned to increase the places for the diploma course in Occupational Medicine. Furthermore, since the Regulation is to be implemented by phases, and the majority of workers are those exposed to excessive noise to be included in the last phase, the Administration believes that there will be sufficient qualified AMPs for conducting the medical examinations.

Appeal board

20. The Subcommittee has raised queries on the qualifications of members and the powers of the proposed Appeal Board. A member is of the view that employers should also have the right to appeal against the recommendation of an AMP. Suggestions are also made on the operation of the Appeal Board and the arrangements for further medical examinations as directed by the Appeal Board. The Administration has accepted most of these suggestions and provided a revised text of the Regulation incorporating the necessary amendments. The Subcommittee is generally satisfied with the new version of sections 13, 14 and 15 of the Regulation presented to the Subcommittee in April 2000.

Follow up to medical reports

21. Members have stressed that the primary objective of the Regulation is to enhance occupational safety and health in workplaces. They therefore have much concern about the follow up actions to be taken by Labour Department on reports of occupational diseases. Members suggest that the Administration should put in place a monitoring system to ensure that the proprietor has taken those measures as recommended by an AMP to improve the safety of the working environment. Members also urge Labour Department to take a more proactive and preventive approach to inspect those workplaces where occupational diseases have been reported in order to prevent other workers in these workplaces from contracting the disease.

22. The Administration has responded that Labour Department conducts regular inspection of factories and industrial undertakings and advises the proprietors on occupational safety measures. The Labour Department will deploy Occupational Health Officers and Occupational Hygienists to investigate into reports of occupational diseases.

Implications on workers' employment and benefits

23. Members have warned the Administration that the mandatory medical examination arrangements will have implications on the employment of the employees in the 17 specified occupations. In this connection, employees' associations and some members have expressed grave concern about section 10 of the Regulation which empowers an AMP to recommend temporary or permanent suspension of an employee from working in the specified occupation. Some members also have worries that the proprietor may dismiss an employee who has contracted an occupational disease. These members emphasize that the Regulation must not have the effect of reducing current entitlements and benefits of employees as provided in existing legislation. These members have therefore sought clarification from the Administration at several meetings about the suspension arrangements, in particular, whether the suspension period will be counted as paid sickness days under the Employment Ordinance and whether the employees concerned will be entitled to compensation or ex-gratia payments under existing legislation.

24. The Administration emphasizes that the intention of the Regulation is to provide better protection of workers' health through early detection and prevention of occupational diseases. It assures members that there is no intention to reduce the employee's benefits or entitlements as provided in existing legislation. The employer therefore must not use the medical report as an excuse to terminate the employment of an employee who is found to have contracted occupational disease. In response to members' further queries, the Administration has advised that the Employment Ordinance already provides adequate safeguards against unlawful dismissal, while compensation for occupational diseases is payable under relevant employee compensation legislation. The Administration has further advised that termination of employment must be in accordance with the provisions in the Employment Ordinance.

25. Despite the Administration's assurance, some members strongly feel that the Regulation should contain provisions to protect the interest of workers who are recommended temporary or permanent suspension from work after medical check. These members are particularly concerned whether the worker will be granted paid sick leave or redeployed to another post during the period of suspension. If such arrangements are not feasible, these members consider that there should be compensation or ex-gratia payments for the employees suspended from employment in the specified occupations.

26. Members note that the granting of sick leave by an AMP will depend on the nature and severity of the illness and whether the health of employee can improve after sick leave. It is possible that recommendation for temporary suspension may not necessarily be accompanied by paid sickness days in some cases. In this connection, a member points out that the maximum paid sickness days under the Employment Ordinance are 120 days, while entitlements to employee compensation are subject to qualifying service requirements ranging from two to five years. These members therefore have serious concern that the livelihood of workers will be adversely affected if the proposed Regulation does not provide for paid sick leave or subsistence payments for employees recommended suspension from employment.

27. Some members have suggested an alternative that the Regulation can be amended to specify that the proprietor has the responsibility to redeploy the employee to another post if an AMP does not recommend sick leave during the period of suspension. However, a few other members express strong reservations about stipulating the redeployment requirements in legislation, as small establishments may have practical difficulties in finding alternative employment for the worker concerned. These members consider it unfair if the proposed amendment imposes a criminal or civil liability on the proprietor. At the suggestion of these members, the Subcommittee has sought the views of the industry, Labour Advisory Board, employers' and employee's associations and professional bodies on the proposed amendment.

28. Mixed responses have been received by the Subcommittee on the suggestion of stipulating the redeployment requirements in the Regulation. While employees' associations generally welcome the proposal, some also indicate their preference of paid sickness days and subsistence payments during the period of suspension. Some other organizations including employers' associations have expressed doubts on the practicability of the redeployment arrangement. They are of the view that redeployment should only be arranged by mutual consent as this involves a change in employment conditions and have implications on the continuity of the employment contract. A number of organizations suggest that Labour Department should incorporate the redeployment arrangements in the guidelines on good management practices for employers.

29. In view of the divergent views expressed by members and deputations, the Subcommittee has decided not to proceed with the proposed amendment on redeployment arrangement. However, as the problem of suspension arrangement remains, the Subcommittee Chairman has requested the Administration to reconsider its position on the issue. A member also maintains the view that there is inconsistency between section 10 in the Regulation and relevant sections in the Employment Ordinance and other labour legislation. The member opines that temporary suspension exceeding

14 days may constitute grounds for "laid-off" under section 31B of the Employment Ordinance. The Subcommittee has therefore urged the Administration to provide a written response on the compatibility of section 10 of the Regulation (Recommendation as to limitations on or for suspension from employment in a particular occupation) with section 31B of the Employment Ordinance.

