

**LegCo Panel on Manpower
(For Meeting on 21 December 1999)**

**Review of the applicability of the Employment Ordinance
to live-in domestic helpers**

Introduction

This paper seeks Members' views on the result of a review of the applicability of the Employment Ordinance (EO) to live-in domestic helpers (DHs) conducted recently by the Labour Department.

Background

Existing protection for live-in domestic helpers

2. Since its enactment in 1968, the EO applies to, among others, live-in DHs. Live-in DHs, including foreign domestic helpers (FDHs), are entitled to all the rights and benefits conferred by the EO, including those on maternity protection, sickness allowance and employment protection.

Review conducted by the Labour Department

3. In June 1997, the Legislative Council (LegCo) passed the Employment (Amendment) Ordinance 1997 and the Employment (Amendment)(No. 3) Ordinance 1997, which provide for improved maternity protection and employment protection for employees respectively. During the legislative process, there was a body of opinion from employer groups and some LegCo Members that live-in DHs should be exempted from the general application of the EO and that separate legislation should be introduced for them. They expressed particular concern over the application of the provisions

on maternity protection, sickness allowance and employment protection to FDHs. The Administration undertook to examine the employment conditions of live-in DHs in view of the special circumstances of their employment, i.e. they have to live and work in the residence of their employers.

4. The Labour Department (LD) has recently completed the review. As the bulk of live-in DHs in Hong Kong are FDHs, the review mainly made reference to their employment circumstances when considering the employment conditions of live-in DHs. In conducting the review, various interest parties, including the relevant consulates, FDH groups, women groups and employers' association were consulted. Whilst FDH employers considered that separate legislation should be made for FDHs, other parties were generally of the view that the existing protection provided by the EO was appropriate.

5. The Labour Relations Service (LRS) of the LD also conducted a 10-month survey during 1997/1998 on the employment problems encountered by live-in DHs and their employers. The survey findings revealed that the most common bone of contention between them was the argument as to whether their employment relationship had been terminated by dismissal or by resignation. Issues like prolonged maternity/sick leave and unreasonable dismissal did not seem to pose significant problems.

Proposals and arguments

6. The review recommends that the EO should remain fully applicable to live-in DHs with no exemption. However, it proposes that an additional option be provided in the maternity protection provisions to allow a flexible arrangement whereby a pregnant live-in DH and her employer may mutually agree to dissolve their employment contract on the condition that the employer has to pay the DH a specified amount as detailed in the Appendix.

Proposal (a) : The EO should remain fully applicable to live-in DHs

7. The reasons why the EO should remain fully applicable to live-in DHs are set out below :

- (a) Under the various international conventions and covenant that Hong Kong has subscribed to, we are obliged to treat all employees, whether local or from overseas, equal under the EO unless there are overriding reasons for a different treatment. These conventions and covenant include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Labour Convention No. 97 (ILC 97) on Migration for Employment and International Covenant on Civil and Political Rights (ICCPR).
- (b) Having examined very carefully the arguments advanced by employer groups in support of the exclusion of live-in DHs, in particular FDHs, from the EO, we consider that there is no justification for their case.
 - (i) FDHs are temporary migrants – This argument is not valid because other temporary migrants, like imported workers and expatriates working in Hong Kong, are also covered by the EO.
 - (ii) The household is a non-profit making unit – This argument is not valid because there are many other non-profit making organisations in Hong Kong which are also covered by the EO.
 - (iii) FDH employers do not have the resources to hire replacements when their FDHs go on maternity leave – This is not a unique reason because many small employers have the same problem with their pregnant employees.
- (c) Many employers have expressed particular concern over the

application of the EO provisions on maternity protection, sickness allowance and employment protection to FDHs. Again, the review has found no strong justification for excluding FDHs from the relevant provisions. The findings of the survey show that these provisions do not pose significant problems to FDH employers. There is also no evidence of widespread abuse of the provisions on maternity and employment protection by FDHs. The review also reveals the following findings which are pertinent :

- (i) The total number of births given by FDHs in Hong Kong in 1998 was 159, representing only 0.09% of the female FDHs (totalling 175 186 in December 1998) in Hong Kong.
 - (ii) The total number of claim cases involving dismissal of FDHs during pregnancy recorded by the LD in 1998 was only 29 (1.1% of total FDH claim cases).
 - (iii) The number of claims lodged by FDHs for employment protection in 1998 was small in proportion to both the total number of employment protection cases handled by the LD (4.3%) and the FDH population in the workforce (5.4%).
 - (iv) Up to end of November 1999, the LRS has not received any complaint from live-in DHs (including FDHs) about the assignment of heavy, hazardous or harmful work by their employers during their pregnancy.
- (d) Providing FDHs with employment conditions which are on par with local workers will protect the employment opportunities of the latter.

