『香港各界商會聯席會議』信箋

香港珠寶製造業廠商會　香港鐘表業總會　香港表廠商會　香港機械金屬業聯合總會　香港金屬製造業協會
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香港壓鑄業協會　香港合成皮革暨金屬物料供應商商會　香港中成藥商會　香港商業專業評審中心
香港中藥聯商會　國際中小企聯合商會　國際金融及管理專業人員協會　國際商貿協會　港九電器商聯會

致：　立法會人力事務委員會
　　主席劉千石議員, JP

緊急及重要

關於：修改《僱傭條例》將「佣金」納入所有員工的「工資」定義 (下稱「修例一事」)

【聯席會議】對上述「修例一事」有以下的立場和意見：-

1. 【聯席會議】及四大經濟支柱行業，包括地產界、金融界、旅遊界及零售界各大商會（下稱「我們」）反對一刀切式把「佣金」納入所有員工的「工資」定義；
2. 我們反對政府沒有向業界提出可接受的方案；及
3. 香港政府並無必要在未經廣泛諮詢業界及市民的情況下，倉促進行修例。

自 2006 年 4 月中開始，我們已積極與勞工處溝通，並向勞工處表達上述三項立場。對於勞工處仍然罔顧後果，一意孤行地進行上述「修例一事」，我們深感憤怒。

為向委員會提供有關「修例一事」的相關事實，我們現附上共 129 頁之附件。相信委員會可藉著附件對上述「修例一事」的前因後果有更詳實的資料作參考。

於 2006 年 6 月 15 日，【聯席會議】曾致函（請參閱附件中第 96 頁至 99 頁）立法會主席辦公室詳述【聯席會議】對上述「修例一事」於法、理、情的據點。我們並不想在此重覆該據點，但重申倉促進行上述「修例一事」只會破壞社會和諧及分化勞、資雙方，最終只會造成香港社會、資方及勞方三

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輸的局面。

2006 年 9 月 25 日

立法會人力事務委員會

我們曾諮詢所有屬會成員及香港四大商會（香港工業總會、香港總商會、香港中華總商會及香港中華廠商聯合會）。各屬會會員一致強列反對倉促修例。對「勞工顧問委員會」部份資方代表在知悉各大商會的一致立場後仍然在 8 月 22 日以「個人立場」倉促地通過支持修例，未能反映業界的共識，我們深感遺憾。

我們相信若果上述「修例一事」在未能反映社會上的意見下通過，勞方未必一定得益，甚至因加得減，因為資方將面對許多不明朗的責任，而無可避免地修改聘用條件及佣金制度，甚至將員工轉作自僱人士，致使勞、資雙方最終均會受損。要知佣金制度是一種自開埠以來行之有效並能製造勞、資雙方忠誠合作的基石，倉促修例肯定會把現時多勞多得、分享成果的勞、資雙贏佣金制度破壞和造成更多不明朗及潛在的社會問題。

無可否認，「修例一事」影響非常廣泛深遠，我們希望委員會否決通過上述「修例一事」。

如有任何聯繫，請致電【聯席會議】召集人陳國民先生或陳其鑣先生。

專此　並祝

台安！

【香港各界商會聯席會議】
秘書長　沈運龍 謹啟
2006 年 9 月 25 日

如要了解有關上述詳情，請瀏覽www.hkeama.org/commission.pdf

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梁君彥議員, SBS, JP
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聲 明

致　經濟發展及勞工局 葉澍堃局長：

我們是一群關注香港社會穩定和諧發展的商會代表。

於1997年，根據《僱傭修訂條例》，「佣金」被納入工資定義，保障日薪和以件工計算工資的員工權益。於2006年2月28日，終審庭就「菲力偉」一案，五名法官一致對該97年條例作出明確肯定。

但　貴局在終審庭最終裁決後，卻認為該法例有不清楚之處，企圖通過勞顧會匆匆修例，亦未作廣泛諮詢，及聽取各界對修例可能導致的惡果，我們認為　貴局的行動實為：

(1) 輸打贏要，不尊重終審庭的最高裁決，有損香港法治精神。
(2) 假以「立法原意」為藉口強行修例，誤導市民和立法會議員。根據資深大律師的法律意見，在香港法律體制內絕對沒有「立法原意」。
(3) 破壞社會和諧的不智之舉。

政府倉促修例將導致之惡果：

(1) 佣金制度歷來行之有效，令員工可以多勞多得、分享成果，其性質與「工資」不同，若硬把「佣金」納入所有員工的「工資」計算，勞方未必一定得益，甚至因加得減，因為資方將面對許多不明朗的責任，而無可避免地修改聘用條件及佣金制度，甚至將員工轉作自僱人士，致使勞、資雙方最終均會受損。
(2) 在未有直接廣泛諮詢前，倉促修例肯定會造成社會上不必要的矛盾和爭論，破壞社會和諧及勞、資雙方的互信基礎，製造三輸局面。

立場：

我們堅決反對政府在未有廣泛諮詢和完善解決方案前，不顧後果，倉促修例。

如要了解有關上述詳情，請瀏覽 www.hkeama.org/commission.pdf

香港各界商會聯席會議
2006年9月25日

(此文件是「香港各界商會聯席會議」信函致「立法會人力事務委員會」的一部份)

關於: 修改《僱傭條例》並把「所有佣金」計算爲薪金一部分(「修例一事」)

BUNDLE OF RELEVANT DOCUMENTS

25th September 2006
香港各界商會聯席會議

FACV No. 17 of 2005

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 17 OF 2005 (CIVIL)

(ON APPEAL FROM CACV NO. 204 OF 2004)

Between:

LISBETH ENTERPRISES LIMITED Appellant

and

MANDY LUK Respondent

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Ivor Richardson NPJ

Date of Hearing: 20 February 2006

Date of Judgment: 28 February 2006

JUDGMENT

Chief Justice Li:

1. I agree with the judgment of Mr Justice Bokhary PJ.

Mr Justice Bokhary PJ:

Question of law

2. This appeal turns on a far-reaching question of employment law. It is clear that neither gratuitous commission nor discretionary commission is to be included in the calculation of holiday pay or annual leave pay. But that still leaves the question of contractual commission i.e. commission to which an employee is contractually entitled. Is contractual commission to be included in the calculation of holiday pay and annual leave pay?

Facts

3. Shortly stated, the facts of the case are these. The appellant is a limited company which operates a health and beauty club for women. It used to employ the respondent as a beauty consultant. I will refer to the appellant employer as "Lisbeth Enterprises" and to the respondent employee as "Ms Luk". Ms Luk was contractually entitled to receive - and did receive - salary and commission, both payable at the end of each calendar month.

4. Clause 7A of the contract of employment provided as follows in regard to commission:

> "In addition to her salary aforesaid [Ms Luk] shall be entitled to commission on sales made by her (provided payment is made by the customer) in accordance with the scale below:-
>
> Sales Range (HK$)
>
> | | | | | |
> |---|---|---|---|---|
> | Up to | | 100,000 | ..... | 2.5% |
> | 100,001 | - | 200,000 | ..... | 3.0% |
> | 200,001 | - | 350,000 | ..... | 3.5% |
> | 350,001 | - | 550,000 | ..... | 4.0% |
> | 550,001 | - | 850,000 | ..... | 4.5% |
> | 850,001 | - | upwards | ..... | 5.0% |
>
> The above scale may be changed by [Lisbeth Enterprises] without prior notice. If [Ms Luk' s] employment ceases for any reason whatsoever she will not receive any commission outstanding on any sales made by her prior to her last working day."

So Ms Luk' s commission was contractual commission. What she received by way of such commission naturally varied from month to month. But it always formed the vast bulk of her monthly remuneration. Indeed it was generally well over 10 times more than her salary of $5,600 per month.

5. The holiday pay and annual leave pay which Ms Luk received while in Lisbeth Enterprises' s employ was calculated by reference to salary only. Commission was not included in such calculation.

Course which proceedings took below

6. After leaving its employ, Ms Luk and two of her former colleagues in a similar position sued Lisbeth Enterprises in the Labour Tribunal, claiming additional amounts which they said that they would have received by way of holiday pay and annual leave pay if contractual commission had been included in calculating the same. The Labour Tribunal (Presiding Officer Ada Yim) dismissed the claims. Ms Luk' s former colleagues took the matter no further. But Ms Luk appealed to the High Court (as I will refer to the Court of First Instance of the High Court).

7. Taking the view that contractual commission is to be included in the calculation of holiday pay and annual leave pay, the High Court (Andrew Cheung J) allowed Ms Luk' s appeal and remitted her claim to the Labour Tribunal for retrial before another presiding officer. Lisbeth Enterprises then appealed to the Court of Appeal. Sharing the High Court' s view that contractual commission is to be included in the calculation of holiday pay and annual leave pay, the Court of Appeal (Rogers VP and Le Pichon JA, Stone J dissenting) dismissed Lisbeth Enterprises' s appeal and affirmed the remitter. By leave of the Court of Appeal, Lisbeth Enterprises now appeals to us. It asks us to restore the Labour Tribunal' s order dismissing Ms Luk' s claim. Ms Luk asks us to affirm the remitter.

Danger of abuse

8. It is argued on Ms Luk' s behalf that the exclusion of contractual commission from the calculation of holiday pay and annual leave pay would open the way for abuse by employers. As against that, it is argued on Lisbeth Enterprises' s behalf that inclusion would open the way for abuse by employees. I do not propose to analyse these rival arguments. Suffice it to acknowledge that, unfortunately, almost any legal position stands in some danger of abuse or attempts at abuse. These rival arguments as to such danger neutralise one another.

Ascertaining the intention to be attributed to the Legislature

9. On the question before the Court of whether contractual commission is to be included in the calculation of holiday pay and annual leave pay, the argument of counsel for Ms Luk came to this. Stressing the interests of employees without regard to any view that the Legislature may have taken of any other interests, he sought to meet all arguments for exclusion by asserting that the Legislature intended inclusion. That does not reflect the correct approach for us to adopt. We cannot assume, without examining the relevant legislation, that the Legislature intended inclusion. As Lord Hoffmann said in *Johnson v. Unisys Ltd* [2003] 1 AC 518 at p.539 F-G:

> "Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision."

That decision is to be found by interpreting legislation purposively, in context and as a whole. That is how the intention to be attributed to the Legislature is ascertained. And of course, subject to any issue as to constitutionality, the Judiciary' s role in areas covered by legislation is to decide cases on the current state of such legislation. Whether, and if so how, the legislation is to be amended in future is a matter for the Legislature.

Paid holidays and paid annual leave

10. I turn now to the legislation to be interpreted in the present case. Save where otherwise indicated, all the statutory provisions cited in this judgment are those of the Employment Ordinance, Cap. 57 ("the Ordinance"). Section 40 provides for paid holidays. And s.41B provides for paid annual leave.

Rate of holiday pay and annual leave pay

11. Dealing with the rate of holiday pay, s.41 provides:

> "(1) Holiday pay shall be a sum equivalent to the wages which the employee would have earned on a full working day.
>
> (2)Notwithstanding subsection (1), where an employee is employed on piece rates or where the daily wages of an employee vary from day to day, the holiday pay shall be a sum equivalent to the average daily wage earned by the employee, and for the purposes of this subsection the average daily wage shall be the average of the daily wages earned by the employee on each day on which he worked during every complete wage period, comprising not less than 28 days and not more than 31 days, immediately preceding or expiring on the holiday or first day of the holidays."

The rate of annual leave pay is dealt with in s.41C which provides:

> "(1) Annual leave pay shall, subject to subsection (2), be a sum equivalent to the wages which the employee would have earned if he had worked every day during the period of annual leave.
>
> (2) Where an employee is employed on piece rates or where the wages of an employee vary from day to day, the annual leave pay shall be calculated by reference to the average daily wage earned by the employee, and for the purposes of this subsection the average daily wage shall be the average of the daily wages earned by the employee on each day on which he worked during every complete wage period, comprising not less than 28 days and not more than 31 days, immediately preceding or expiring on the first day of the annual leave or on the day on which the contract of employment terminates, as the case may be."

Thus it is statutorily provided that holiday pay and annual leave pay shall be calculated by reference to wages.

"Wages"

12. As to what "wages" means, the Ordinance' s interpretation clause, namely s.2(1) provides that, unless the context otherwise requires,

> " 'wages' subject to subsections (2) and (3), means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment, but does not include -
>
> (a)the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;
>
> (b) any contribution paid by the employer on his own account to any retirement scheme;
>
> (c) any commission which is of a gratuitous nature or which is payable only at the discretion of the employer;
>
> (ca) any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer;
>
> (cb) any travelling allowance which is of a non-recurrent nature;
>
> (cc) any travelling allowance payable to the employee to defray actual expenses incurred by him by the nature of his employment;
>
> (cd) the value of any travelling concession;
>
> (d)any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;
>
> (da) any end of year payment, or any proportion thereof, which is payable under Part IIA;

(e)any gratuity payable on completion or termination of a contract of employment; or

(f) any annual bonus, or any proportion thereof, which is of a gratuitous nature or which is payable only at the discretion of the employer."

Subsections (2) and (3) referred to above deal with matters immaterial to the question of law before the Court.

"A multi-faceted thing"

13. There are many judicial and academic statements on statutory interpretation. And I will cite a number of them. But lest their nature be misunderstood, I consider it advisable to preface my citation of them with a reference to an extra-judicial warning sounded by Lord Wilberforce against attempting to confine this subject in rules. Statutory interpretation is - as his Lordship so graphically described it at 418 HL Official Report (5th series) col. 73 (9 March 1981) - "a multi-faceted thing".

Interpretation clauses

14. Interpretation clauses have a relatively short but somewhat chequered history. In 1852 they were said by Lord St Leonards LC (in *Dean of Ely v. Bliss* (1852) 2 De GM & G 459 at p.471) to be of "modern origin". Then in 1865 the hope was expressed by Cockburn CJ (in *Wakefield Board of Health v. West Riding & Grimsby Railway Co.*(1865) 6 B & S 794 at p.801) that "the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion". And in 1885 Lord Blackburn spoke (in *Mayor of Portsmouth v. Smith*(1885) 10 App. Cas. 364 at p.374) of what he saw as "the soundness of the objection of the old school of draftsman to the introduction of interpretation clauses". Interpretation clauses have survived such disapproval and ill wishes. But even in recent times it has been said by no less a judge than Lord Reid (in *Brutus v. Cozens*[1973] AC 854 at p.861H) that when statutes provide definitions that "often creates more problems than it solves". It is neatly put in *Sutherland Statutory Construction*5th ed. (1992 Revision), Vol. 2A at p.152, para. 47.07 where it is said that "definitions themselves are often not clear and may be subject to interpretation".

15. Be that as it may, interpretation clauses now form an established and important feature of our statute law. In *Savoy Hotel Co. v. London County*

Council[1900] 1 QB 665 it was held that the Savoy Hotel was a shop. Channell J observed (at p.669) that "the result of an interpretation clause is frequently to bring the most incongruous things within the operation of a statute". Sometimes that is precisely what the Legislature intended - and for discernibly good policy reasons. This is well brought out by the comment on the *Savoy Hotel*case in *Cross: Statutory Interpretation*, 3rded. (1995) at p.120. It is there said that "[i]n spite of its seeming oddity, the effect of the decision was beyond criticism for it brought persons under 18 within the protection against excessive working hours accorded by the Shops Act 1892 under which 'shop' included 'licensed public houses and refreshment houses of any kind'". On the same page the learned editors of *Cross*, one of them formerly First Parliamentary Counsel, observe that interpretation clauses "are responsible for a great deal of economy in drafting". The upshot, in my opinion, is that no useful purpose would be served by viewing interpretation clauses with hostility or suspicion. The proper approach is to read them purposefully and with the context very much in mind.

Context

16. As can be seen from s.2(1), "wages" does not include gratuitous or discretionary commission but, unless the context otherwise requires, includes contractual commission. Does the context of holiday pay and annual leave pay require the exclusion of contractual commission from the meaning of "wages"? In answering this question I begin by noting how definitions are qualified by context. Section 2(1) contains an express statement to the effect that the definitions which it provides must give way to any different meaning that the context may require. It has become common to the point of being routine for definition sections to stipulate qualifications of that nature. But such qualifications are probably no more than what would be implied anyway.

17. "Words", as Lord Nicholls of Birkenhead emphasises in "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577 at p.579, "must always be understood, or 'interpreted', in their context". To the same effect, Lamer J (later Lamer CJC) said in *Hills v. Attorney General of Canada*(1988) 48 DLR (4th) 193 at p.196 that "[w]ithout going so far as to say that a word has no meaning in itself, it is true that its real meaning will depend on the context in which it is used". It is therefore a canon of statutory construction

that definitions are to be read subject to anything "repugnant in the context, or in the sense" (which is how Lord Selborne put it in *Meux v. Jacobs*(1875) LR 7 HL 481 at p.493). This is a salutary approach, especially as the experience of legislative draftsmen appears to be that "having stipulated a meaning for a word it is extraordinarily, almost uncannily, difficult to use it only in that sense". So says a former legislative draftsman in his book *G.C. Thornton: Legislative Drafting* 4thed. (1996) at p.154.

18. Next, I turn to what we described in *Medical Council ofHong Kong v. Chow*(2000) 3 HKCFAR 144 at p.157E as "the law's tendency to construe each and every provision of a statute in such a way as to accord the same a due measure of real meaning and substance". This necessitates looking to see whether the exclusion of all commission from the calculation of holiday pay and annual leave pay would leave the Ordinance bereft of context in which contractual commission would be treated as wages. Having done that, I am satisfied that such exclusion would not have that consequence. For plainly wages would still include contractual commission which has already accrued but has not yet been paid, for example, in relation to: the time for paying wages under s.23; interest on the late payment of wages under s.25A; the manner and place of payment of wages under s.26; and liability for outstanding wages under s.65.

Workability

19. Counsel's researches have not revealed any past claim for holiday pay or annual leave pay based on commission. So Lisbeth Enterprises may well be correct in contending that Ms Luk's claim is unprecedented. That a claim is or may well be novel does not necessarily mean that the claim lacks legal foundation. But the novelty or possible novelty of a claim can be - and in the present case is - a good reason for taking the precaution of examining the practicality of the claim with particular care.