30. After seeking further legal advice, the Administration provided a written response in June 2000. According to the written response, there is no conflict between section 10 of the Regulation and section 31B of the Employment Ordinance. The Administration has advised that an employee suspended from employment under the Regulation should not be regarded as "laid-off" under the Employment Ordinance, the reason being that the employee concerned ceases work not because the proprietor fails to provide work for him but because an AMP recommends him be suspended from work in that particular occupation after considering his health and safety. The Administration stresses again that it is not the intention that the employee's current entitlements to employment rights and benefits are to be adversely affected with the implementation of the Regulation.

31. Nevertheless, the Administration acknowledges in its written response that the Employment Ordinance does not cater for the situation of an employee being suspended from work (temporarily or permanently) due to his medical unfitness to perform his duties. To clarify the legislative intent, the Administration proposes to provide in the Regulation that such an employee should be deemed to be continuing his employment during the suspension period and the employee is therefore entitled to the same rights and benefits under the Employment Ordinance as any employee engaged in a continuous employment. However, as the Commissioner for Labour is not empowered to make such a regulation, the Administration considers that section 7 of FIUO should be amended in the first place.

32. While members do not object to the Administration's proposal to amend the principal ordinance to clarify the legislative intent, they are disappointed that the Administration has not proposed the amendment earlier and has not taken early action to introduce an amendment bill to that effect. The Chairman has expressed dissatisfaction on behalf of Members belonging to the Democratic Party that the belated proposal from the Administration has resulted in insufficient time to enact the Regulation before the end of the current LegCo term, and has wasted the Subcommittee's efforts in the scrutiny of the Regulation. Some other members acknowledge that the Regulation has far-reaching implications on the employment of workers in the 17 specified occupations and are therefore in support of the Administration's withdrawal of the Regulation pending amendment to the principal ordinance.

33. To ensure that the legislative amendments to be proposed by the Administration are consistent and compatible with the relevant labour legislation, members stress that the Administration must give thorough consideration to the proposed amendments before introduction into LegCo. Members also urge the Administration to consult the industry and the employers' and employees' associations on the practicability of the proposed arrangements.

34. The Subcommittee met representatives of Hong Kong Construction Industry Employees General Union in June 2000. The Subcommittee notes that the organization prefers deferral of the Regulation unless a safety net is provided in the Regulation to enable compensation to be made to the affected employees.

Other issues

35. The Subcommittee has detailed discussion on individual clauses in the proposed Regulation. The Administration has accepted the Subcommittee's suggestions and agreed to introduce amendments to improve the clarity and presentation of various sections in the Regulation. The Subcommittee also notes the consequential amendments to the four related Regulations.

Advice sought

36. Members are invited to note the deliberations of the Subcommittee on the Factories and Industrial Undertakings (Medical Examinations) Regulation, and the Administration's decision to postpone the Regulation, pending amendment to section 7 of FIUO to clarify the legislative intent.

Legislative Council Secretariat

22 June 2000

**Subcommittee on
Regulations relating to Occupational Safety and Health**

Membership List

Hon Andrew CHENG Kar-foo (Chairman)

Hon HO Sai-chu, SBS, JP

Hon Cyd HO Sau-lan

Hon Michael HO Mun-ka

Hon LEE Cheuk-yan

Hon LEE Kai-ming, SBS, JP

Dr Hon LUI Ming-wah, JP

Hon Ronald ARCULLI, JP

Hon CHAN Wing-chan

Dr Hon LEONG Che-hung, JP

Hon TAM Yiu-chung, GBS, JP

Total : 11 Members

Date : 27 July 1999

**Subcommittee on
Regulations relating to Occupational Safety and Health**

List of organizations consulted

1. CityU SCOPE OSH Alumni Association
2. Construction Industry Training Authority
3. Dr CHOI Kin, Gabriel
4. Employers' Federation of Hong Kong
5. Estate Doctors Association Ltd
6. Federation of Hong Kong Industries
7. Hong Kong College of Community Medicine
8. Hong Kong College of Physician
9. Hong Kong Confederation of Trade Unions
10. Hong Kong Construction Industry Employees General Union
11. Hong Kong Federation of Trade Unions
12. Hong Kong Industrial Safety Association
13. Hong Kong Institute of Occupational and Environmental Hygiene
14. Hong Kong Workers' Health Centre
15. Labour Advisory Board
16. Occupational Deafness Compensation Board
17. Occupational Safety & Health Council
18. Pneumoconiosis Mutual Aid Association
19. Society of Registered Safety Officers
20. The Chinese General Chamber of Commerce
21. The Chinese Manufacturers' Association of Hong Kong
22. The Federation of Hong Kong and Kowloon Labour Unions
23. The Hong Kong College of Family Physicians
24. The Hong Kong Construction Association Ltd
25. The Hong Kong General Chamber of Commerce
26. The Hong Kong Occupational Deafness Association
27. The Hong Kong Occupational Safety and Health Association
28. The Hong Kong Polytechnic University
29. The Hong Kong Small and Medium Business Association
30. The Real Estate Developers Association of Hong Kong
31. 建築地盤職工總會
32. 香港建造業扎鐵職工會
33. 香港建造業模板職工會
34. 香港建造業機械操作及維修專業人員協會
35. 香港喉管從業員總會
36. 港九木匠總工會
37. 港九油漆業總工會
38. 港九坭水建築業職工會
39. 港九搭棚工會
40. 街坊工友服務處
41. Individuals