Proposal (b) : An additional option should be provided in the EO to allow dissolution of a pregnant live-in DH's employment contract by mutual agreement

8. (a) The live-in condition which is peculiar to the employment of live-in DHs does create unique problems for a DH and her employer when the DH becomes pregnant. Her pregnancy may cause practical inconvenience to the employer and his family and may affect their daily life. The employer would have a moral, if not legal, obligation to take care of her. Her continued stay in the employer's residence during pregnancy may prevent the employer from hiring a temporary live-in replacement. On the other hand, a DH may find it inconvenient to stay in her employer's home, sharing common facilities and utilities, especially at the advanced stage of her pregnancy. A FDH may wish to return to her home country before commencement of her maternity leave. A FDH may also have difficulty resuming work after her maternity leave because there is no suitable place to accommodate, or person to look after, her baby in Hong Kong. While these problems would not justify the exclusion of live-in DHs from the maternity protection provisions of the EO, there is a case to provide more flexible arrangement under the existing provisions to cater for the needs of both pregnant live-in DHs and their employers. This proposal will provide an additional option and alternative flexibility rather than an outright substitute to the existing requirements for the two sides to turn to if they both agree.
- (b) Although there were only 159 recorded births given by FDHs in Hong Kong in 1998, we believe that the number of FDHs who become pregnant during their employment duration is larger than this figure. It is believed that many of them would return to their country of origin before their confinement began. From operational experience, it is fairly common for pregnant FDHs to come into agreement with their employers on early termination of

the employment contract, usually with the employer paying them an extra sum on top of their legal entitlements. However, under the existing provisions of the EO, an employer who terminates the employment contract of his pregnant DH in such circumstances still runs the risk of being subject to criminal prosecution and to claim for further compensation if the DH reneges. The current proposal, if implemented, will relieve the employer from these criminal and civil liabilities and prevent unnecessary disputes. Indeed, it will also ensure that the DH gets a reasonable monetary compensation from the employer as specified in the law, thus protecting her interest.

Consultation with concerned parties

9. The relevant parties including employers group, workers groups and consulates were invited to give their views on the proposals during the two-month period from July to August 1999. Altogether 10 written submissions from 81 organisations, including consulates, employers group, FDH and migrant workers groups, women and human rights groups, religious organisations and overseas concern groups were received.

10. The first proposal to have the EO remaining fully applicable to live-in DHs is supported by all the respondents except the employers group, which asks for separate legislation for FDHs.

11. The second proposal to allow for alternative flexible arrangement under the maternity protection provisions has met with general objection from the respondents. While the employers group maintains that the proposal will not solve the employers' problems and would increase their financial burden, the workers and other concerned groups consider the proposal discriminatory against FDHs and women. Paragraphs 12-13 summarise the views of the various groups.

Views of employers group

12. In essence, the employers group has put forward four points:
- (a) The wide differences between the working environment in a domestic household and in a business setting justify separate legislation for FDHs.
 - (b) The employment rights of FDHs are already provided for in their standard employment contract. Given that some of the contract terms (e.g. the provision of air passage, food and accommodation, free medical treatment to FDHs) are more favourable than the requirements under the EO, it is fair to have separate legislation for FDHs. Employers should not be subject to the non-statutory terms in the standard contract if the EO is to remain applicable to FDHs.
 - (c) The Government should at least exclude FDHs from the provisions of the EO on maternity protection, sickness allowance and employment protection. There are many complaints from employers about pregnant FDHs refusing to perform certain duties or asking for bed rest. The new maternity and employment protection provisions introduced in 1997 have the effect of encouraging FDHs to become pregnant.
 - (d) The proposed flexible arrangement will not solve the employer's problems because the pregnant FDH will still have the right to refuse the employer's request to dissolve the employment contract. To make it effective, the requirement of mutual consent should be removed.

Views of workers and other concerned groups

13. Briefly, the objection from workers and other concerned groups are

as follows :

- (a) The proposal undermines the statutory employment protection for live-in DHs and deprives them of their existing rights to maternity protection.
- (b) It represents repression of workers and retrogression in the protection of human rights.
- (c) It is discriminatory against women and migrant workers and constitutes discrimination on grounds of sex, race and family status.
- (d) It is inconsistent with universally accepted employment and human rights standards and breaches the provisions of CEDAW, ILC 97 and ICCPR.
- (e) There is no evidence to show that pregnant DHs are not capable of discharging their duties and that their employers have to take care of them. Domestic employees should have the same rights as all other employees.
- (f) Mutual agreement cannot be achieved in reality because of the imbalance in bargaining power between the employer and the DH.
- (g) Given the insignificant number of births given by FDHs in Hong Kong, there is no overriding reason to change the law.

Misunderstanding about the proposal on flexible arrangement

14. It is apparent from the response of workers and other concerned groups that there is considerable misunderstanding about the proposal on alternative flexible arrangement. Since receipt of their comments, the LD has

taken every opportunity to clarify these misconceptions. The following points have been repeatedly stressed:

- (a) The proposal will not in itself remove or reduce the rights and protection conferred by the EO to live-in DHs, who will continue to enjoy the full maternity protection under the EO.
- (b) Without affecting in any way the existing rights and benefits of live-in DHs, the proposal seeks to provide an additional option and alternative flexibility for both pregnant live-in DHs and their employers to address the practical problems arising from the unique live-in condition of the employment. It will enable the parties to agree, out of their own free will, to dissolve the employment contract, with the employer paying the DH a specified sum stipulated under the law.
- (c) The proposed flexible arrangement hinges on mutual consent. It will be entirely for the DH to decide whether or not to go for this arrangement. She can choose to stayput by refusing her employer's offer and can still enjoy the maternity benefits as provided by the EO, including the protection against dismissal during pregnancy.
- (d) The proposal will not give employers the right to terminate the employment of pregnant live-in DHs unilaterally. Even if the proposal is implemented, any employer who unilaterally terminates the employment contract of a pregnant DH will still be considered to have committed an offence and is liable to prosecution. He is also required to pay compensation to the DH for the dismissal.
- (e) The proposal will apply to all live-in DHs, whether local or from overseas. There is no question of discrimination against FDHs.