20. Where a statute provides that a word or phrase shall have a particular meaning save where the context otherwise requires, a context in which that meaning would create an unworkable situation can properly be regarded as a context requiring some other meaning. This is, I think, well illustrated by *Floor v. Davis (Inspector of Taxes)*[1980] AC 695. In that case the House of Lords had to decide whether the words "a person having control" in paragraph 15(2) of Schedule 7 to the Finance Act 1965 extended to control by more than one

person. This depended on whether the word "person" in the singular was to be construed as including the plural. In that connection s.1(1)(b) of the Interpretation Act 1889 provided that "unless the contrary intention appears … words in the singular shall include the plural, and words in the plural shall include the singular". And s.45 of the 1965 Act provided that "unless the context otherwise requires" the word "control" was to be construed in accordance with paragraph 3 of Schedule 18 to the Act. At p.709 G-H Viscount Dilhorne said:

> "If … on examination of the application of the Interpretation Act and construing 'control' in accordance with paragraph 3 led to paragraph 15(2) being *unworkable*… then it can be concluded that an intention contrary to the application of the Interpretation Act appears and that 'control' is not to be so construed." (Emphasis supplied.)

21. An employee's commission is, putting it broadly, the employee's specified share of what the employer receives through the employee's efforts while at work. And the employee's fortunes follow that of the employer inasmuch as the employee's commission fluctuates along with what the employer so receives. Including commission in the calculation of holiday pay or annual leave pay would in effect be giving the employee something by way of a share in nothing. For such an exercise to be possible, there would have to be a workable mode of calculation, probably involving an element of deeming. If any such mode of calculation is to be found in the present law, it will have to be found in the sections dealing with the rate of holiday pay and the rate of annual leave pay, namely sections 41 and 41C respectively.

22. The courts below differed in their reasons for deciding in Ms Luk's favour. Andrew Cheung J thought that her claim was covered by sections 41(1) and 41C(1) and was "simply a question of quantification, evidence and proof". Quantification upon proof by evidence is appropriate for litigation or the like, but not for the simple and certain exercise that the regular payment of holiday pay and annual leave pay has to be if chaos is to be avoided. Rogers VP and Le Pichon JA rightly recognised the necessity for a simple and certain mode of calculation. They thought that it could be found in sections 41(2) and 41C(2).

23. Plainly no mode of calculating holiday pay or annual leave pay based on commission is to be found in sections 41(1) or 41C(1). Those subsections are directed to what the employee "would" have earned. But commission

involves what the employee *might*have earned, depending on whether the contractual requirements for entitlement to commission are satisfied. To the extent that provision is made for holiday pay and annual leave pay based on what the employee might have earned, that is done by sections 41(2) and 41C(2) which cater for piece rates and daily wages that vary from day to day. "Piece rates" have nothing to do with commission. What about "daily wages" ? Perhaps the term "daily wages" applies only to wages in the sense of salary. But let us suppose for the sake of the present argument that the term extends to commission.

24. What then would supply the requisite quality of dailiness? Wages may not have to be *paid*on a daily basis before they can be regarded as "daily wages" . But I do not see how wages can be so regarded unless they at least *accrue and are calculated*on a daily basis. Subject therefore to the possibility that sections 41(2) and 41C(2) can be read to cover contractual commission accruing and calculated on a *daily*basis in amounts varying from day to day, those subsections do not cater for commission. It follows that holiday pay and annual leave pay form a context which requires that the word "wages" be read as excluding commission save possibly for commission accruing and calculated on a *daily*basis in amounts varying from day to day.

25. It is unnecessary to express any view in relation to that possible exception. It is irrelevant to the present case since Ms Luk' s commission accrued and was calculated on a *monthly*basis. Her commission was payable according to fluctuating monthly results and on a sliding scale which moved up and down with such results. So her commission simply could not accrue or be calculated until the end of the month arrived and that month' s results were known.

26. Two cases on attendance bonus have been cited on Ms Luk' s behalf. They are *Wong Ping Kong v. Tai Hing Cotton Mill Ltd*[1994] 2 HKLR 107 and *Wong Yin Fong v. ISS Hong Kong Services Ltd*[2005] 2 HKLRD 648. Neither provides a workable mode of calculating the commission which Ms Luk seeks to recover by way of holiday pay and annual leave pay. In the 1994 case the Court of Appeal held that attendance bonus is to be included in the calculation of severance pay. And in the 2005 case Lam J held that attendance bonus is to be included in the calculation of annual leave pay. Severance pay is calculated

(under s.31G) on known figures. As for annual leave pay, the inclusion of attendance bonus in the calculation thereof is covered by s.41C(1). This is because attendance bonus is paid for attending work every day, and the subsection provides that annual leave pay is to be a sum equivalent to the wages which the employee would have earned if he had worked *every day* during the period of annual leave.

Conclusion

27. For the foregoing reasons, I am of the view that, subject to the possibility that sections 41(2) and 41C(2) are to be read to cover contractual commission accruing and calculated on a *daily* basis in amounts varying from day to day, no commission is to be included in the calculation of holiday pay and annual leave pay. That possibility is, as I pointed out earlier, irrelevant to the present case since Ms Luk' commission accrued and was calculated on a *monthly* basis. The High Court set aside the award of $366 fixed costs made by the Labour Tribunal in Lisbeth Enterprises' s favour. Both courts below awarded Ms Luk her costs to be taxed. The parties agreed at the hearing before us that if this appeal were allowed, each party should be left to bear its or her own costs here and below. Accordingly I would allow the appeal, set aside the remitter, restore the Labour Tribunal' s dismissal of Ms Luk' s claim and order that each party bear its or her own costs in the Labour Tribunal, in both courts below and in this Court.

Mr Justice Chan PJ:

28. I agree with the judgment of Mr Justice Bokhary PJ.

Mr Justice Ribeiro PJ:

29. I agree with the judgment of Mr Justice Bokhary PJ.

Sir Ivor Richardson NPJ:

30. I agree with the judgment of Mr Justice Bokhary PJ.

Chief Justice Li:

31. The Court unanimously allows the appeal, sets aside the remitter, restores the Labour Tribunal's dismissal of Ms Luk's claim and orders that each party bears its or her own costs in the Labour Tribunal, in both courts below and in this Court.

(Andrew Li)
Chief Justice

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(R A V Ribeiro)
Permanent Judge

(Sir Ivor Richardson)
Non-Permanent Judge

Mr D Chang SC and Mr Jeremy S K Chan (instructed by Messrs Gallant Y T Ho & Co.) for the appellant

Mr A Hung (instructed by Messrs Philip S W Chan & Co.) for the respondent

修訂《僱傭條例》以充分反映有關計算法定權益的立法原意

立法原意

- 在計算《僱傭條例》下僱員應享有的法定權益時，應以《僱傭條例》界定的「工資」爲準則。在 1997 年 6 月，《僱傭條例》曾作出修訂，明確訂明「工資」指能以金錢形式表示的所有報酬，包括佣金(不論其名稱或計算方式但屬賞贈性質或僅由僱主酌情付給者除外)、勤工花紅、勤工津貼等。

終審法院的裁決

- 終審法院於 2006 年 2 月審理 Lisbeth Enterprises Limited 與 Mandy Luk 一案時，指出在《僱傭條例》中並沒有可行的計算方法，將案中按月計算的佣金計入僱員的假日薪酬及年假薪酬之內。案中的僱員需根據其每月的銷售總額，按一個對照表而獲發佣金。佣金的金額每月不同，金額在月底確定後發放。

修訂《僱傭條例》的建議

- 有鑑於終審法院的裁決，政府認爲有需要修訂有關假日薪酬及年假薪酬的條文，以充分反映立法原意，即在計算假日薪酬及年假薪酬時，佣金(不論其計算方式)應納入爲「工資」的一部分，以確保有清晰的法律可供遵循和執行。

- 由於僱傭條例內代通知金、年終酬金、產假薪酬和疾病津貼的法律條文與有關假日薪酬和年假薪酬的條文相似，政府亦建議對它們的計算方法作出類似的澄清，以剔除任何含糊或不明確的成分。

對僱主的影響

- 修訂建議並沒有爲僱員訂立新的權益，也沒有在計算現有法定權益的方法上作出任何基本的改變。

- 由於建議並沒有爲僱主帶來新的責任，因此不會增加營商成本。

- 建議只爲不折不扣地反映及澄清立法原意。

勞工處
2006 年 5 月

14

Gmail by Google BETA

Benny Kong <bennykongipt@gmail.com>

FW: Definition of Wages - LegCo Brief

1 message

Christina Sun <christinasun@jewelry.org.hk> **Sat, May 6, 2006 at 10:54 AM**
To: bennykongipt@gmail.com

Dear Mr. Benny Kong,

Please find the LegCo Council Brief for your information.

Best regards,

Christina Sun
Secretariat
Hong Kong Jewelry Manufacturers' Association
Direct Line: 21225082
Fax: 23623647
Email: gmoffice@jewelry.org.hk

----Original Message----
From: SLO-LR-1@labour.gov.hk [mailto:SLO-LR-1@labour.gov.hk]
Sent: Thursday, May 04, 2006 7:26 PM
To: zz gmoffice; alexandra.poon@fhki.org.hk
Subject: Definition of Wages - LegCo Brief

Dear Ms Suen and Ms Poon,

As mentioned in our meeting today, I attach the Legislative Council Brief
relating to the amendment of the definition of "wages" under the Employment
Ordinance in 1997 for your members' reference. Paragraphs 18 to 20 are relevant.

(See attached file: LegCo Council Brief(E).pdf) (See attached file: LegCo
Council Brief(C).pdf)

Regards,
Koo Chiu-shing
Labour Department
Tel.: 2852 3517

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2 attachments

LegCo Council Brief(E).pdf
405K

LegCo Council Brief(C).pdf
598K

EMB CR 12/3231/78 VIII

LEGISLATIVE COUNCIL BRIEF

Employment Ordinance
(Chapter 57)

EMPLOYMENT (AMENDMENT) BILL 1996
EMPLOYMENT (AMENDMENT) (NO. 2) BILL 1996

INTRODUCTION

At the meeting of the Executive Council on 14 May 1996, the Council ADVISED and the Governor ORDERED that the Employment (Amendment) Bill 1996 and Employment (Amendment) (No. 2) Bill 1996 at *Annex A* should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

2. The Administration has recently conducted a number of reviews of some major contentious areas of employees' rights and benefits under the labour laws in the light of Hong Kong's socio-economic changes, views expressed by trade unions and employer bodies, as well as international labour standards and practices in other countries. We have now come up with a number of proposals to improve the existing statutory provisions regarding maternity protection, long service payment, wage protection, end-of-year payment and definition of wages. A summary of these proposals is at *Annex B*. The background and proposals relating to each of these areas are set out in the following paragraphs.

MATERNITY PROTECTION

Background

3. Under the existing Employment Ordinance, a female employee who has completed 26 weeks' continuous service before her

expected date of commencement of maternity leave is entitled to four weeks' ante-natal maternity leave, a further period from the expected date of confinement to the actual date of confinement, six weeks' post-natal maternity leave, and a possible extension of a further period of four weeks on medical grounds. All this leave is without pay. If she has completed 40 weeks' continuous service before her expected date of commencement of maternity leave and has no more than two surviving children, she is entitled to a maximum of 10 weeks' maternity leave pay, calculated at the rate of four-fifths of her average wages. If the pregnant employee has been under continuous employment for 12 weeks or more, an employer is not allowed to dismiss her from the date she gives notice of her intention to take maternity leave till the date she is due to return to work from leave.

4. We have conducted a comprehensive review of the above provisions, having regard to the International Labour Convention (ILC) No. 3 concerning the employment of women before and after child birth, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as well as the practices of other countries. The proposals arising from the review are set out in the following paragraphs.

Qualifying service for maternity leave

5. We propose to remove the existing qualifying service of 26 weeks' continuous employment for unpaid maternity leave so that any pregnant employee who is under a continuous contract of employment (defined as four consecutive weeks of service comprising 18 hours of work per week under the Employment Ordinance) will be entitled to 10 weeks' unpaid maternity leave.

Limitation on number of surviving children

6. When maternity leave pay was introduced in 1981, the present qualifying condition of having no more than two surviving children was considered necessary to avoid creating an open-ended commitment for the employer. The trend of a reducing family size since then has rendered the basis of the argument underlying this provision less and less tenable. We therefore propose to remove this restriction so as to bring our system on a par with our neighbouring countries.

Duration of maternity leave

7. Under the present provisions, the 10-week maternity leave of a pregnant employee can be shortened or prolonged, depending on whether the actual date of confinement comes before or after the expected date. This has sometimes caused confusion to the pregnant employees and their employers. To rectify this problem, we propose that the 10-week maternity leave should count from the date of commencement of leave, with the possible extension of a period equivalent to the number of days of delay in confinement and another period of four weeks on medical grounds. In case the actual confinement takes place before the leave commences, the 10-week maternity leave should count from the actual date of confinement.

Maternity leave taking

8. According to medical advice, a period of six weeks is normally required for recovery from confinement (this also conforms with the ILC standard), whereas the full ante-natal leave period of four weeks is not absolutely necessary. To provide pregnant employees with some flexibility in varying the length of ante-natal and post-natal leave periods, we propose that with the employer's agreement, a pregnant employee should be allowed to allocate part of her four-week ante-natal leave, subject to a maximum of two weeks, to be taken after her confinement, so that she can have a longer post-natal leave period for recuperation and for looking after her new-born child.

Qualifying service for employment protection

9. At present, when a female employee has been employed by the same employer for a continuous period of 12 weeks, her employer is prohibited from dismissing her on the ground of pregnancy. This qualifying service for employment protection was last revised from 26 to 12 weeks in 1990 to provide a greater degree of such protection for pregnant employees. To further improve this protection, we propose to remove the qualifying condition altogether, so that any pregnant employee who has a continuous contract of employment under the Employment Ordinance will be entitled to such protection.

Penal damages for wrongful termination

10. The present penalty for wrongful dismissal of a pregnant employee includes 10 weeks' maternity leave pay (if the employee would otherwise be entitled to it) and penal damages equivalent to seven days' wages. The latter, which came into force in 1970, can no longer have a sufficient deterrent effect on employers and can hardly compensate for the psychological and financial sufferings of the aggrieved employees. We therefore propose to increase the amount to the equivalent of one month's wages.

Prohibition of assignment of hazardous work

11. The existing law does not contain any provisions prohibiting the assignment of hazardous work to pregnant employees. To conform with the spirit of CEDAW and to bring our system on a par with our neighbouring countries like Japan and Korea, we consider it necessary to legislate against assignment of hazardous work to pregnant employees. We propose to draw up provisions enabling a pregnant employee, by producing a medical certificate on her unfitness to undertake certain work, to request her employer to refrain from giving her such work or to remove her from such work, and to require her employer to accede to the request in not later than 14 days. The employer may, within 14 days upon receipt of such request, arrange the female employee to attend another medical examination to obtain a second opinion. We also propose that in case of conflicting medical opinions, the Commissioner for Labour will be empowered to give a final ruling. Where the employer fails to accede to the employee's request without reasonable excuse, we propose to make it an offence under the Employment Ordinance subject to a maximum fine of $50,000. Any change in the employee's earnings as a result of her transfer from hazardous work should not affect the basis for the calculation of maternity leave pay and penal damages if she is wrongfully dismissed.

Maternity leave notice

12. Under the existing law, a female employee who intends to take maternity leave is required to give notice to that effect to her employer and such notice must specify the expected dates of her confinement and commencement of the leave. This maternity notice is crucial for the establishment of a female employee's entitlement to maternity benefits and employment protection. Whilst it is reasonable to

require notice of pregnancy to enable the employer to make arrangements for replacement or redeployment of staff, the pregnant employees sometimes have difficulties in providing these dates soon after the pregnancy is confirmed. This has created certain operational problems. We therefore propose to simplify the notice by removing the mandatory requirements to specify both the expected dates of confinement and commencement of leave on it.

LONG SERVICE PAYMENT(LSP) FOR EMPLOYEES UNDER 45 YEARS OF AGE

Background

13. The Long Service Payment (LSP) scheme was introduced under the Employment Ordinance in 1986 to provide financial protection for elderly and long-serving employees who were dismissed through no fault of their own. Although all employees with a minimum of five years' continuous service will be entitled to LSP, the amount payable to employees who have less than 10 years' service will be reduced according to their age in relation to their length of service. The prescribed scheme of percentage reduction in the amount of LSP payable to these employees was drawn up on the ground that younger employees would, upon dismissal, encounter less difficulty in obtaining alternative employment. This has, however, been perceived as a form of discrimination against younger employees.

Proposal

14 We propose to remove this provision by two phases. First, the percentage reduction for those younger employees who have seven years' service or more will be removed with immediate effect. A year later, those with less than seven years service will have the reduction removed. With this progressive improvement, the additional cost implications on employers can be staggered over a period of one year.

WAGE PROTECTION

Background

15. Under the existing Employment Ordinance, wages should be paid not later than seven days after they are due. Any breach of the provisions constitutes an offence and, upon conviction, is subject to a maximum penalty of a fine of $200,000 and imprisonment for one year. Default payment of wages constitutes a cause of complaint in about 25% of all wage claims handled by the Labour Department. Having conducted a review of the legislative provisions relating to protection of wages, we propose a number of new provisions and amendments, which are set out in the following paragraphs.

Payment of interest on outstanding wages

16. The existing law does not contain any provision to compensate employees for their pecuniary loss arising from outstanding wages. To discourage employers from delaying wage payment, we propose to require an employer to pay interest on wages owed to an employee if the wages are not paid within seven days of the due date. The present legislative system already empowers the Labour Tribunal (LT) and the Minor Employment Claims Adjudication Board (MECAB) to order payment of interest on the amount of wages owed by an employer to an employee. For consistency, we propose that the new provision should adopt the rate of interest fixed by the Chief Justice under the District Court Ordinance now being followed by the LT and the MECAB.

Non-payment of wages for over one month to be deemed as termination of employment

17. Under the labour laws of our neighbouring countries like Singapore and Malaysia, an employer who fails to pay wages in accordance with the law shall be deemed to have broken his employment contract with the employee to the effect that the employee will be entitled to all the termination benefits as a result of this deemed situation. In Hong Kong, this protection is only implied in Section 10 of the Employment Ordinance which entitles an employee to terminate the contract without notice or payment in lieu of notice on grounds of

Common Law; but even so, he is not entitled to claim any statutory damages as a result of this termination of employment. The lack of a definite provision in the Employment Ordinance has created uncertainties about the right of an employee who is owed wages to deem the contract as terminated and to claim termination payments such as wages in lieu of notice, severance payment and long service payment. To strengthen protection for the employees affected by outstanding wages, we propose to introduce a provision to entitle an employee who has been owed wages for a period exceeding one month from the due date to deem his employment contract to have been terminated by his employer without notice so that he is entitled to all termination payments arising from this scenario under the Employment Ordinance.

DEFINITION OF 'WAGES'

Background

18. Under the Employment Ordinance, "wages" are defined as "all remuneration, earnings, allowances, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment, but does not include

a) the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;

b) any contribution paid by the employer on his own account to any retirement scheme;

c) any travelling allowance or the value of any travelling concession;

d) any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;

e) any end-of-year payment, or any proportion thereof;

f) any gratuity payable on completion or termination of a contract of employment; and

g) any annual bonus, or any proportion thereof, which is of a gratuitous nature, or which is payable only at the discretion of the employer.

19. Although the existing definition of wages is fairly all-embracing, the issue of whether certain payments (like commission and overtime pay) are wages or not has cropped up in the context of labour disputes from time to time. Some unscrupulous employers are known to have considerably reduced their liabilities for severance payment and long service payment by designating a substantial portion of wages as overtime pay, travelling allowance and attendance bonus. Besides, in recent years, the High Court and the Appeal Court have made rulings that the attendance bonus and travelling allowance which are payable in respect of work done or to be done, and regular and obligatory overtime pay should be included in the meaning of wages.

20. Taking into account the above factors, we have reviewed the definition of 'wages' under the Employment Ordinance. As a result, we propose to amend the definition of wages as follows:

(a) To include commission, attendance bonus, attendance allowance, travelling allowances and overtime pay, subject to some specified exclusions, such as payments or reimbursements which are of a non-contractual and gratuitous nature, or payable at the discretion of the employer; and

(b) To include regular overtime pay in the calculation of wages for the purpose of calculating accrued employment benefits and, in the case of irregular overtime pay, to include the average overtime pay in the last 12 months, if it amounts to 20% or more of the employee's average wages.

These proposed amendments will not create a new liability on employers to pay commission, attendance bonus, attendance allowances, travelling allowance and overtime pay. Rather, they seek to clarify the nature of these payments when they are already provided under the contract of employment to the effect that they should be reckoned as part of an employee's wages when calculating the amounts of statutory entitlements under the Employment Ordinance. Those statutory entitlements which are calculated on the basis of an employee's wages

include wages in lieu of notice to terminate employment, severance payment, long service payment, maternity leave pay and sickness allowance(plus penal damages for wrongful termination), holiday pay, annual leave pay and end-of-year payment.

END-OF-YEAR PAYMENT(EYP)

Background

21. Under the existing Employment Ordinance, end-of-year payment refers to any annual payment of a contractual nature but not any annual payment of a gratuitous nature payable at the discretion of the employer. Where EYP is included in the employment contract, its amount, payment period and payment date are subject to the terms of the contract. Where such details are not specified in the contract, the actual EYP is taken to be a full month's wages payable on the last day of a lunar year. Any employee who has been employed continuously for 26 weeks or more, but less than the whole of the payment period, will be entitled to pro-rata EYP at the end of a payment period and during a payment period upon dismissal on grounds other than for disciplinary reasons or termination of contract of employment by the employer by notice or payment in lieu of notice. Whilst EYP is a widespread practice in many trades, disputes often arise as to whether an annual payment is of a contractual or gratuitous nature and whether the employer has any statutory obligation to pay pro-rata EYP when dismissing an employee.

22. To remove doubts and to further improve protection for employees, we propose to make the following amendments to the EYP provisions:

(a) To provide that any contractual annual payment, however designated or described, shall be governed by the existing provisions on EYP, except when the employer has stipulated in writing that such payment is gratuitous and payable at his discretion; and

(b) To reduce the qualifying service for pro-rata EYP from 26 weeks to 3 months, not including the first 3 months of any probation period, in the payment period.

THE BILLS

The Employment (Amendment) Bill 1996

23. The principal clauses of the Bill are as follows:

(a) Clause 3 seeks to remove the qualifying service for unpaid maternity leave so that any female employee with a continuous contract of employment will be eligible for this benefit; to specify clearly the duration of maternity leave as counting from the commencement of maternity leave, and to simplify the notice for maternity leave taking (paras 5,7,8 & 12 above refer);

(b) Clause 4 provides for more flexibility in maternity leave taking (para 8 above refers);

(c) Clause 6 seeks to improve the payment for maternity leave by removing the limitation on the number of surviving children (para 6 above refers).

(d) Clause 7 improves the provisions relating to protection against dismissal of a female employee on the ground of pregnancy by removing the qualifying service requirement and increasing the sum payable by employers for such termination of employment (paras 9 & 10 refer).

(e) Clauses 8 & 9 prohibit an employer from requiring a pregnant employee to handle heavy, hazardous or harmful work, and stipulates the penalty on employers contravening this provision without any reasonable excuse (para 11 refers).

Employment (Amendment) (No. 2) Bill 1996

24. The principal clauses of the Bill are as follows:

(a) Clauses 3 & 4 revise the definition of "wages" to explicitly include in it travelling allowances, attendance allowances, attendance bonus, commission and overtime pay, subject to some specified exclusions (paras 18-20 refer).

(b) Clause 5 adds in a new provision which entitles an employee to deem a contract of employment as being terminated by the employer without notice, if the wages are not paid within one month from the date on which they become due (para 17 above refers).

(c) Clauses 6 to 8 improve the end-of-year payment(EYP) provisions by presuming that unless expressed in writing to the contrary by the employer, an annual payment or annual bonus should not be gratuitous, nor payable at the discretion of the employer, and by reducing the qualifying service requirement for pro-rata EYP (paras 21-22 above refer).

(d) Clauses 9 & 16 seek to improve protection of wage payments for employees by stipulating that employers have to pay interest for wages due over seven days, and making failure to pay such interest an offence (paras 15-16 above refer).

(e) Clauses 10 to 15, 17 and 18 remove the percentage reduction of long service payments for employees younger than 45 by two stages (paras 13-14 above refer).

LEGISLATIVE TIMETABLE

25. The legislative timetable for the above two bills is as follows:

Publication in the Gazette	17 May 1996
First Reading and commencement of the Second Reading debate	29 May 1996
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

FINANCIAL AND STAFFING IMPLICATIONS

26 There will be minimal financial implications for Government as an employer. At present, the Employment Ordinance does not bind the Crown. In respect of the proposals on long service payment, wage protection, definition of wages and end-or-year payment as described in the above, they are not applicable to the conditions of service of civil servants. As regards the proposals on maternity leave, there may be pressure for Government to adopt the same practice if the Bill is enacted. This would, however, have minimal financial implications on Government as the current maternity leave entitlement for female civil servants with no more than two surviving children is ten weeks although an officer might forfeit some leave if her actual confinement takes place earlier than the expected date.

27. The proposals regarding maternity leave will also have some financial and staffing implications on the subvented sector. It is, however, difficult to give an accurate assessment on the number of staff who will potentially benefit from those proposed improvements and hence the exact consequential implication on Government cannot be quantified at this stage. Nevertheless, the financial implications so arisen will be notional and will be coped with within the existing resources of the subvented organizations.

BILL OF RIGHTS IMPLICATIONS

28. The proposed legislative amendments are not inconsistent with the Hong Kong Bill of Rights Ordinance.

ECONOMIC IMPLICATIONS

29. It is estimated that implementation of the various proposals to improve employees' benefits, taken together, would increase the total wage bill of employers by an average of about 0.1%. However, this estimate has not taken into account the possible loss in output, or the employers' need to pay for the extra work done by their existing staff so as to make up for the reduction in manpower thus arising.

30. While the additional cost burden is apparently small on the average, it is likely to be heavier on firms with low profitability and a

large payroll. Also, if the additional cost burden is shifted forward into the prices of goods and services, there would be negative effect on the external competitiveness of Hong Kong's products.

31. Implementation of proposals of this nature could induce employers to accelerate the process of substituting capital equipment for manpower so as to cut staff costs, and this could in turn have a negative effect on employment opportunities. On the other hand, proposals to increase employees' benefits are seen to be conducive to harmonious labour relations.

PUBLIC CONSULTATION

32. The above proposals were discussed and endorsed by the Labour Advisory Board at their meetings on 29 June 1995, 29 January 1996 and 11 March 1996.

PUBLICITY

33. Officials of the Education and Manpower Branch and the Labour Department will meet the media after the gazettal of the Bills on 17 May 1996.

34. Upon the passage of the proposed Bill, the Labour Department will organise briefings for employers and employees on the proposals and distribute information leaflets to the public.

ENQUIRIES

35. Any enquiries relating to the legislative proposals in this paper can be directed to Mr James C K YEUNG of the Labour Department on 2852-4096.

Education and Manpower Branch
17 May 1996

A BILL

To

Amend the Employment Ordinance.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

1. Short title

This Ordinance may be cited as the Employment (Amendment) Ordinance 1996.

2. Section added

The Employment Ordinance (Cap. 57) is amended in Part III by adding before section 12 -

"12A. Interpretation

In this Part, unless the context otherwise requires -

"pregnant employee" (懷孕僱員) means a female employee whose pregnancy has been confirmed by a medical certificate.".

3. Maternity leave

(1) Section 12(1), (2), (3) and (4) is repealed and the following substituted -

"(1) A female employee employed under a continuous contract immediately before taking any leave under this Part shall be entitled to maternity leave under this Part.

(2) Maternity leave shall be the aggregate of -

(a) a continuous period of 10 weeks from and inclusive of –

(i) the date of commencement of maternity leave as determined under section 12AA; or

(ii) the actual date of confinement, if confinement occurs before the date of commencement mentioned in subparagraph (i);

(b) a further period equal to the number of days, if any, beginning on the day after the expected date of confinement up to and including the actual date of confinement; such further period of leave is to be taken immediately following the period of leave under paragraph (a); and

(c) a further period, not exceeding 4 weeks, on grounds of illness or disability arising out of the pregnancy or confinement.

(3) The period of maternity leave under subsection (2)(c) may be taken –

(a) wholly or in part immediately before the period mentioned in subsection (2)(a);

(b) wholly or in part immediately after the period mentioned in subsection (2)(a) or (b), as the case may be.

(4) Before taking leave, a female employee who intends to take any period of maternity leave under subsection (2) shall give notice of her pregnancy and of her intention to take maternity leave to her employer after her pregnancy has been confirmed by a medical certificate; the presentation of a

30

medical certificate to the employer by the female employee confirming her pregnancy shall be a notice for the purpose of this subsection.".

(2) Section 12(5), (6) and (7) is repealed and the following substituted -

"(5) If her confinement takes place -

(a) before notice under subsection (4) is given; or

(b) after notice under subsection (4) is given but before the commencement of the period of maternity leave under subsection (2)(a)(i),

the female employee shall, within 7 days of her confinement, give notice to her employer of the date of confinement and of her intention to take any period of maternity leave under subsection (2)(a).

(6) A female employee who gives notice under subsection (4) shall, if so required by her employer, produce a medical certificate specifying the expected date of confinement.

(7) A female employee who gives notice under subsection (5) shall, if so required by her employer, produce a medical certificate specifying the date of confinement.

(7A) A female employee who may take any period of maternity leave under subsection (2)(b) shall, if so required by her employer, produce a medical certificate specifying the date of confinement.".

(3) Section 12(8) is amended by repealing "(2)(d)" and substituting "(2)(c)".

(4) Section 12(9) is repealed.

4. Section added

The following is added after section 12 -

"12AA. Commencement of maternity leave

(1) With the agreement of her employer, a pregnant employee may decide on the date of commencement of her 10 weeks maternity leave, provided that such date is within a period of not less than 2 weeks before, and not more than 4 weeks before, the expected date of confinement.

(2) If the employee does not exercise her option to decide on the date of commencement in subsection (1), or if she fails to secure her employer's agreement to her proposed leave schedule, the date of commencement of maternity leave shall be 4 weeks immediately before the expected date of confinement.".

5. Authority to issue medical certificates

(1) Section 13(1) is amended by repealing "(6) or (7)" and substituting "(4), (6), (7) or (7A) or 12AA".

(2) Section 13(2) is amended by adding "or 15AA" after "12(8)".

6. Payment for maternity leave

(1) Section 14(2) is amended -

(a) by repealing "Subject to subsection (6), an" and substituting "An";

(b) by repealing "and (c)";

(c) in paragraph (a), by repealing "expected date of her commencement of maternity leave" and substituting "date of her commencement of maternity leave as determined under section 12AA";

(d) by repealing paragraph (d).

(2) Section 14(5) is amended by repealing "and (c)".

(3) Section 14(6) is repealed.

7. Prohibition against termination of employment

(1) Section 15(1) is repealed and the following substituted -

"(1) After a pregnant employee has served notice of pregnancy on her employer, the employer may not terminate her continuous contract of employment under section 6 or 7 during the period from the date on which her pregnancy is confirmed by a medical certificate to the date on which she is due to return to work on the expiry of her maternity leave or the date of cessation of pregnancy (otherwise than by reason of confinement), or when she serves such notice immediately after being informed of termination of contract of employment under section 6 or 7 by her employer, the employer shall withdraw the termination or notice of termination in which event the termination or notice of termination shall be treated as if it had not taken place.".

(2) Section 15(1A) is repealed.

(3) Section 15(2)(a) is amended by adding ", provided that she has not received any such payment under that section" at the end.

(4) Section 15(2)(b) and (3). is amended by repealing "7 days" and substituting "1 month".

8. Section added

The following is added after section 15 -

"15AA. Prohibition of assignment of heavy, hazardous or harmful work

(1) An employer may not require a pregnant employee to handle heavy materials, work in places where gas injurious to pregnancy is generated, or do other work injurious to pregnancy.

(2) A pregnant employee may, on producing a medical certificate with an opinion as to her unfitness to undertake certain specified work, request her employer to refrain from giving her such work during her pregnancy period.

(3) On receipt of a request under subsection (2), the employer may not allocate to the employee the work specified in the medical certificate and, if the employee is already performing such work, the employer shall remove her from such work as soon as practicable but in any case not later than 14 days after the date of the receipt of the request under subsection (2) notwithstanding that -

(a) the result of the medical examination referred to in subsection (4); or

(b) the determination of the Commissioner in subsection (7),

may be pending.

(4) The employer may, at his own expense, arrange for the employee to attend another medical examination by a registered medical practitioner to obtain a second opinion as to her fitness to undertake the work at issue.

(5) The employer shall give the employee at least 48 hours' notice of the examination under subsection (4) which is to be carried out within a period of 14 days after the date of the receipt of the employee's request made under subsection (2).

(6) If the second medical opinion provides that the employee is fit to do the specified work referred to in subsection (2) or if the employee refuses to attend the medical examination as arranged by the employer under subsection (4),

the employer may refer the employee's request made under subsection (2) to the Commissioner; the Commissioner may take appropriate action, including seeking further medical advice, to assist him in bringing about a determination.

(7) When the Commissioner receives the employer's reference under subsection (6), he may make a determination to -

(a) uphold the employee's request;

(b) rule that the employee's request is not supported;

(c) make such other rulings as he considers reasonable.

(8) The employer and the employee concerned in the reference shall comply with any determination made by the Commissioner.

(9) Any change in the earnings of the employee as a result of her transfer from heavy, hazardous or harmful work in accordance with this section, shall not affect the basis for calculating payment for termination of employment under section 15(2) or payment for maternity leave under this Part, and any such payment shall be calculated on the basis of the wages earned by the employee immediately before the transfer from heavy, hazardous or harmful work in accordance with this section; section 14(3) shall be construed accordingly.".

9. Offences

Section 15A(2) is repealed and the following substituted -

"(2) Any employer who, without any reasonable excuse, fails to comply with -

(a) the requirements under section 15AA(3); or

(b) the determination made by the Commissioner under section 15AA(7),

shall be guilty of an offence and shall be liable on conviction to a fine at level 5.".

10. Transitional provision

(1) This Ordinance applies to pregnant employees whose maternity leave is, in accordance with the provisions of the Employment Ordinance (Cap. 57) in force immediately before the commencement of this Ordinance, to commence on or after the date of commencement of this Ordinance.

(2) The provisions of the Employment Ordinance (Cap. 57), which are in force immediately before the commencement of this Ordinance, shall continue to apply to the employees who have commenced their maternity leave prior to the commencement of this Ordinance.

(3) This Ordinance applies to the employees who have been given notice of termination in accordance with the provisions of the Employment Ordinance (Cap. 57) in force immediately before the commencement of this Ordinance, and the period of notice has not expired before the commencement of this Ordinance.

Explanatory Memorandum

The purpose of this Bill is to implement the recommendations based on a comprehensive review conducted by the Labour Department as regards maternity protection. The Labour Advisory Board has been consulted on the recommendations.

2. Clause 2 provides for the definition of "pregnant employee".

3. Clause 3 removes the qualifying service for unpaid maternity leave, i.e. 26 weeks of continuous employment. It also provides for the duration of maternity leave.

4. Clause 4 provides for more flexibility for the employee to commence her maternity leave.

5. Clause 5 provides for the authority to issue medical certificates.

6. Clause 6 provides for the payment for maternity leave. It also removes the limitation on the number of surviving children for entitlement to maternity leave pay.

7. Clause 7 prohibits termination of employment of a pregnant employee during her pregnancy. It also increases the sum payable under section 15(2)(b) of the Employment Ordinance (Cap. 57) for such termination from wages for 7 days to wages for 1 month.

8. Clause 8 prohibits an employer from requiring a pregnant employee to handle heavy, hazardous or harmful work.

9. Clause 9 provides that an employer shall be liable to criminal prosecution if he fails to comply with the prohibition mentioned in clause 8 without any reasonable excuse.

10. Clause 10 provides for transitional matters.

A BILL

To

Amend the Employment Ordinance.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

1. Short title

This Ordinance may be cited as the Employment (Amendment)(No. 2) Ordinance 1996.

2. Commencement

(1) Subject to subsection (2), this Ordinance shall come into operation on the day on which it is published in the Gazette.

(2) Sections 10, 11, 13, 14, 15 and 18 shall come into operation on the first anniversary of the day on which this Ordinance is published in the Gazette.

3. Interpretation

Section 2 of the Employment Ordinance (Cap. 57) is amended -

(a) in subsection (1), in the definition of "wages" -

(i) by adding "including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay" after "allowances";

(ii) by repealing paragraph (c) and substituting -

"(c) any commission which is of a gratuitous nature or which is payable only at the discretion of the employer;

(ca) any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer;

(cb) any travelling allowance which is of a non-recurrent nature;

(cc) any travelling allowance payable to the employee to defray actual expenses incurred by him by the nature of his employment;

(cd) the value of any travelling concession;";

(b) by repealing subsection (2)(f) and substituting -

"(f) any annual leave pay under Part VIIIA,

unless the overtime pay is of a constant character or the monthly average of the overtime pay over a period of 12 months (or if not applicable, such shorter period of employment) immediately preceding the respective dates specified in subsections (2A) and (2B) is equivalent to or exceeds 20% of his average monthly wages during the same period.";

(c) by adding -

"(2A) In the calculation of the monthly average of the overtime pay under subsection (2), the date specified for the purpose of that subsection is -

(a) in relation to any end of year payment under Part IIA, the expiry date of the payment period;

(b) in relation to any maternity leave pay under Part III, the commencement date of maternity leave;

(c) in relation to any severance payment under Part VA and any long service payment under Part VB -

(i) subject to subparagraph (ii), the relevant date;

(ii) where the employee's contract of employment is terminated by payment in lieu of notice in accordance with section 7, the date on which the termination takes effect;

(d) in relation to any sickness allowance under Part VII, the first sickness day;

(e) in relation to any holiday pay under Part VIII, the first day of the holiday; and

(f) in relation to any annual leave pay under Part VIIIA, the first day of the annual leave.