The Department of Justice has advised that the proposal conforms fully with the provisions of the international conventions and covenant that Hong Kong has subscribed to, including CEDAW, ILC97 and ICCPR, as well as the Sex Discrimination Ordinance.

Views of the Labour Advisory Board

15. The Labour Advisory Board (LAB) discussed the proposals of the review at its meeting on 30 November 1999. Members unanimously agreed to the first proposal, i.e. the EO should continue to apply fully to live-in DHs. In view of the opposition from both the employers and workers groups, Members considered that the discussion on the other proposal of providing for alternative flexible arrangement under the maternity protection provisions of the EO should be deferred, so that the Administration may collect more views on the subject.

Education and Manpower Bureau
December 1999

Proposed payment for dissolution of employment contract
by mutual consent

A. Under the proposal, an employer who mutually agrees with his pregnant live-in DH on the dissolution of employment contract will have to make the following payment to the employee. This payment serves as a compensation to the employee for the loss of earnings as a result of the dissolution of employment by mutual consent.

I. *Where the employee is not employed on a fixed-term contract or where the employee is employed on a fixed-term contract, her maternity leave (ML) falls within the period of the fixed-term contract-*

- (a) If the employee has a continuous contract of 40 weeks or more before the expected date of commencement of the ML, the full amount of the maternity leave pay (MLP) under the EO (i.e. 10 weeks pay at the rate of four-fifths of her normal wages) plus a sum equivalent to one month's wage.
- (b) If the employee has a continuous contract of less than 40 weeks before the expected date of commencement of the ML, half of the amount of the MLP under the EO plus a sum equivalent to one month's wage.

II. *Where the employee is employed on a fixed-term contract and her ML extends totally or partially outside the period of the fixed-term contract –*

The full amount of MLP for those ML which falls within the fixed-term contract and half of the amount of MLP for those which falls outside the contract plus a sum equivalent to one month's wages.

III. *Where the employee has the five-year qualifying service for long service payment (LSP) at the time of the termination of the employment contract –*

In addition to the amount in (I)(a), LSP under the EO. (Under the existing EO, an employee who has been employed under a continuous contract for not less than 5 years is entitled to LSP if he/she is dismissed by his/her employer except in the case of summary dismissal due to the employee's serious misconduct or dismissal made by reason of redundancy.)

B. For illustration purpose, some examples of the amount of payment which a pregnant live-in DH who has mutually agreed with her employer on the termination of her employment may receive, are set out below:

<i>Where the maternity leave falls within the period of the fixed-term contract</i>		
(i)(a)	If she has served on a continuous contract for <u>less than 40 weeks</u> before the expected date of commencement of her maternity leave	10 weeks' wages x $\frac{4}{5}$ x $\frac{1}{2}$ + 1 month's wages = ~2 months' wages
(i)(b)	If she has served on a continuous contract for <u>not less than 40 weeks</u> before the expected date of commencement of her maternity leave	10 weeks' wages x $\frac{4}{5}$ + 1 month's wages = ~3 months' wages
<i>Where the maternity leave extends totally or partially outside the period of the fixed-term contract</i>		
(ii)	e.g. if 2 weeks of the ML are within the contract and 8 weeks of it are outside the contract	2 weeks' wages x $\frac{4}{5}$ + 8 weeks' wages x $\frac{4}{5}$ x $\frac{1}{2}$ + 1 month's wages = ~ 2.2 months' wages
<i>Where she has served on a continuous contract for not less than 5 years at the time of the cessation of the employment contract</i>		

(iii)	e.g. if she has 5 years' service	10 weeks' wages x 4/5 + 1 month's wages + LSP under the EO (5x2/3) = ~ 3 months' wage + 3.3 months' LSP
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C. Under the existing provisions of the EO, an employer who dismisses a pregnant employee is required to pay the dismissed employee compensation comprising wages in lieu of notice, a sum of one month's wages and 10 weeks' MLP, if she has been employed under a continuous contract for not less than 40 weeks before the commencement of the ML. In addition, the employer who dismisses a pregnant employee commits an offence which, on conviction, attracts a maximum fine of \$100,000 and he/she is further liable to claim for compensation up to \$150,000 under Part VIA of the EO for unreasonable and unlawful dismissal.

Under the present proposal, any employer who has agreed with his live-in DH on the termination of employment and paid her the specified amount will not be taken to have committed an offence under the EO for unlawful dismissal and will not be liable to claim for compensation under Part VIA of the EO.