(2B) Notwithstanding anything contained in subsection (2A), the date specified for the purpose of subsection (2) in relation to any termination of employment is -

(a) subject to paragraph (b), the relevant date;

(b) where the employee's contract of employment is terminated by payment in lieu of notice in accordance with section 7, the date on which the termination takes effect.".

4. Termination of contract by payment in lieu of notice

Section 7(4) is repealed and the following substituted -

"(4) For the purposes of this section, and notwithstanding any other provision of this Ordinance, the term "wages" (工資) -

(a) includes overtime pay of a constant character or the monthly average of which over a period of 12 months (or if not applicable, such shorter period of employment) immediately preceding the date on which the termination takes effect is equivalent to or exceeds 20% of his monthly

average wages during the same period;

(b) except as provided in paragraph (a), shall be deemed not to include overtime pay.".

5. Section added.

The following is added -

"10A. Deemed termination of contract under section 7

(1) An employee may terminate his contract of employment without notice or payment in lieu of notice if any wages are not paid within one month from the day on which they become due to him under section 23.

(2) Where a contract of employment is terminated under subsection (1), the contract shall be deemed to be terminated by the employer in accordance with section 7 and the employer shall be deemed to have agreed to pay to the employee the sum specified in section 7.".

6. Interpretation

Section 11A is amended in the definition of "end of year payment" by adding "any annual payment or" after "does not include".

7. Section added

The following is added -

"11AA. Presumption

(1) It shall be presumed that an annual payment or annual bonus is not of a gratuitous nature and is not payable only at the discretion of the employer unless there is a written term or condition in the contract of employment to the contrary.

(2) For the avoidance of doubt, it is hereby declared that subsection (1) shall not apply to any contract of employment made before the commencement of this section.".

8. Proportion of the end of year payment

Section 11F is amended -

(a) in subsection (1) -

(i) by repealing "Where" and substituting "Subject to subsection (1A), where";

(ii) by repealing "26 weeks" and substituting "3 months";

(b) by adding -

"(1A) If it is a term or condition of a contract of employment that the employee is on probation, the period of such probation or a period of 3 months, whichever is the shorter, shall be excluded from the calculation of the 3 months' period under subsection (1).".

9. Section added

The following is added -

"25A. Interest on late payment of wages

(1) Subject to subsection (3), if any wages or any sum referred to in section 25(2)(a) are not paid within 7 days from the day on which they become due under sections 23, 24 and 25, the employer shall pay interest at the rate specified in subsection (2) on the outstanding amount of wages or sum from the date on which such wages or sum become due up to the date of actual payment.

(2) The rate of interest specified for the purpose of subsection (1) shall be the rate fixed by the Chief Justice by notice in the Gazette under section 50 of the District Court Ordinance (Cap. 336).

(3) No interest shall be payable in respect of any period before the commencement of this section.".

10. General provisions as to employee's right to long service payment

Section 31R is amended –

(a) in subsection (1)(a), by repealing "the number of years of service at the relevant date, specified in column 2 of the table in the Fifth Schedule opposite his age at the date specified in column 1 of that table" and substituting "5 years of service at the relevant date";

(b) by repealing subsection (2).

11. Death of employee

Section 31RA is amended –

(a) in subsection (1), by repealing "the number of years of service on the date of his death, specified in column 2 of the table in the Fifth Schedule, opposite his age at the date specified in column 1 of that table" and substituting "5 years of service on the date of his death";

(b) by repealing subsection (1A).

12. Amount of long service payment

Section 31V(2)(a), (b) and (c) is repealed.

13. Amount of long service payment

Section 31V(2)(d) and (e) is repealed.

14. Re-employment after retirement at a specified age

Section 31ZF(1)(b) is amended by repealing "the number of years of service, ending at the relevant date, specified in column 2 of the table in the Fifth Schedule opposite his age at the relevant date specified in column 1 of that table" and substituting "5 years of service ending at the relevant date".

15. Section added

The following is added -

"31ZG. Transitional

The amendment made by section 14 of the Employment (Amendment)(No. 2) Ordinance 1996 (of 1996) to section 31ZF shall not affect employees who retired before the commencement of that amendment; and the provisions of section 31ZF as they read immediately before such commencement shall continue to apply as regards such employees as if it had not been so amended.".

16. Section added

The following is added -

"63CA. Offences relating to interest on late payment of wages

Any employer who wilfully and without reasonable excuse contravenes section 25A commits an offence and is liable to a fine at level 3.".

17. Table

The Fifth Schedule is amended -

(a) by repealing -

"Less than 41	10
41	9
42	8";

(b) by adding "Not more than" before "43".

18. Table

The Fifth Schedule is repealed.

Explanatory Memorandum

The purposes of this Bill are to amend the definition of wages, to deem a contract of employment as being terminated by the employer if he failed to pay wages to the employee for more than one month, to provide for a presumption that an annual payment or annual bonus is not of a gratuitous nature and is not payable only at the discretion of the employer, to reduce the qualifying service for pro rata end of year payment from 26 weeks to 3 months, to provide payment of interest on outstanding wages, and to remove the percentage reduction in long service payments by two stages.

2. Clause 3 amends the definition of wages to include travelling allowances, attendance allowances, attendance bonus, commission and overtime pay. It also amends section 2(2) to include overtime pay which is of a constant character or equivalent to or more than 20% of average monthly wages, in the calculation of wages for the purpose of employment entitlements.

3. Clause 4 amends section 7 to provide that the overtime pay as described in paragraph 2 will be included in the calculation of wages in lieu of notice.

4. Clause 5 adds a new provision for the employee to deem a contract of employment as being terminated by the employer under section 7 if the wages are not paid within one month from the date

on which they become due and the employer shall be deemed to have agreed to pay to the employee the sum specified under section 7.

5. Clause 7 presumes that an annual payment or annual bonus is not of a gratuitous nature and is not payable only at the discretion of the employer unless a written term or condition expresses intention to the contrary.

6. Clause 8 reduces the qualifying service for pro rata end of year payment from 26 weeks to 3 months. Any probation period, subject to a maximum of 3 months, will be excluded from the calculation of qualifying service.

7. Clause 9 provides that employers have to pay interest for wages due over 7 days.

8. Clauses 10 to 14, 17 and 18 remove the percentage reduction in long service payments by two stages.

9. Clause 15 stipulates that the amendment made to section 31ZF shall not affect employees who retired before the commencement of that amendment.

10. Clause 16 stipulates that failure to pay interest on outstanding wages is an offence.

A Summary of the Proposed Amendments under the Employment (Amendment) Bill 1996 and the Employment (Amendment) (No. 2) Bill 1996

Employment (Amendment) Bill 1996	
Existing Law	*Proposed Amendments*
Maternity Protection	
• *Qualifying service for unpaid maternity leave* : 26 weeks of continuous employment before the expected date of commencement of maternity leave.	• To remove the 26-week qualifying service such that a pregnant employee working under a continuous contract of employment will be entitled to unpaid maternity leave. A 'continuous contract of employment' means an employee having worked continuously for the same employer for 4 weeks or more and for at least 18 hours in each of the weeks.
• *Limitation on number of surviving children for maternity leave pay* : Not more than 2 surviving children for a pregnant employee.	• To remove the limitation on number of surviving children.
• *Duration of maternity leave* : 4 weeks' before the expected date of confinement and 6 weeks' after the actual date of confinement. The 10-week maternity leave will be shortened when the actual date of confinement comes before the expected date.	• To count the 10-week maternity leave from the date of commencement of leave. In case of delay in confinement, the leave will be extended for a period equivalent to the delay. Maternity leave pay will, however, still be limited to 10 weeks.

Employment (Amendment) Bill 1996 (cont'd)	
Existing Law	*Proposed Amendments*
Maternity Protection	
• *Flexibility in maternity leave taking* : Maternity leave has to begin 4 weeks before the expected date of confinement.	• To allow for more flexibility for a pregnant employee to commence maternity leave. With the employer's consent, the employee can allocate up to 2 weeks of her 4-week ante-natal leave to be taken after her confinement.
• *Qualifying service for employment protection* : An employer is prohibited from dismissing a pregnant employee after she has worked for 12 weeks and has given the maternity leave notice.	• To remove the 12-week qualifying service. A pregnant employee working under a continuous contract of employment will be entitled to employment protection.
• *Penal damages for wrongful termination* : 7 days' wages.	• To increase to 1 month's wages.
• *Maternity leave notice* : Maternity leave notice has to specify the expected date of confinement and the date of commencement of maternity leave.	• To simplify the maternity leave notice by removing the mandatory requirements to specify the expected date of confinement and the date of commencement of maternity leave.
• *Prohibition of hazardous work* : No such provisions.	• To prohibit an employer from requiring a pregnant employee to handle heavy, hazardous or harmful work.

Employment (Amendment) (No. 2) Bill 1996	
Existing Law	*Proposed Amendments*
Long Service Payment	
• *Percentage reduction* : For employees under 45 years of age and with less than 10 years' service, the amount of Long Service Payment is subject to specified percentage reduction.	• To remove the percentage reduction in Long Service Payment by 2 stages : first, employees with 7 years' service or more; a year later, employees with less than 7 years' service.
Definition of 'Wages'	
• 'Wages' mean all remuneration, earnings, allowances, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment. • Overtime pay is not included in the calculation of wages for the purpose of wages in lieu of notice, end of year payment, maternity leave pay, severance payment, long service payment, sickness allowance, holiday pay and annual leave pay.	• To also include in the definition of 'wages' *travelling allowances, attendance allowances, attendance bonus, commission and overtime pay*, subject to some specified exclusions, such as payments or reimbursements of a non-contractual and gratuitous nature, or payable at the discretion of employer. • To include overtime pay which is of a constant character or equivalent to or more than 20% of average monthly wages in the calculation of wages for the purpose of these employment entitlements.

Employment (Amendment) (No. 2) Bill 1996 (cont'd)	
Existing Law	*Proposed Amendments*
Wage Protection	
• Wages should be paid not later than 7 days after they are due.	• *Payment of interest on outstanding wages* : To require an employer to pay interest on wages which remain outstanding 7 days after they become due. • *Non-payment of wages for over 1 month to be deemed as termination of employment* : To entitle an employee to deem his contract of employment as being terminated by the employer without notice if wages are not paid after 1 month from the due date.
End of Year Payment	
• End of year payment refers to any annual payment of a contractual nature, and does not include any annual payment or bonus which is of a gratuitous nature or which is payable at the discretion of the employer. • The qualifying service for pro rata end of year payment is 26 weeks.	• An annual payment or annual bonus is not of a gratuitous nature and is not payable only at the discretion of the employer unless a written term or condition expresses intention to the contrary. • To reduce the qualifying service for pro rata end of year payment to 3 months. Any probation period, subject to a maximum of 3 months, is excluded from the calculation of qualifying service.

BENNY KONG & PETER TANG
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OUR REF: 9218-MS-01-0106 DATE: 15th May 2006

YOUR REF:

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Dear Sis,

Re: **Drafting A Succinct Opinion Letter**

We act for Mr Edward Chan K.M. and refer to the consultation conference with Counsel on the 9th May 2006.

At the said conference, Counsel advised and the client agreed to prepare a succinct opinion letter ("the said Letter") for the purpose of expressing and/or advising that it is inappropriate and/or wrong ("the said Purpose") for the Labour Department to:-

(1) Interpret the provisions, in particular the definition of the term "commission" of the Employment Ordinance, Cap. 57 by using 「立法原意」("**Allegation 1**"); and

(2) Suggest that amending the provisions, including the said term "commission" of the said Ordinance is an act of 「不折不扣地反映及澄清立法原意」 ("**Allegation 2**").

Instructions

Counsel is instructed to draft the said Letter for the said Purpose and the purpose of procuring to stop the Labour Department and others from provoking for a change of the current and existing employment laws relating to "Commission".

.../2

15th May 2006
Mr. Denis Chang, S.C.
And Jeremy Chan, Esq.

Prior to today's date, the Labour Department has repeatedly expressed the Allegation 1 and Allegation 2 both orally and in writing.

Enclosed please find a copy of document titled 「修訂《僱傭條例》以充分反映有關計算法定權益的立法原意」circulated by the Labour Department in early May 2006.

Please note that the said Letter, after drafted will be signed by different associations and sent to the Labour Department on or before 23rd May 2006.

Yours faithfully,

Encl
BK/kp
c.c. client

Re: Commission & Holiday Pay, Annual Leave Pay, *etc* ...

Statement of Labour Department (May 2006)

on

Proposal to Amend Employment Ordinance

– COUNSEL'S OPINION –

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1. Introduction

1.1. We are instructed that the Labour Department has, apart from making other public pronouncements through its officials, issued a Statement dated May 2006 (annexed hereto) proposing that the Employment Ordinance should be amended in reaction to the decision of the Court of Final Appeal ("the CFA") in *Lisbeth Enterprises Ltd. v. Mandy Luk* (FACV No. 17 of 2005, 28 Feb 2006).

1.2. The Labour Department is apparently actively promoting amending legislation to *include* commission in the calculations of holiday pay, annual leave pay, *etc*... It is apparently representing to the public that its proposal (i) does nothing more than to reflect fully "the original

intent" of the Employment Ordinance ("the Ordinance"), (ii) gives no "new" legal entitlement to the employee or affect any fundamental change, and (iii) imposes no new burden on the employer and therefore will not increase the costs of business. It asserts that the proposal does nothing more and nothing less than simply reflects and clarifies "the original legislative intent".

1.3. We were Counsel acting for the appellant Lisbeth Enterprises Ltd. in the said appeal to the CFA and have been asked to advise on a couple of legal issues arising from the Labour Department's Statement.

2. **1st Question: What legal basis, if any, does the Labour Department have in purporting to interpret the "original legislative intent" in manner which it has done or at all ?**

2.1. In our view, the Labour Department has not stated or demonstrated the legal basis for contending that the CFA's decision is in any way different from the true legislative intent. We are unable to see any basis for such a contention. Our answer to the first question, accordingly, is that so far as we can see, "none".

2.2. The CFA carefully considered the relevant provisions of the Ordinance, adopted a "purposive construction" to discover their true

legislative intent, meaning and effect, and unanimously concluded that the basic monthly salary which the employee *"would have"* earned should be included in the calculation of holiday pay and annual leave pay, but not commission which the employee *"might"* have but did not in fact earn.

2.3. In truth, the practice of not including such commission was long established, and was not confined to this particular employer, but was an industry-wide practice. If, as contended by the Labour Department, the "original legislative intent" was that such commission should be included – why was the practice so widely accepted for so many years without any protest or challenge until now, and why has the Department not hitherto pointed out that the practice was contrary to law or suggested that the law be changed or clarified ?

2.4. Far from introducing any new requirement, what the CFA did was to allow the appeal and *restore* the Labour Tribunal's ruling that such commission should not be included in the calculations. In other words, it was not the CFA which dropped the bombshell and stirred up controversy, but the intermediate courts' judgments (which the CFA reversed). The decision of the CFA is final. Quite unlike the position under Chinese Mainland law, the Courts in Hong Kong are

the only organs which can issue authoritative and binding interpretations of the law, and not executive authorities.

3. **2nd Question: Is there any basis for the Labour Department to say that its proposal to amend the law will add nothing or take away nothing in terms of the obligations of the employer or the rights of the employee that already exist under the Employment Ordinance ? (see the Labour Tribunal's Statement annexed hereto).**

3.1. In our view, it is highly misleading to suggest that all that the proposal will be doing is to clarify the existing law and will not add to the burden of the employer or give the employee any additional rights. Our answer to the 2nd question accordingly is also in the negative.

3.2. The law as interpreted by the CFA is the existing law, and under that law, employers know that they do not need to pay commission twice over in circumstances similar to the case decided by the CFA. It is difficult to see how it can ever be suggested that if the law is amended to require the employer to pay the commission twice over, or even a part of it, as part of holiday pay or annual leave pay, that that is not adding or subtracting anything to the existing law.

3.3. In fact any change in the law regarding the inclusion of commission in holiday pay or annual leave pay may also have significant effect on the rights and obligations of the employer and employee under other provisions of the Ordinance; for example, concerning sickness allowance, maternity leave pay, payment in lieu of notice upon termination, *etc* ...

Denis Chang S.C.

Jeremy S.K. Chan

Dated this 18th day of May 2006.

Re: Commission & Holiday Pay,

Annual Leave Pay, *etc* ...

Statement of Labour Department (May 2006)

on

Proposal to Amend Employment Ordinance

– COUNSEL'S OPINION –

Dated this 18th day of May 2006.

Messrs. Benny Kong & Peter Tang

Solicitors

21/F Tesbury Centre

No. 28 Queen's Road East

Hong Kong

Tel: 2519 3567

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Ref: 9218-MS-01-0106

關於: 佣金及假期薪酬、有薪假期等

勞工處之聲明 (二零零六年五月)

有關

修訂僱傭條例的建議

-大律師之意見-

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1. 簡介

1.1. 我們獲得通知，勞工處在沒有透過其正式渠道發表其他公告下，在二零零六年五月發表了一項聲明(附錄)，建議僱傭條例應隨終審法院在*Lisbeth Enterprises Ltd. v. Mandy Luk* (FACV No. 17 of 2005, 二零零六年二月二十八日) 一案中的判決作出修訂

1.2. 勞工處顯然積極地促進修訂法例的通過，*包括*佣金計算於假期薪酬、有薪假期薪酬等。這樣很明顯地向公眾表示其提案(i) 未能充分反映僱傭條例的立法原意("該條例")； (ii) 未有給予"新"的法律權利予僱員或影響任何根本法則的改變；及 (iii) 加重僱主新的負擔及因此沒有增加經營的成本。這顯然有關建議未有反映

及使"起首的立法原意"更爲清晰。

1.3. 我司是爲上述終院上訴人Lisbeth Enterprises Ltd. 的代表大律師及曾被要求就勞工處的聲明的多項法律問題作出建議。

2. **第一條問題: 基於什麼法律根本，如有，勞工處是否有以任何方式意圖去解釋"立法原意"?**

2.1. 在我們的立場，勞工處並沒有說明或証明爭辯終審法院判決在任何一方面與直正法律根本有差異。我們未能看到任何爭辯的根據。因此，我們就第一個問題的答案是，我們所看到的是，"一點也沒有"。

2.2. 終審法院小心地考慮到有關條例的規定，採取"有目的地建設"去尋找真正的法律意義，解釋及影響， 及無異議地包括基本月薪，僱員"應該"賺取的計算於假期薪酬及有薪假 薪酬之內，但不包括僱員"可能"獲得但實際上未能賺取的。

2.3. 事實上，不包括佣金的制度實施多年，但這並不只限制特別的僱主，而是整個行業的實施。正如勞工處的爭辯，"原本法律的原意"是包括佣金---爲什麼此項措施被廣泛認可多年而之前未有反對或質疑? 及爲什麼處方並迄今未有指出此項措施是抵觸法律

或是建議該法律已被更改或是已被澄清?

2.4. 撇開推行任何新的要求，終審法院是容許上訴及恢復勞工法庭有關佣金不計算在內的判決。換句話說，終審法院並非丟下炸彈及引起爭議，而是調解法庭的判決(終審法院所撤銷的)。終審法院的判決是最終決議。與中國內地法律不同，香港法院是唯一可以發表權威性及約束法律解釋的機構，而不是行政上的判例。

3. **第二條問題: 勞工處是否有理據說明其修訂法例的建議並不會增加或減少僱主的責任或是僱員在僱員條例下已獲得的權益? (請參閱附件勞工法庭的聲明)**

3.1. 依我們所見，有關建議是去澄清現有法律及並不會增加僱主的負擔或是給予僱員任何額外的權益。我們對第二個問題的答案同樣是否定。

3.2. 終審法院解釋的爲現行法律，根據法例，僱主知道他們在類似終審法院判決案件的情況下無需雙倍支付佣金。如果修訂法例需要僱主支付雙倍佣金或是其中一部分，作爲假期薪酬或是有薪假期薪酬的一部分，而沒有增加或是減去現有的法例，很難去理解之前爲什麼會被建議。

3.3. 事實上，任何關於佣金計算入假期薪酬或是有薪假期法例的改變，在條例其他的規定下，對僱主與僱員的權利和責任同樣有顯著的影響。例如，有關疾病津貼、產假薪酬、終止僱用代通知金等。

Labour Department (Labour Relations Division) 勞工處（勞資關係科）

Your reference 來函檔號：
Our reference 本處檔案檔號： LR LRD/12-1/2-46 III
Tel. number 電話號碼： 2852 3517
Fax number 傳真號碼： 2545 2959

傳真：2362 3647

九龍紅磡民裕街 51 號
凱旋工商中心第 2 期 2 樓 G 室
香港各界商會聯席會議

敬啓者：

謝謝你們 5 月 24 日的來信。現隨信附上以下文件，以供參考：

(1) 1996 年 5 月 17 日的立法局參考資料摘要第 18 至 20 段有關佣金的部份
(註：由於摘要全文已於今年 5 月 4 日經電郵傳送給貴 會議秘書處，現只附上該文件的相關段落以供參閱)；
(2) 1996 年 5 月 17 日副教育統籌司在記者招待會就條例草案的發言講稿；及
(3) 1996 年 5 月 29 日教育統籌司在立法局動議二讀條例草案的會議紀錄。

如有任何疑問，請致電 2852 3509 與本處鄧苑珊女士聯絡。

經濟發展及勞工局常任秘書長（勞工）兼
勞工處處長
（古達材 代行）

2006 年 5 月 26 日

檔號：EMB CR 12/3231/78 VIII

立法局參考資料摘要

僱傭條例
(香港法例第57章)

1996年僱傭(修訂)條例草案

1996年僱傭(修訂)(第2號)條例草案

「工資」的定義

背景

18. 根據僱傭條例，「工資」是指付給僱員作爲該僱員根據其僱傭合約所做或將要做的工作而能以金錢形式表示的所有報酬、收入、津貼、小費及服務費，不論其名稱或計算方式，但不包括 —

(a) 由僱主提供的居所、教育、食物、燃料、燈火、醫療或用水的價值；

(b) 僱主自行負責爲退休計劃支付的供款；

(c) 交通津貼或任何交通特惠的價值；

(d) 僱員支付因其工作性質所招致的特別開銷而須付給該僱員的款項；

(e) 年終酬金或其部分；

(f) 於僱傭合約完成或終止時付給的酬金；及

(g) 屬實賠性質或僱主酌情付給的每年花紅或其部分。

19. 雖然工資的現行定義涵蓋範圍極廣，某些款項(例如佣金及超時工作薪酬)是否屬於工資的問題，仍不時在勞資糾紛中出現。據悉，一些無良僱主把很大部分的工資指定為超時工作薪酬、交通津貼及勤工花紅，藉以大幅減少其在遣散費及長期服務金方面的責任。此外，近年來高等法院及上訴法院曾經裁定，因僱員完成工作或將會完成工作而支付的勤工花紅和交通津貼，以及固定和強制性質超時工作的薪酬，應包括在工資的定義內。

20. 我們考慮上述因素後，已對僱傭條例所載的「工資」定義作出檢討，現建議修訂工資的定義如下：

(a) 包括佣金、勤工花紅、勤工津貼、交通津貼及超時工作薪酬，惟不包括某些指明的款項，例如非在合約訂明及屬實賠性質，或僱主酌情支付的款項或償款；及

(b) 在計算累算僱員福利時，把固定超時工作薪酬計算在工資之內，如屬不固定超時工作薪酬，則把過去 12 個月佔僱員平均工資 20%或以上的平均超時工作薪酬包括在內。

這些建議修訂不會令僱主須另外承擔責任，支付佣金、勤工花紅、勤工津貼、交通津貼及超時工作薪酬。反之，這些修訂旨在闡釋已在僱傭合約內載明的款項的性質，以訂明根據僱傭條例計算僱員可依法領取的款額時，上述款項應算作僱員工資的一部分。根據僱員工資計算的法定應得款項，包括終止僱用的代通知金、遣散費、長期服務金、產假薪酬及疾病津貼(包括不當解僱的賠償罰金)、假日薪酬、年假薪酬及年終酬金。

年終酬金

背景

21. 根據現行僱傭條例，年終酬金是指任何在合約內訂明的每年酬金，而不包括任何實賠性質、由僱主每年酌情發放的酬金。假若年終酬金已在僱傭合約內訂明，則其數額、酬金期及發放日期，均須符合約條款的規定計算；假若合約並無列明這些細則，年終酬金會當作一

一九九六年五月十七日(星期五)下午四時

副教育統籌司張建宗

在記者招待會就1996年僱傭(修訂)條例草案及

1996年僱傭(修訂)(第2號)條例草案發言摘錄

引言

今天在憲報刊登的1996年僱傭(修訂)條例草案，以及1996年僱傭(修訂)(第2號)條例草案，提出15項改善僱員權益及福利的措施。我們打算在本年五月二十九日的立法局會議席上，一併提出這兩條條例草案。

2. 第一條條例草案，即1996年僱傭(修訂)條例草案，是要落實執行僱傭條例中有關生育保障條款的檢討結果。

3. 第二條條例草案，即1996年僱傭(修訂)(第2號)條例草案，是要修訂僱傭條例，以改善有關工資定義、長期服務金、欠薪保障和年終酬金的條文。

背景

4. 首先我想指出，政府一向的政策，是因應香港的社會和經濟的發展情況，逐步改善僱員的福利。因此，我們經常檢討勞工法例中有關僱員權益及福利的條文，並在適當時候作出修訂。僱傭條例是關乎勞資關係的一項主要法例。為了改善僱員的福利，該條例過去多年來已經過多次的修訂。

5. 政府在草擬改善建議時，會詳細考慮及平衡僱員的期望和僱主的利益，配合香港當時的社會環境和經濟狀況，亦會參考國際勞工標準，以及鄰近國家的情況和做法。所有建議都是經由勞資雙方在勞工顧問委員會的代表共同策劃，以及詳細討論後制訂的。上述兩項條例草案的改善建議也不例外，是經過以上的磋商及諮詢過程方才提出來的。同時，勞顧會勞資雙方代表亦已對這兩條條例草案達成整體的共識。

條例草案

1996年僱傭(修訂)條例草案

6. 讓我先談談加強生育保障的建議。勞工處對僱傭條例內有關生育保障的條文進行了全面檢討，並參考國際勞工公約第3號有關婦女分娩前後受僱事宜的條文、聯合國消除對婦女一切形式歧視公約，以及其他國家的做法。我們根據檢討結果，在條例草案中提出8項改善建議。

(一) 刪除現時僱員須連續受僱26個星期，才可享有無薪產假的規定。任何根據連續性合約受僱的懷孕僱員，均可獲10個星期的無薪產假；

(二) 刪除現時懷孕僱員不得有超過兩名在生子女，才可享有有薪產假的規定；

(三) 簡化及清楚釐定有關產假期限的條文；

(四) 彈性分配10個星期的產假在產前和產後期間放取；

(五)取消僱員須服務滿 12 個星期，才符合資格享有僱傭保障的規定；

(六)提高不當解僱懷孕僱員的懲罰性賠款，由相等於 7 日工資增加至相等於一個月工資；

(七)禁止指派懷孕僱員擔任危險的工作；及

(八)簡化放取產假的通知手續。

1996 年僱傭(修訂)(第 2 號)條例草案

7. 1996 年僱傭(修訂)(第 2 號)條例草案，是要落實執行僱傭條例中關於僱員福利的條款的檢討結果，有關的條文包括：

- 工資的定義；
- 欠薪保障；
- 年終酬金；及
- 45 歲以下僱員可領取的長期服務金。

8. 我們建議工資的定義，應明確規定以工作換取的固定報酬，亦包括①佣金、②勤工花紅、③勤工津貼、④交通津貼和⑤固定的超時工作薪酬，提出這項建議的目的，並不是要僱主額外承擔責任，

向僱員支付這些款項，而是要清楚訂明，根據僱傭條例計算僱員依法應得的薪酬時，上述款項應算作僱員工資的一部分，避免僱主和僱員發生爭拗。這些建議符合最近法院對計算因終止僱用僱員應得的補償時，「工資」應包括哪些項目的裁決。

9. 爲加強保障僱主未付工資時，工人的利益，我們作出兩項改善建議

(一)規定僱主如在到期支付工資當日起計7天內仍未支付薪金，便須給予僱員欠薪的利息；及

(二)僱員如在到期支薪當日起計1個月後仍未獲發工資，便可當作僱主在沒有通知的情況下終止僱傭合約，因而可申索因終止僱傭合約應得的補償。

10. 爲改善年終酬金的條款，我們建議

(一)規定任何在合約內訂明的每年酬金，不論名稱是甚麼，均受到現行僱傭條例下有關年終酬金的規管，除非僱主曾以書面形式訂明，酬金屬資贈性質，並可由僱主酌情支付；及

(二)有資格按比例領取年終酬金的服務期，由現時的26個星期縮減至3個月。

11. 關於長期服務金的條款，我們建議在一年內，分兩個階段取消45歲以下，受僱不足10年的僱員可得的長期服務金，須按百分率扣減的規定。全面實施這項修訂一年後，任何連續5年受僱於同一僱主的僱員，不論年齡，均可按僱傭條例規定的同一比率，獲發長期服務金。

12. 有關這兩條條例草案提出的詳細建議，請參閱派發的摘要。

教育統籌科

一九九六年五月十七日

OFFICIAL RECORD OF PROCEEDINGS
立法局會議過程正式紀錄

Wednesday, 29 May 1996
一九九六年五月二十九日星期三

The Council met at half-past Two o'clock
下午二時三十分會議開始

MEMBERS PRESENT
出席議員：

THE PRESIDENT
THE HONOURABLE ANDREW WONG WANG-FAT, O.B.E., J.P.
主席黃宏發議員，O.B.E., J.P.

THE HONOURABLE ALLEN LEE PENG-FEI, C.B.E., J.P.
李鵬飛議員，C.B.E., J.P.

THE HONOURABLE MARTIN LEE CHU-MING, Q.C., J.P.
李柱銘議員，Q.C., J.P.

DR THE HONOURABLE DAVID LI KWOK-PO, O.B.E., LL.D. (CANTAB), J.P.
李國寶議員，O.B.E., LL.D. (CANTAB), J.P.

THE HONOURABLE NGAI SHIU-KIT, O.B.E., J.P.
倪少傑議員，O.B.E., J.P.

THE HONOURABLE SZETO WAH
司徒華議員

THE HONOURABLE LAU WONG-FAT, O.B.E., J.P.
劉皇發議員，O.B.E., J.P.

THE HONOURABLE EDWARD HO SING-TIN, O.B.E., J.P.

Debate on the motion adjourned and Bill referred to the House Committee pursuant to Standing Order 42(3A).

EMPLOYMENT (AMENDMENT) (NO. 2) BILL 1996

THE SECRETARY FOR EDUCATION AND MANPOWER to move the Second Reading of: "A Bill to amend the Employment Ordinance."

教育統籌司致辭：主席先生，我謹動議二讀《1996年僱傭（修訂）（第2號）條例草案》。

條例草案的目的是修訂《僱傭條例》，以改善有關工資定義、長期服務金、欠薪保障和年終酬金的條文。條例草案提出七項改善僱員權益和福利的措施，連同我剛才動議二讀的《1996年僱傭（修訂）條例草案》中的建議，這兩條條例草案共提出15項改善措施。

條例草案建議修訂的條文包括：

— 工資的定義；

— 欠薪保障；

— 年終酬金；及

— 45歲以下僱員可領取的長期服務金。

首先，在工資的定義方面，根據現行的《僱傭條例》，"工資"是指付給僱員作為他根據其僱傭合約所做或將要做的工作，能以金錢形式表示的所有報酬、收入、津貼及服務費。雖然"工資"定義的涵蓋範圍很大，但某些款項應否當作工資計算，仍不時引起勞資雙方爭議。我們經過檢討，建議應將工資的定義，明確規定為以工作換取的固定報酬，並清楚訂明：

（一） 工資應包括佣金、勤工花紅、勤工津貼、交通津貼，但不包括

一些列明的項目，例如未有在合約訂明及屬賞贈性質或由僱主酌情付給的款項；及

（二） 工資亦應包括固定的超時工作薪酬，或相等於每月平均工資20%或以上的超時工作薪酬。

提出這項建議的目的，並不是要僱主額外承擔責任，而是要清楚訂明，根據《僱傭條例》計算僱員依法應得的薪酬時，上述款項應算作僱員工資的一部分，避免僱主和僱員發生爭拗。這些建議亦符合最近法院對計算因終止僱用僱員應得的補償時，"工資"應包括哪些項目的裁決。

第二，為加強保障僱主未付工資時工人的利益，我們提出兩項改善建議：

（一） 規定僱主如在到期支付工資當日起計七天內仍未支付薪金，便須給予僱員欠薪的利息，利率與首席大法官根據《地方法院條例》釐定的利率相同；及

（二） 僱員如在到期支薪當日起計一個月後仍未獲發工資，便可當作僱主在沒有通知的情況下終止僱傭合約，因而可申索因終止僱傭合約而應得的補償。目前《僱傭條例》第10條訂明，僱員有權根據習慣法無須給予通知或代通知金而終止合約，但僱員仍無權因僱用終止而申索任何法定賠償。因此，我們建議增加這一條文，以加強保障被拖欠工資的僱員。

第三，有關年終酬金的條文，目前，年終酬金究竟屬合約性質還是賞贈性質，以及僱主解僱僱員時，是否有法定責任須按比例發放年終酬金等問題，經常引起爭議。為改善年終酬金的條款及減少不必要的糾紛，我們建議：

（一） 規定任何在合約內訂明的每年酬金，不論名稱是甚麼，均受到現行《僱傭條例》下有關年終酬金的規管。除非僱主曾以書面形式訂明，酬金屬賞贈性質，並可由僱主酌情支付者則除外；

及

（二） 有資格按比例領取年終酬金的服務期，由現時的26個星期縮減至三個月，但不包括合約內規定最長可遲三個月的試用期。

第四，在長期服務金方面，雖然根據現行法例，所有連續服務滿五年的僱員，均有權領取長期服務金，但服務不足十年的僱員，可獲發的長期服務金，將視乎其年齡和服務年期相應遞減。這種計算方法被視為歧視年輕僱員。因此，我們建議在一年內，分兩個階段取消46歲以下，受僱不足十年的僱員可得的長期服務金，須按百分率扣減的規定。第一階段是即時取消有七年或以上年資的年輕僱員的長期服務金，須按百分率遞減的規定。一年後，取消所有遞減長期服務金的現行規定，使任何連續五年受僱於同一僱主的僱員，不論年齡，均可按《僱傭條例》規定的同一比率，獲發長期服務金。

正如《1996年僱傭（修訂）條例草案》中的八項建議一樣，這項條例草案內的七項建議，均是政府經詳細考慮後擬訂的。我們認為這些建議可平衡僱員的期望和僱主的利益，而具體內容亦已參考過國際勞工標準，以及鄰近國家的情況和做法。同時，這些建議更獲勞工顧問委員會委員一致通過。

主席先生，我謹提出議案。

Question on the motion on the Second Reading of the Bill proposed.

Debate on the motion adjourned and Bill referred to the House Committee pursuant to Standing Order 42(3A).

~~IMMIGRATION (AMENDMENT) (NO. 2) BILL 1996~~

***THE SECRETARY FOR SECURITY** to move the Second Reading of: "A Bill to amend the Immigration Ordinance."*

He said: Mr President, I move the Second Reading of the Immigration (Amendment) (No. 2) Bill 1996. The Bill seeks to amend the definition of a lawfully employable person, and to impose a duty on the employer to inspect the travel document of any person who is not a permanent resident before employing

修訂《僱傭條例》以充分反映有關計算法定權益的政府政策原意

政府政策原意

- 在計算《僱傭條例》下僱員應享有的法定權益時，應以《僱傭條例》界定的「工資」爲準則。在 1997 年 6 月，《僱傭條例》曾作出修訂，明確訂明「工資」指能以金錢形式表示的所有報酬，包括佣金(不論其名稱或計算方式但屬賞贈性質或僅由僱主酌情付給者除外)、勤工花紅、勤工津貼等。

終審法院的裁決

- 終審法院於 2006 年 2 月審理 Lisbeth Enterprises Limited 與 Mandy Luk 一案時，指出在《僱傭條例》中並沒有可行的計算方法，將案中按月計算的佣金計入僱員的假日薪酬及年假薪酬之內。案中的僱員需根據其每月的銷售總額，按一個對照表而獲發佣金。佣金的金額每月不同，金額在月底確定後發放。

修訂《僱傭條例》的建議

- 有鑑於終審法院的裁決，政府認爲有需要修訂有關假日薪酬及年假薪酬的條文，以不折不扣地充分反映政府的政策原意，即在計算假日薪酬及年假薪酬時，佣金(不論其計算方式)應納入爲「工資」的一部分，以確保有清晰的法律可供遵循和執行。

- 由於《僱傭條例》內代通知金、年終酬金、產假薪酬和疾病津貼的法律條文與有關假日薪酬和年假薪酬的條文相似，政府亦建議對它們的計算方法作出類似的澄清，以剔除任何含糊或不明確的成分。

- 我們建議沿用現時的計算方法，以僱員最近一個月的薪金[1]爲計算法定權益的基礎。

對僱員權益的影響

- 修訂建議並沒有爲僱員訂立新的權益，也沒有在計算現有法定權益的方法上作出任何基本的改變。

勞工處
2006 年 5 月

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[1]即根據《僱傭條例》，參考僱員在緊接或截至法定假日、年假首天或其他有關日期爲止爲期不少於 28 天及不多於 31 天的完整工資期內每日平均所賺取的工資。

ENNY. KONG & PETER TANG
)LICITORS
江炳滔律師事務所
ents for Patents, Trade Marks and Designs
利、商標及外觀設計註冊代理人

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DATE: 8th June 2006

OUR REF: 9218-MS-01-0106

YOUR REF:

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Dear Sirs,

Re: Drafting A Succinct Counsel's Opinion

We act for 香港各界商會聯席會議 and refer to Counsel's Opinion dated 18th May 2006.

On 26th May 2006, we received from the Labour Department the following documents, which they purported to claim that the papers are the "Original Policy Intent" issued for reference by the LegCo in 1996:

(1) 1996年5月17日的立法局參考資料摘要第18至20段有關佣金的部份;

(2) 1996年5月17日副教育統籌司在記者招待會就條例草案的發言讀稿;及

(3) 1996年5月29日教育統籌司在立法局動議二讀條例草案的會議紀錄。

.../2

8th June 2006
Mr. Denis Chang, S.C.
And Jeremy Chan, Esq.

Instructions

Counsel is instructed to draft a second opinion on the following issues for the purpose of procuring to stop the Labour Department and others from provoking for a change of the current and existing employment laws relating to "Commission":

Issue 1: What legal basis, if any, does the Labour Department have in purporting to interpret the "Original Policy Intent 政策原意" in manner which it has done or at all?

Issue 2: What legal action, if any, our clients may take to stop or delay the legislative process to be initiated by the Labour Department?

We also enclose herewith the following papers issued by Labour Department for your reference:-

(i) 修訂《僱傭條例》一以充分反映有關計算法定權益的政府政策原意(5月24日給香港工業總會的文件)；及

(ii) 修訂《僱傭條例》一以充分反映有關計算法定權益的政府政策原意(5月25日給香港中華廠商聯合會的文件)

Please note that your written opinion is required by our clients at the meeting with the representatives of 勞顧會 on 15th June 2006.

Yours faithfully,

Encl
PK
c.c. client

『香港各界商會聯席會議』信箋

香港珠寶製造業廠商會　香港鐘表業總會　香港表廠商會　香港機械金屬業聯合總會　香港金屬製造業協會　78
香港中華眼鏡製造廠商會　香港電子業商會　香港塑膠再生原料協會　香港塑膠原料商會　潮倫塑膠廠商會
香港塑業商會　香港塑料發業廠商會　香港製刷業協會　香港中小型企業聯合會　香港瓦通紙業廠商會
港九塑膠製造商聯合會　香港中小型企業商會　香港食品商會　香港五金商業總會　香港鑄造業協會
香港電鍍業商會　香港金屬表面處理學會　香港中小企經貿促進會　香港電器製造業協會　右敏汽車商會(香港)有限公司
香港壓鑄業協會　香港合成皮革暨金屬物料供應商商會　香港中成藥商會　香港商業專業評審中心
香港中藥聯商會　國際中小企聯合商會　國際金融及管理專業人員協會　國際商貿協會　港九電器商聯會

致：　立法會議員梁君彥先生　傳真: 2480 7193
　　立法會議員呂明華先生　傳真: 2793 9867
　　立法會議員林健鋒先生　傳真: 2897 0254

有關政府提出修訂現行《僱傭條例》工商界之意見大會

十分感謝　閣下一直以來對工商界的支持，並多次出席有關修訂現行《僱傭條例》之會議，全力與政府磋商，令各方得到滿意的成果。

【香港各界商會聯席會議】於2006年6月1日晚上舉行會議及新聞發佈會，就政府提出修訂《僱傭條例》將佣金納入年假及有薪假期工資計算，對外發表了立場聲明，我們的分析與立場以符合法、理、情作為出發點，希望政府能夠詳細研究與多方面諮詢，並不贊成倉卒定案修例，以免導致分化勞資雙方、製造矛盾對立、破壞社會和諧。

【聯席會議】收到香港工業總會的邀請，出席於6月15日下午與勞顧會委員及香港工業總會代表之會議，希望能夠達成一致共識，從而與政府尋找解決的方案。我們當然希望得到立法會成員繼續支持，向政府理性諮詢和談判。如有需要，我們亦會向　閣下尋求協助，工商各界攜手創造和諧社會，勞資雙方忠誠合作，開創更美好的明天。

專此　並祝

台安！

【香港各界商會聯席會議】
秘書長　沈運龍
召集人　陳國民　謹啟
2006年6月9日

義務秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街51號凱旋工商中心第二期二樓G室
電話：(852) 2122 5082　傳真：(852) 2362 3647　電郵：gmoffice @jewelry.org.hk

『香港各界商會聯席會議』信箋

香港珠寶製造業廠商會　香港鐘表業總會　香港表廠商會　香港機械金屬業聯合總會　香港金屬製造業協會
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香港橡膠製品業廠商會　香港塑料發業廠商會　香港製刷業協會　香港中小型企業聯合會　香港瓦通紙業廠商會
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香港中藥總商會　國際中小企聯合商會　國際金融及管理界業人員協會　國際商貿協會　港九電器商聯會

傳真: 27213494

致: 香港工業總會
主席丁午壽先生

緊急及重要

有關政府提出修訂現行《僱傭條例》工商界之意見大會

十分感謝　貴會之勞顧會僱主代表聯同其他勞顧會委員一直以來對工商界的支持，就此事與政府積極交涉對話。至於立法會動議譴責勞顧會出爾反爾，【香港各界商會聯席會議】對此極之反感，並準備發信予立法會人力資源小組要求收回有關譴責。

【聯席會議】於 2006 年 6 月 1 日晚上舉行會議及新聞發佈會，就政府提出修訂《僱傭條例》將佣金納入年假及有薪假期工資計算，對外發表了立場聲明，我們的分析與立場以符合法、理、情作為出發點，希望政府能夠詳細研究與多方面諮詢，並不贊成倉卒定案修例，以免導致分化勞資雙方、製造矛盾對立、破壞社會和諧，相信　貴會亦與我們的立場一致。

貴會希望政府充份瞭解工商界對整件事情之立場，提出擬於 6 月 15 日下午聯同勞顧會委員以及【聯席會議】各大商會代表會面，達成一致共識，從而與政府尋找解決的方案。我們極之認同，並已發出緊急及重要通告，通知各大商會領導踴躍參加。我們亦希望工商各界能攜手創造和諧社會，勞資雙方衷誠合作，開創更美好的明天。

專此　並祝

台安！

【香港各界商會聯席會議】
秘書長　沈運龍
召集人　陳國民　謹啟
2006 年 6 月 9 日

義務秘書處：香港珠寶製造業廠商會
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『香港各界商會聯席會議』信箋

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香港中藥聯商會 國際中小企聯合商會 國際金融及管理專業人員協會 國際商貿協會 港九電器商聯會

傳真: 28655285

致: 香港僱主聯合會
主席業榮達先生

緊急及重要

有關政府提出修訂現行《僱傭條例》工商界之意見大會

十分感謝 貴會之勞顧會僱主代表聯同其他勞顧會委員一直以來對工商界的支持，就此事與政府積極交涉對話。至於立法會動議譴責勞顧會出爾反爾，【香港各界商會聯席會議】對此極之反感，並準備發信予立法會人力資源小組要求收回有關譴責。

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專此 並祝

台安！

【香港各界商會聯席會議】
秘書長 沈運龍
召集人 陳國民 謹啟
2006年6月9日

義務秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街51號凱旋工商中心第二期二樓G室
電話：(852) 2122 5082 傳真：(852) 2362 3647 電郵：gmoffice @jewelry.org.hk

『香港各界商會聯席會議』信箋

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傳真: 25277886

致: 香港總商會
主席艾爾敦先生

緊急及重要

有關政府提出修訂現行《僱傭條例》工商界之意見大會

十分感謝 貴會之勞顧會僱主代表聯同其他勞顧會委員一直以來對工商界的支持，就此事與政府積極交涉對話。至於立法會動議譴責勞顧會出爾反爾，【香港各界商會聯席會議】對此極之反感，並準備發信予立法會人力資源小組要求收回有關譴責。

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台安！

【香港各界商會聯席會議】
秘書長 沈運龍
召集人 陳國民 謹啟
2006 年 6 月 9 日

義務秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街 51 號凱旋工商中心第二期二樓 G 室
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傳真: 25414541

致: 香港中華廠商聯合會
會長洪克協先生

緊急及重要

有關政府提出修訂現行《僱傭條例》工商界之意見大會

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專此 並祝

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秘書長 沈運龍
召集人 陳國民 謹啟
2006年6月9日

義務秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街51號凱旋工商中心第二期二樓G室
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傳真: 28452610

致: 香港中華總商會
會長霍震寰先生

緊急及重要

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【香港各界商會聯席會議】
秘書長 沈運龍
召集人 陳國民 謹啟
2006年6月9日

義務秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街51號凱旋工商中心第二期二樓G室
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「香港各界商會聯席會議」信箋

香港珠寶製造業廠商會 香港鐘表業總會 香港表廠
香港中藥眼鏡製造廠商會 香港電子業商會 香港塑
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香港壓鑄業協會 香港合成皮革暨金屬物料供應
香港中藥聯商會 國際中小企聯合商會 國際金融

傳真：27213494

致：香港工業總會
主席丁午壽先生

緊急及重要

有關政府提出修訂現行《僱傭條例》工商界之意見大會

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貴會希望政府充份瞭解工商界對整件事情之立場，提出擬於6月15日下午聯同勞顧會委員以及【聯席會議】各大商會代表會面，達成一致共識，從而與政府尋找解決的方案。我們極之認同，並已發出緊急及重要通告，通知各大商會領導踴躍參加。我們亦希望工商各界能攜手創造和諧社會，勞資雙方(忠)誠合作，開創更美好的明天。

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【香港各界商會聯席會議】
秘書長 沈運龍
召集人 陳國民 謹啟
2006年6月8日

義務秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街51號凱旋工商中心第二期二樓G室
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致: 香港中華總商會會長霍震寰先生
香港中華廠商聯合會會長洪克協先生
香港總商會主席艾爾敦先生
香港僱主聯合會主席業榮達先生

傳真: 28452610
傳真: 25414541
傳真: 25277886
傳真: 28655285

緊急及重要

有關政府提出修訂現行《僱傭條例》工商界之意見大會

十分感謝 貴會之勞顧會僱主代表聯同其他勞顧會委員一直以來對工商界的支持，就此事與政府積極交涉對話。至於立法會動議譴責勞顧會出爾反爾，【香港各界商會聯席會議】對此極之反感，並準備發信予立法會人力資源小組收回有關譴責。

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【聯席會議】收到香港工業總會的邀請，出席於6月15日下午與勞顧會委員及香港工業總會代表之會議，希望能夠達成一致共識，從而與政府尋找解決的方案。我們已發出緊急及重要通告，通知各大商會領導踴躍參加，我們亦希望 貴會支持是次會議，工商各界攜手創造和諧社會，勞資雙方忠誠合作，開創更美好的明天。

專此 並祝

台安！

【香港各界商會聯席會議】
秘書長 沈運龍
召集人 陳國民 謹啟
2006年6月8日

義務秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街51號凱旋工商中心第二期二樓G室
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『香港各界商會聯席會議』信箋

香港珠寶製造業廠商會 香港鐘表業總會 香港表廠商會 香港機械金屬業聯合總會 香港金屬製造業協會
香港中華眼鏡製造廠商會 香港電子業商會 香港塑膠再生原料協會 香港塑膠原料商會 潮僑塑膠廠商會
香港橡膠塑鞋業廠商會 香港塑料袋業廠商會 香港製刷業協會 香港中小型企業聯合會 香港瓦通紙業廠商會
港九塑膠製造商聯合會 香港中小型企業商會 香港食品商會 香港五金商業總會 香港鑄造業協會
香港電鍍業商會 香港金屬表面處理學會 香港中小企經貿促進會 香港電器製造業協會 古牡汽車商會(香港)有限公司
香港壓鑄業協會 香港合成皮革暨金屬物料供應商商會 香港中成藥商會 香港商業專業評審中心
香港中藥聯商會 國際中小企聯合商會 國際金融及管理專業人員協會 國際商貿協會 港九電器商聯會

致： 立法會議員梁君彥先生 傳真: 2480 7193
立法會議員呂明華先生 傳真: 2793 9867
立法會議員林健鋒先生 傳真: 2897 0254

有關政府提出修訂現行《僱傭條例》工商界之意見大會

十分感謝 閣下一直以來對工商界的支持，於4月13日及19日出席有關修訂現行《僱傭條例》之會議，並全力與政府磋商，令到各方得到滿意的成果。

【香港各界商會聯席會議】於2006年6月1日晚上舉行會議及新聞發佈會，就政府提出修訂《僱傭條例》將佣金納入年假及有薪假期工資計算，對外發表了立場聲明，我們的分析與立場以符合法、理、情作為出發點，希望政府能夠詳細研究與多方面諮詢，並不贊成倉卒定案修例，以免導致分化勞資雙方、製造矛盾對立、破壞社會和諧。

【聯席會議】收到香港工業總會的邀請，出席於6月15日下午與勞顧會委員及香港工業總會代表之會議，希望能夠達成一致共識，從而與政府尋找解決的方案。我們當然希望得到立法會成員繼續支持，向政府理性諮詢和談判。如有需要，我們亦會向 閣下尋求協助，工商各界攜手創造和諧社會，勞資雙方忠誠合作，開創更美好的明天。

專此 並祝

台安！

【香港各界商會聯席會議】
秘書長 沈運龍
召集人 陳國民 謹啟
2006年6月8日

義務秘書處：香港珠寶製造業廠商會
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Estate Agents Management Association
地產代理管理協會

By Fax & By Post

2006年6月8日

敬啟者：

有關：政府提出修訂現行《佣金條例》工商界之意見大會

接奉邀請出席2006年6月15日有關政府提出修訂現行《佣金條例》工商界之意見大會，本會定當積極參與有關會議，並將發表意見。藉此感謝 閣下及各友好帶動有關工作，本會當會本著同舟共濟的態度，合力推動。

順祝金安！

此致

香港各界商會聯席會議
秘書長 沈運龍先生

曾紹偉

地產代理管理協會
會長曾紹偉 謹啟

副本：香港電器製造業協會陳國民理事長

會址：香港中區德輔道中19號環球大廈25樓2508室
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Re: Commission & Holiday Pay, Annual Leave Pay, *etc* ...

Statement of Labour Department (24.05.2006)

on

Proposal to Amend Employment Ordinance

– COUNSEL'S OPINION –

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1. We are instructed that the Labour Department has issued various further Statements dated May 2006.

2. The Labour Department has apparently said that it does not intend to propose legislative amendments in relation to the definition of *'wages'*; of course in section 2(1) of the Employment Ordinance ("the Ordinance"), *wages* includes ***"unless the context otherwise requires*** *... commission ... but does not include ... any commission which is of a gratuitous nature or which is payable only at the discretion of the employer"*.

3. As the Court of Final Appeal held in *Lisbeth Enterprises Ltd. v. Mandy Luk* (FACV No. 17 of 2005; 28 February 2006) at

paragraph 24 – *"holiday pay and annual leave pay* ***form a context*** *which* ***requires*** *that the word 'wages'* ***be read as excluding commission*** *save possibly for commission accruing and calculated on a daily basis in amounts varying from day to day".*

4. In other words, the CFA looked at the context and decided that notwithstanding the existing definition of "wages", commission is excluded by the context of the relevant provisions (save possibly for the exception referred to by the CFA). Hence, proposing no changes to the definition of "wages" does not mean that nothing is being added or subtracted: it all depends on what changes are made to what other provisions of the Ordinance.

5. It is wholly misleading for the Labour Department to be representing to the public that there will therefore "be no changes", notwithstanding that legislative amendments will be proposed (albeit not necessarily to section 2(1) of the Ordinance).

6. The public should not be left with the erroneous impression that what the proposed amendments seek to do is to restore the law back to where it was before the decision of the Labour Tribunal in the *Mandy Luk* case (which the CFA unpheld, reversing the Court

of Appeal's majority judgment). The truth is such amendments, if passed, will have the effect of disturbing what the law has been for many years. In short, the Labour Department should be forthright enough to spell out the true consequences.

7. It would be wrong to oversimplify the issues, and such presentation does not resolve nor assist the problems and concerns faced by employers and employees.

8. The truth of the matter, according to evidence filed in *Mandy Luk,* is that the exclusion of commission from the calculation of holiday pay and annual leave pay in circumstances similar to *Mandy Luk* has been an industry-wide practice common to many different trades. The CFA judgment, therefore, came as no surprise, especially to those who have been following the practice.

9. Quite to the contrary, it is the Labour Department's proposals to change the law (but whilst not so presenting the matter) that has come as somewhat of a surprise. For example, if the Government had thought that there was anything wrong with the existing law as it is or that it does not accord with Governmental policies or understanding, it is unexplainable as to why in all these years the

Labour Department had stood by and refrained from saying anything all along, apparently condoning the industry-wide practice and perception of the law (which has now been confirmed as correct by the CFA).

10. It should also not be so superficially assumed that any changes in widening the context of holiday pay / annual leave pay so as to include commission not presently so included under the existing law, will necessarily result in benefit to employees generally. Just for simple example, employers may well be driven to restructure their financial arrangements, so as to reduce financial exposures, resulting in employees being worse off than before in reality and in practice. This is especially so if legislative amendments result in undue introduction of randomness and unpredictability, so that employers will in prudence be compelled to err on the side of conservative caution.

11. It should be clearly recognised and responsibly presented to the public that there may be consequences to all sides of the story, which must be carefully balanced and considered. The proposed legislative reforms should be clearly presented, and the form and nature of proposed changes in the law responsibly recognised and

openly clarified as to what the Government intends, so that their full implications can be considered and appreciated during the consultative process.

12. There is also for example a high degree of arbitrariness involved in changing the law so that commission paid during periods of statutory holiday / annual leave be based upon only the last immediate preceding month's commission earned. This statutory formulation is problem ridden and quite unfair. Of course, this is also directly contrary to the CFA's Judgment as to those statutory provisions, and will most certainly require substantive amendment to the law (and should not be misrepresented otherwise).

13. For example, both employers and employees would suffer difficulties in knowing in advance how much commission would be paid during periods of statutory holiday / annual leave. There is also much scope for abuse and financial incentive for manipulation. Employees would be keen to take leave immediately after having earned a lot of commission during one month; whilst employers would be keen to put employees on leave immediately after a bad month with low commission. Both employers and employees would suffer the injustice of uncertainty and

randomness, depending upon no more than when annual leave / statutory holiday happens to be taken or occur to fall, or which month the employee happens to earn more or less commission.

14. In any event, it is a gross misrepresentation to say that there will be no change in the law or no financial implications, if the proposed legislative amendments may result in commission being generally *included* in holiday pay / annual leave pay calculations, by simply taking as reference point the immediate last preceding month. This will most certainly require adding in new statutory provisions and statutory formula that the CFA has ruled does not exist within the present context. It is clearly a change in the law and ought to be represented as such.

15. As for the way forward, the Labour Department in acting transparently and openly, should present the Government's proposed legislative amendments so that the public, including in particular all parties concerned, will be able to comment and be consulted.

16. Our understanding is that neither the public nor the industries or representative bodies have been consulted nor presented with the

actual legislative amendments that the Government has in mind. The situation should not be misrepresented as though anybody has already agreed or consent to the Labour Department's unilaterally adopted position or stance.

17. Only by taking these talks out of the abstract sphere and putting the proposals in concrete written form, will the Labour Department be truly able to inform the public what it is that the Government has in mind.

18. Of course, seeing the actual proposed legislative amendments would also make good the Labour Department's suggestion that there will be "no changes" – if that will truly be the case, it should be plain to see from the proposed amendments to the statutory provisions.

Denis Chang S.C.

Jeremy S.K. Chan

Dated this 15th day of June 2006.

Re: Commission & Holiday Pay,

Annual Leave Pay, *etc* ...

Statement of Labour Department (24.05.2006)

on

Proposal to Amend Employment Ordinance

– COUNSEL'S OPINION –

Dated this 15th day of June 2006.

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『香港各界商會聯席會議』信箋 96

香港珠寶製造業廠商會 香港鐘表業總會 香港表廠商會 香港機械金屬業聯合總會 香港金屬製造業協會
香港中華眼鏡製造廠商會 香港電子業商會 香港塑膠原料商會 潮汕塑膠廠商會
香港鞋業商會 香港塑料製業廠商會 香港製劇業協會 香港中小型企業聯合會 香港瓦通紙業廠商會
港九塑膠製造商聯合會 香港中小型企業商會 香港食品商會 香港玉石商業總會 香港鑄造業協會
香港電鍍業商會 香港金屬表面處理學會 香港中小企經貿促進會 香港電器製造業協會 吉欽汽車商會(香港)有限公司
香港壓鑄業協會 香港合成皮革製金屬物料供應商商會 香港中成藥商會 香港商業專業評審中心
香港中藥聯商會 國際中小企聯合商會 國際金融及管理專業人員協會 國際商貿協會 港九電器商聯會

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致： 立法會主席
范徐麗泰議員

緊急及重要

促請「立法會人力事務委員會」收回對勞顧會資方代表之譴責

有關「立法會人力事務委員會」日前動議譴責勞顧會資方代表出爾反爾，【香港各界商會聯席會議】表示極不同意及遺憾，並促請立法會立即收回有關譴責。

勞顧會資方代表一直以來與各大商會積極探討修訂《僱傭條例》對工商界的影響，希望能夠達成一致共識，與政府尋求解決方案，而資方代表並沒有就修例一事作任何承諾及決定。在5月29日之勞顧會會議，資方代表個別陳述所屬商會之意見，但勞方代表卻因不滿資方代表反對政府倉卒修例，中途拉隊離場抗議。我們認為在任何一個顧問委員會會議上，各方代表可持不同意見及立場，這是十分正常的運作，而「立法會人力事務委員會」在未真正深入瞭解事情的原因就貿然提出譴責，這樣很容易造成今後立法會動議及譴責不再受到重視。

根據【聯席會議】於6月1日之全體會議及新聞發佈會，就政府提出修訂《僱傭條例》將佣金納入年假及有薪假期工資計算，對外發表了立場聲明【附件一】，我們的分析與立場以符合法、理、情作為出發點，希望政府能夠詳細研究與多方面諮詢，並不贊成倉卒定案修例，以免導致分化勞資雙方、製造矛盾對立、破壞社會和諧。希望 閣下能夠主動向「立法會人力事務委員會」提出收回上述譴責，以示向勞顧會資方代表討回公道。

【聯席會議】仍然會繼續與勞顧會代表及勞工處積極商議及探討解決方案，我們希望立法會各議員能夠深入瞭解及參與有關修例法案。

如有任何聯繫，請致電【聯席會議】召集人陳國民先生，電話：9487 0707 或義務秘書處孫小姐，電話：2122 5082。

專此 並祝

台安！

【香港各界商會聯席會議】
秘書長 沈運龍 謹啟
2006年6月15日

副本抄送：立法會人力事務委員會

義務秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街51號凱旋工商中心第二期二樓G室
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【香港各界商會聯席會議】於6月1日發表之立場聲明

1. 我們的分析與立場以符合法、理、情作為出發點
2. 有邏輯、以事實、數字為根據來分析
3. 不衝動、不倉卒、負責任的回應
4. 能對社會大眾有交代

1. 法方面

1.1 終審庭已明確指出法律的觀點及裁決。

1.2 我們尊重及遵守法律以及終審庭的裁決。

1.3 我們認為現行條例是清楚與沒有漏洞，法律規定合約佣金是工資一部份。但有些情況在邏輯上、環境上是無法計算的，終審庭已澄清這一點，合約佣金的計算方式複雜，並因應各行業、市場而有不同；所以我們理性地分析現行法例，認為當初立法時已考慮到這一點，法例亦已將日薪部份納入。已知箇中困難，所以月薪部份不作立法。

1.4 香港普通法並無立法原意一詞，只有立法意圖，經資深大律師精闢分析勞工處提供當時立法情形的資料後，當時立法並不包括月薪佣金，現時一旦修例，對僱主責任不加不減是不可能的。

1.5 我們認為現行法例是清晰的，完全合符現在商業上的運行。

1.6 所以我們不贊成倉卒定案修例。

2. 理方面

2.1 佣金制度行之已久，是商業社會市場經過長期運行的一個重要機制，以鼓勵員工可以多勞多得，從而增加公司業績，能與員工分享成果。

2.2 自十年前修例至今，是第一次出現此類法院案例，證明行之有效，所有僱主及僱員均明瞭佣金的道理及運作。

2.3 未有僱主違反有關佣金的法例。

2.4 終審庭維持勞資審裁處原裁定。

2.5 如不合情理作出倉卒定案修例，而修改得不周詳或不適當，我們很擔心將可能導致以下不良的結果：

(i) 分化勞資雙方、製造矛盾對立、破壞社會和諧

(ii) 促使僱主更改僱傭合約，僱員總收入有可能因此而減少

(iii) 將會衍生無休止的索償訴訟爭議

(iv) 形成惡劣的法律制度先例

義務秘書處：香港珠寶製造業廠商會
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雙方面

3.1 我們在這裏指出，我們現在做法是為保障員工，令其做得更好並得到應得的報酬，公司業績上升才是一個雙贏的局面，倉卒修例反而造成三輸局面。

總結：

1. 我們並非反對修例，而是反對倉卒定案修例，需要詳細研究與多方面諮詢。假如要定案修例，亦需經過各方面詳細考慮，研究法律觀點，定出充裕時間才能定案。
2. 歡迎與勞工界或其代表對話，以取得溝通。
3. 若政府能深思熟慮，不倉卒作出決定，便可獲各商會支持，達致三贏局面。

法理：

1. 不論是政府所指的是「立法原意」或「政策原意」也好，政府有沒有認真及深入地去檢討該「原意」呢？或可能考慮但認為不適宜，所以沒有加在當時的法例。政府是次強硬堅持修例，不加不減是誤導市民大眾的。
2. 終審庭的法理基礎是相當清晰的，因佣金的本質是僱主與僱員分享利潤，且不是固定的，不可以預先計算未賺取的佣金計算於假日或年終薪酬。
3. 終審庭已行使本港最終的司法權，政府是不是要輸打贏要？

公理：

1. 現時的佣金計酬機制行之有效數十年，勞資雙方均按此機制賺取應得報酬和利潤，沒有任何抗衡局面，政府為什麼要一手激化這和諧局面呢？
2. 現行之佣金制度是勞資雙方共贏的機制，在多勞多得的前提下，僱員可以賺取更高的報酬，而僱主也可以增加收入。若政府硬要一刀切把所有佣金劃入「工資」計算，只有逼使僱主改用「自僱人士」方式聘用員工或更改合約，員工收入可能因此而減少，這是否政府及各界願意看到的？
3. 因本港有各行各業，工作性質和類別也不同，立例是否可以一刀切地硬把所有佣金加進工資計算呢？這肯定是行不通的。

情理：

我們在這裏指出，我們現在做法是想保障員工，令其做得更好並得到應得的報酬，公司業績上升才是一個雙贏的局面，倉卒修例反而造成三輸局面。

【香港各界商會聯席會議】謹啟
2006年6月1日

秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街51號凱旋工商中心第二期二樓G室
電話：(852) 2122 5082 傳真：(852) 2362 3647 電郵：gmoffice@jewelry.org.hk

『香港各界商會聯席會議』信箋 99

香港珠寶製造業廠商會 香港鐘表業總會 香港表廠商會 香港機械金屬業聯合總會 香港金屬製造業協會
香港中華眼鏡製造廠商會 香港電子業商會 香港塑膠原生原料協會 香港塑膠原料商會 潮僑塑膠廠商會
香港塑業商會 香港塑料袋業廠商會 香港製刷業協會 香港中小型企業聯合會 香港瓦通紙業廠商會
香港九龍塑膠製造商聯合會 香港中小型企業商會 香港食品商會 香港五金商業總會 香港鑄造業協會
香港壓鑄業協會 香港合成皮革暨金屬物料供應商商會 香港中成藥商會 香港商業專業評審中心
香港中藥聯商會 國際中小企聯合商會 國際金融及管理專業人員協會 國際商貿協會 港九電器商聯會

傳真：2877 9600
電話：2869 9462

致： 立法會主席
范徐麗泰議員

緊急及重要

促請立法會收回對勞顧會之譴責

有關立法會日前動議譴責勞顧會出爾反爾，【香港各界商會聯席會議】表示極不同意，並促請立法會立即收回有關譴責。

勞顧會資方代表一直以來與各大商會積極探討修訂《僱傭條例》對工商界的影響，希望能夠達成一致共識，與政府尋找解決的方案，然而勞顧會並沒有就修例一事作出任何承諾及決定。另外，於5月29日之勞顧會會議，資方代表個別陳述所屬商會之意見，而勞方代表卻因不滿資方反對政府修例，中途拉隊離場抗議。我們認為在任何一個顧問委員會會議上，各方代表可持不同意見及立場，這是十分正常的運作，然而「立法會人力事務委員會」在未真正深入瞭解事情的原因就貿然提出譴責，這樣很容易造成今後立法會動議及譴責不再受到重視。

根據【聯席會議】於6月1日之全體會議及新聞發佈會，就政府提出修訂《僱傭條例》將佣金納入年假及有薪假期工資計算，對外發表了立場聲明，我們的分析與立場以符合法、理、情作為出發點，希望政府能夠詳細研究與多方面諮詢，並不贊成倉卒定案修例，以免導致分化勞資雙方、製造矛盾對立、破壞社會和諧。希望 閣下能夠主動向「立法會人力事務委員會」提出收回上述譴責，以示對勞顧會資方代表討回公道。

如有任何查詢，請致電召集人陳國民先生，電話：9487 0707 或【聯席會議】義務秘書處孫小姐，電話：2122 5082。

專此 並祝

台安！

【香港各界商會聯席會議】
秘書長 沈運龍
召集人 陳國民 謹啟
2006年6月15日

義務秘書處：香港珠寶製造業廠商會
香港九龍紅磡民裕街51號凱旋工商中心第二期二樓G室
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OUR REF: 9218-MS-01-0106 DATE: 17th June 2006

YOUR REF: LR LRD/12-1/2-46III

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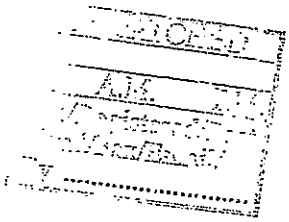
BY POST BY FAX (2545-2959)

The Labour Department (Labour Relations Division)
The Commissioner for Labour
16/F, Harbour Building
38 Pier Road, Central
Hong Kong



Attn: 張建宗先生 及 古超程先生

Dear Sirs

Re: Employment Ordinance, Cap. 57 and Matters Relating to "Legislature Intent"

We act for 香港各界商會聯席會議 and the Associations thereunder.

We refer to the conference held at the offices of The Federation of Hong Kong Industries on 23rd May 2006 regarding some proposed amendments to the Employment Ordinance, Cap. 57, the letter dated 24th May 2006 issued by 香港各界商會聯席會議 to you and your ensuing reply letter dated 26th May 2006 issued to 香港各界商會聯席會議.

At the said conference, 張建宗先生, the Permanent Secretary for Economic Development and Labour (Labour) & Commissioner for Labour of The Labour Department repeatedly mentioned that the above proposed amendments were to reflect a "政策原意" ("the said 政策原意").

We are instructed by 香港各界商會聯席會議 to enquire for your replies/answers to the followings:-

.../2

17th June 2006
The Labour Department

1. If the said 政策原意 then in mind of Mr Cheung thereat refers/referred to those 政策原意 made on or prior to 17th May 1996 ("**1996** 政策原意"); and

2. If the said 政策原意 then in mind of Mr Cheung thereat refers/referred to those "政策原意" made after 17th May 1996 but before 23rd May 2006 ("**2006** 政策原意").

We look forward to receiving your prompt replies/answers to the above within the next seven (7) days.

Yours faithfully

BK/kp
c.c. (1) 香港各界商會聯席會議
(By Fax: 2362-3647 and By E-mail: gmoffice@jewelry.org.hk)
(2) Mr Edward Chan (By E-mail: edward@germanpool.com)

(3)

修訂《僱傭條例》以充分反映有關計算法定權益的政府政策原意

CHA

政府政策原意

- 在計算《僱傭條例》下僱員應享有的法定權益時，應以《僱傭條例》界定的「工資」爲準則。在 1997 年 6 月，《僱傭條例》曾作出修訂，明確訂明「工資」指能以金錢形式表示的所有報酬，包括佣金、勤工花紅、勤工津貼等(不論其名稱或計算方式但屬賞贈性質或僅由僱主酌情付給者除外)。

終審法院的裁決

- 終審法院於 2006 年 2 月審理 Lisbeth Enterprises Limited 與 Mandy Luk 一案時，指出在《僱傭條例》中並沒有可行的計算方法，將案中按月計算的佣金計入僱員的假日薪酬及年假薪酬之內。案中的僱員需根據其每月的銷售總額，按一個對照表而獲發佣金。佣金的金額每月不同，金額在月底確定後發放。

修訂《僱傭條例》的建議

- 有鑑於終審法院的裁決，我們認爲有需要修訂有關假日薪酬及年假薪酬的條文，以不折不扣地充分反映我們的政策原意，即在計算假日薪酬及年假薪酬時，佣金(不論其計算方式)應納入爲「工資」的一部分，以確保有清晰的法律可供遵循和執行。
- 修訂不會更改《僱傭條例》下「工資」的定義，亦不會將屬賞贈性質或僅由僱主酌情付給的佣金包括在「工資」定義之內。
- 由於《僱傭條例》內代通知金、年終酬金、產假薪酬和疾病津貼的法律條文與有關假日薪酬和年假薪酬的條文相似，我們亦建議對它們的計算方法作出類似的澄清，以剔除任何含糊或不明確的成分。
- 我們建議沿用現時的計算方法，以僱員最近一個月的平均工資(即參考僱員在緊接或截至法定假日、年假首天或其他有關日期爲止爲期不少於 28 天及不多於 31 天的完整工資期內每日平均所賺取的工資)爲計算法定權益的基礎。
- 換句話說，修訂建議並沒有爲僱員訂立新的權益，也沒有在計算現有法定權益的方法上作出任何基本的改變。
- 我們無意就修訂建議提供追溯期。

勞工處
2006 年 5 月

中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會主席辦公室
OFFICE OF THE PRESIDENT OF THE LEGISLATIVE COUNCIL
范徐麗泰議員 Mrs Rita Fan, GBS, JP

來函檔號 YOUR REF :
本函檔號 OUR REF :
電 話 TELEPHONE : 2869 9461
圖文傳真 FACSIMILE : 2877 9600

九龍紅磡民裕街 51 號
凱旋工商中心第二期二樓 G 室
香港各界商會聯席會議
沈滻龍秘書長

尊敬的沈秘書長：

多謝 貴聯席會議於 2006 年 6 月 15 日的來信，就立法會人力事務委員會口前證貴勞顧會資方代表的動議，發表意見，該信的副本亦抄送立法會人力事務委員會。

謹此告知，於 6 月 15 日立法會人力事務委員會的會議上，委員會秘書已將 貴會的意見呈交各委員，以供備悉。而有關的議題預計將於本年十月再與政府商討。

再次多謝 貴會的意見。

立法會主席

范徐麗泰

范徐麗泰

2006 年 6 月 20 日

By Fax & By Post

2006年6月16日

敬啟者：

有關：政府建議修訂「佔領條例」之事宜

有關政府建議修訂「佔領條例」之事宜，本集團對上述建議持反對意見。隨函附上本集團之意見書以供了解，如有疑問，請致電 96830008 與本人聯絡。

順祝金安！

此致

香港電器製造業協會
理事長陳國民先生

英聯集團董事總經理 謹啟

美聯集團 MIDLAND HOLDINGS
香港第一上市物業代理(1200)
置業・搵樓 簡易方便

政府建議修訂「傭佣條例」，將佣金計入年假及法定假期的建議

美聯集團於香港創立及紮根已有三十三年的歷史，並於 1995 年 6 月於香港交易所上市。作爲一間上市公司，對政府的施政努力支持及配合，對社會的發展及改進亦肩負一定的責任。

今年二月，終審庭在裁決「亞力傑」一事中，清楚闡釋，僱員過往所賺取的佣金不適用於計算該員工於離職時的有薪年假。本集團歡迎此裁決，因它可以解決計算年假或法定假期時存在的一些灰色地帶。

近日，政府建議修改現行的僱傭法例，擬將佣金明文列入年假及法定假日的薪酬計算之內，雖然政府解釋此爲 1997 年修訂有關條例的原意，並強調此舉並不會對僱主帶來額外的負擔，但本集團並不同意此說，並強烈反對有關修訂。

本集團謹此提出下列意見：

1. 修例原意是保障勞工，避免受到剝削的情況，但代理行業並無此問況存在。

2. 有關建議不應以「一刀切」形式加諸於所有行業，因各行業的營銷方式各有不同。

3. 在物業代理界別中，前線營業員在加盟時已清楚知道自己的工作性質，明白此行業是屬於「多勞多得」，公司所支付的底薪是供僱員用作交通或膳食的基本開支用，成功促銷交易而分取得的佣金始爲重要的「糧食」。

總 行：香港中環德輔道中19號環球大廈25樓 電話：2825 8383 傳真 2845 0705 網址：http://www.mkland.com.hk
HEAD OFFICE: 25/F, World-Wide House, 19 Des Voeux Road C., Hong Kong Tel:2825 8383 Fax:2845 0705
URL:http://www.mkland.com.hk

4. 以本行業的標準爲例，營業員的底薪爲每月$6,000 至$25,000 之間，視乎其資歷而定，此底薪的水平與其他行業比較已經是頗高的水平，佣主並無剝削的成份。

5. 傑出的營業員因促成交易而可分取的佣金可以高過底薪的三倍至十倍，甚至更多，所以此制度吸引到一群有衝勁、對理想有挑戰的從業員參與。

6. 於放假時僱員並無工作，更無促成交易，故除可享有底薪外不應分到佣金的收入。

7. 其實每個行業都會因其性質有一個「可承擔工資」的比例，地產代理的工資比例是非常高，以大行爲例，工資連佣金佔總開支約 60%。政府若一意孤行修改法例，將令行內的佣主在工資及津貼方面增加約 6-7%的額外支出，影響非常大，並非如經濟發展及勞工局所說的不會構成額外支出。

8. 強行修例可能導致反效果。佣主爲控制支出，惟有修訂分佣制度，扣減部份佣金留待放假時始發放，但據營業員的習慣，他們大多希望即時分取應得佣金。

9. 若經營情況變壞，可能迫使部份代理公司將營業員改爲「自僱人士」(於保險業已普遍施行)，令僱員失去更多的福利及保障。

10. 建議的制度是以對上一個月的佣金收入作爲計算「工資」，而眾所周知，地產代理的佣金收入時多時少，端賴市場而定，如不良的僱員取巧，於高佣金收入的翌月提出放假要求而獲取個人最高利益，將令僱主於行政上及經濟上帶來更多損失。

綜觀上述各點，建議的修例對代理業將構成不公，甚至損害佣主與僱員間的合作，謹此提醒政府及立法會的議員深思而訂。

[signature]

[illegible] 謹呈

BENNY KONG & PETER TANG
SOLICITORS
江炳滔律師事務所
Agents for Patents, Trade Marks and Designs
專利、商標及外觀設計註冊代理人

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OUR REF: 9218-MS-01-0106 DATE: 17th June 2006

YOUR REF:

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BY POST BY FAX (2845 0439)

Mr. Denis Chang, S.C.
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Hong Kong

BY FAX (2526 8201)

Jeremy Chan, Esq.
Barrister-at-law
Suites 1517 Two Pacific Place
88 Queensway, Admiralty
Hong Kong

Dear Sis,

Re: Advice on Employment Ordinance and Matters Relating to Legislation Procedures

We act for Mr Chan Kwok Man Edward (陳國民先生) and refer to the forthcoming consultation conference with Counsel next Monday, on the 19th June 2006 at 5:30 pm.

Counsel is instructed to advise on the following issues thereat:-

1. If there is (are) any statutory provision(s) in the Employment Ordinance, Cap. 57 expressing and/or implying that wages include "all commissions" ("**Issue 1**");

2. The legislation procedures for amending the Employment Ordinance, Cap. 57 and the procedures relating to "Judicial Review" proceedings ("**Issue 2**");

3. The possible means (if any), including Judicial Review and lawsuits that can be taken for the purposes of blocking improper legislation procedures for amending the Employment Ordinance, Cap. 57.

.../2

17th June 2006
Mr. Denis Chang, S.C.
And Jeremy Chan, Esq.

Mr Chan Kwok Man, Edward, Mr Arron Shum and Mr K.B. Chan, the representatives of the 33 Associations under "香港各界商會聯席會議" will attend thereat.

We look forward to meeting Counsel next Monday.

Yours faithfully

BK/kp
c.c. (1) 香港各界商會聯席會議
(By Fax: 2362-3647 and By E-mail: gmoffice@jewelry.org.hk)
(2) Mr Edward Chan (By E-mail: edward@germanpool.com)

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Website: www.bk.com.hk

OUR REF: 9218-MS-01-0106 DATE: 17th June 2006

YOUR REF: LR LRD/12-1/2-46III

PLEASE REPLY TO: Mr. Benny Kong
Direct email: litigation@bk.com.hk

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BY POST BY FAX (2545-2959)

The Labour Department (Labour Relations Division)
The Commissioner for Labour
16/F, Harbour Building
38 Pier Road, Central
Hong Kong

Attn: 張建宗先生 及 古超程先生

Dear Sirs

Re: Employment Ordinance, Cap. 57 and Matters Relating to "Legislature Intent"

We act for 香港各界商會聯席會議 and the Associations thereunder.

We refer to the conference held at the offices of The Federation of Hong Kong Industries on 23rd May 2006 regarding some proposed amendments to the Employment Ordinance, Cap. 57, the letter dated 24th May 2006 issued by 香港各界商會聯席會議 to you and your ensuing reply letter dated 26th May 2006 issued to 香港各界商會聯席會議.

At the said conference, 張建宗先生, the Permanent Secretary for Economic Development and Labour (Labour) & Commissioner for Labour of The Labour Department repeatedly mentioned that the above proposed amendments were to reflect a "政策原意" ("the said 政策原意").

We are instructed by 香港各界商會聯席會議 to enquire for your replies/answers to the followings:-

.../2

17th June 2006
The Labour Department

1. If the said 政策原意 then in mind of Mr Cheung thereat refers/referred to those 政策原意 made on or prior to 17th May 1996 ("**1996** 政策原意"); and

2. If the said 政策原意 then in mind of Mr Cheung thereat refers/referred to those "政策原意" made after 17th May 1996 but before 23rd May 2006 ("**2006** 政策原意").

We look forward to receiving your prompt replies/answers to the above within the next seven (7) days.

Yours faithfully

BK/kp
c.c. (1) 香港各界商會聯席會議
(By Fax: 2362-3647 and By E-mail: gmoffice@jewelry.org.hk)
(2) Mr Edward Chan (By E-mail: edward@germanpool.com)

BENNY KONG & PETER TANG
SOLICITORS
江炳滔律師事務所
Agents for Patents, Trade Marks and Designs
專利、商標及外觀設計註冊代理人

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Website: www.bk.com.hk

OUR REF: 9218-MS-01-0106 DATE: 22nd June 2006

YOUR REF: LR LRD/12-1/2-46III

PLEASE REPLY TO: Mr. Benny Kong
Direct email: litigation@bk.com.hk

URGENT

BY POST BY FAX (2545-2959)

The Labour Department (Labour Relations Division)
The Commissioner for Labour
16/F, Harbour Building
38 Pier Road, Central
Hong Kong

A.I.
Air/Regd
Hand/Fax
By .....

Attn: 張建宗先生 及 古超程先生

Dear Sirs

Re: Labour Department's Proposal(s) To The Employment Ordinance, Cap. 57

We refer to our letter dated 17th June 2006.

We were given by our clients to understand that there has been a document titled 「修訂《僱傭條例》以充份反映有關計算法定權益的政府政策原意」("the said Document") issued by you to the Labour Advisory Board and passed by the said Labour Advisory Board to our clients.

The said Document stipulates, inter alia six (6 nos.) proposals reading the followings:-

> "• *有鑑於終審法院的裁定* ... ...
> ... ...
> • *我們無意就修訂建議提供追溯期。*".

A copy of the said Document is enclosed herewith for your easy reference.

.../2

Partners:
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EDMOND YEUNG 楊名遠律師 Ext: 105 Direct Line: 3105 5105
JACQUELINE CHAN 陳特雯律師 Ext: 119 Direct Line: 3105 5119

22nd June 2006
The Labour Department

Our clients were enquired and asked by the said Labour Advisory Board to reply to and make comment on "Your Proposals" to amend the Employment Ordinance, Cap. 57 ("the said Request").

To facilitate our clients in targeting the correct document and/or in making a prompt reply to the said Request, we are instructed by our clients to ask for your written confirmation that:-

> *"The six (6 nos.) proposals stated in the said Document reflect all your and your latest proposals to the Employment Ordinance, Cap. 57"*

Our clients' reply to the said Request has to be submitted to the said Labour Advisory Board on or before 24th June 2006. For the foregoing reason, we urge your reply and/or written confirmation by close of business tomorrow, on the 23rd June 2006.

We look forward to receiving from you tomorrow.

Yours faithfully

BK/kp
Encl (1 page)
c.c. (1) 香港各界商會聯席會議
(By Fax: 2362-3647 and By E-mail: gmoffice@jewelry.org.hk)
(2) Mr Edward Chan (By E-mail: edward@germanpool.com)

修訂《僱傭條例》以充分反映有關計算法定權益的政府政策原意

政府政策原意

- 在計算《僱傭條例》下僱員應享有的法定權益時，應以《僱傭條例》界定的「工資」爲準則。在1997年6月，《僱傭條例》曾作出修訂，明確訂明「工資」指能以金錢形式表示的所有報酬，包括佣金、勤工花紅、勤工津貼等(不論其名稱或計算方式但屬賞贈性質或僅由僱主酌情付給者除外)。

終審法院的裁決

- 終審法院於2006年2月審理Lisbeth Enterprises Limited與Mandy Luk一案時，指出在《僱傭條例》中並沒有可行的計算方法，將案中按月計算的佣金計入僱員的假日薪酬及年假薪酬之內。案中的僱員需根據其每月的銷售總額，按一個對照表而獲發佣金。佣金的金額每月不同，金額在月底確定後發放。

修訂《僱傭條例》的建議

- 有鑑於終審法院的裁決，我們認爲有需要修訂有關假日薪酬及年假薪酬的條文，以不折不扣地充分反映我們的政策原意，即在計算假日薪酬及年假薪酬時，佣金(不論其計算方式)應納入爲「工資」的一部分，以確保有清晰的法律可供遵循和執行。
- 修訂不會更改《僱傭條例》下「工資」的定義，亦不會將屬賞贈性質或僅由僱主酌情付給的佣金包括在「工資」定義之內。
- 由於《僱傭條例》內代通知金、年終酬金、產假薪酬和疾病津貼的法律條文與有關假日薪酬和年假薪酬的條文相似，我們亦建議對它們的計算方法作出類似的澄清，以剔除任何含糊或不明確的成分。
- 我們建議沿用現時的計算方法，以僱員最近一個月的平均工資(即參考僱員在緊接或截至法定假日、年假首天或其他有關日期爲止爲期不少於28天及不多於31天的完整工資期內每日平均所賺取的工資)爲計算法定權益的基礎。
- 換句話說，修訂建議並沒有爲僱員訂立新的權益，也沒有在計算現有法定權益的方法上作出任何基本的改變。
- 我們無意就修訂建議提供追溯期。

勞工處
2006年5月

BY FAX (2519 3610) & MAIL (10 pages)

勞工處（總處）
Labour Department (Headquarters)
Your reference 來函編號： 9218-MS-01-0106
Our reference 本處檔案編號： LD LRD/12-1/2-46 III
Tel. number 電話號碼： 2852 3517
Fax number 傳真機號碼： 2545 2959

23 June 2006

Messrs. Benny Kong & Peter Tang
Solicitors
21/F, Tesbury Centre
28 Queen's Road East
Hong Kong
(Attn.: Mr. Benny KONG)

Dear Sirs,

Re: Proposed amendments to the Employment Ordinance

I refer to your letters of 17 and 22 June 2006.

The one-page Chinese document entitled "修訂《僱傭條例》以充分反映有關計算法定權益的政府政策原意" attached to your letter of 22 June 2006 was prepared for Labour Advisory Board Employer Members with a view to facilitating them in their consultation with members of their associations. The document was meant to be an aide-memoire setting out the key points of the issue and, as such, should not be treated as a definitive or exhaustive statement of the proposed amendments.

We briefed the Legislative Council Panel on Manpower on the progress of the amendment proposal at its meeting on 30 May 2006. The bilingual versions of the information paper for the meeting are enclosed for your ease of reference. The paper is also available on the website of the Legislative Council at:

English version:

http://www.legco.gov.hk/yr05-06/english/panels/mp/papers/mp0530cb2-2119-3-e.pdf

Chinese version:

http://www.legco.gov.hk/yr05-06/chinese/panels/mp/papers/mp0530cb2-2119-3-c.pdf

Yours faithfully,

C. S. Koo

(C S KOO)
for Permanent Secretary for Economic Development
and Labour (Labour)/ Commissioner for Labour

Encl.

LC Paper No. CB(2)2119/05-06(03)

For information on
30 May 2006

Legislative Council Panel on Manpower

A proposal to amend the Employment Ordinance to adequately express the Government's policy intention concerning the calculation of statutory entitlements

Purpose

This paper briefs Members on the latest progress on a proposal to amend the Employment Ordinance ("EO") to put beyond doubt that all components of "wages", including **commission of a contractual nature,** however designated or calculated, are to be reckoned for the purpose of calculating statutory entitlements under the EO.

Background

2. The EO sets out the statutory entitlements of employees and specifies the related calculation methods. These statutory entitlements include, inter alia, wages in lieu of notice ("WILON") to terminate employment, end-of-year payment ("EYP"), maternity leave pay ("MLP"), sickness allowance ("SA"), holiday pay ("HP"), and annual leave pay ("ALP").

3. The calculation methods for individual entitlements are provided under the respective sections of the EO. Although there are some variations to the construction of these provisions, they generally make reference to "wages"[1] as defined under section 2 of the EO which expressly include **commission of a contractual nature.**

4. In a recent case before the Court of Final Appeal (CFA), i.e. Lisbeth Enterprises Limited vs Mandy LUK ("the Lisbeth case"), it was ruled that commission accrued and calculated on a monthly basis was not to be included in the calculation of HP and ALP on the ground that sections 41 and 41C of the EO did not provide for a workable mode of calculation. In the Lisbeth case, the employee concerned received a monthly basic salary of $5,600 per month. She

---

[1] Under section 2 of the EO, "wages" means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment, with a few exceptions, one of which is commission which is of a gratuitous nature or which is payable only at the discretion of the employer.

was also contractually entitled to commission on a sliding scale dependent on the value of her gross monthly sales volume. The amount of commission varied from month to month and was payable to the employee after it was ascertained at the end of each month.

5. The CFA's ruling on the Lisbeth case on 28 February 2006 has raised the question as to whether the relevant provisions under the EO could adequately express the original policy intention. This has also become an issue of considerable public concern.

Government's Policy Intention

6. The policy intention behind the calculation of statutory entitlements of employees under the EO is that "wages" inclusive of **commission of a contractual nature** should be used as the basis for all calculations. This is to ensure that an employee's take-home pay would not be affected if he/she enjoys a statutory entitlement such as taking a statutory holiday or a period of annual leave.

7. In March 1996, the Labour Advisory Board endorsed a proposal to amend the definition of "wages" to expressly include **commission of a contractual nature**, attendance bonus/allowance, travelling allowance, and overtime pay if they constitute a regular or substantial part of an employee's wages. The Employment (Amendment)(No.2) Ordinance 1997 was subsequently enacted in June 1997. This amendment exercise aimed at removing any ambiguities or inadequacies in the definition of "wages", and putting beyond doubt that commission and some other payments to an employee are part and parcel of the employee's wages for the purpose of calculating statutory entitlements under the EO. This policy intention was clearly spelt out in paragraph 20 of the relevant Legislative Council brief, which is reproduced as follows:

> "These proposed amendments [to include commission and other payments in the definition of "wages"] will not create a new liability on employers to pay commission, attendance bonus, attendance allowance, travelling allowance and overtime pay. Rather, they seek to clarify the nature of these payments when they are already provided under the contract of employment to the effect that they should be reckoned as part of an employee's wages when calculating the amounts of statutory entitlements under the Employment Ordinance. Those statutory entitlements which are calculated on the basis of an employee's wages include wages in lieu of notice to terminate employment, severance payment, long service payment, maternity leave pay and sickness

allowance (plus penal damages for wrongful termination), holiday pay, annual leave pay and end-of-year payment."

Conciliation and Adjudication of Claims

8. Since the enactment of the Employment (Amendment)(No.2) Ordinance 1997 in June 1997, the Labour Relations Division (LRD) of the Labour Department (LD) has been assisting aggrieved employees to pursue claims for statutory entitlements calculated on the basis of "wages" as defined under section 2 of the EO. Regardless of the system and mode of payment, **commission of a contractual nature** has always been included as part of wages in the calculation of the statutory entitlements when the LRD helps to resolve such claims and disputes. Any claims that cannot be satisfactorily resolved by conciliation are referred to the Labour Tribunal (LT) or Minor Employment Claims Adjudication Board (MECAB) for adjudication in accordance with the amount of claim and number of claimants involved. Despite the CFA ruling on 28 February 2006, we have continued with this referral arrangement to LT and MECAB on unresolved claims and disputes. It is for the Court to determine whether the CFA's ruling would apply, having regard to the particular facts of the case.

Amendment Proposal

9. The recent *Lisbeth case* has shown that the Government's policy intention has not been fully reflected. We therefore need to amend the provisions for HP and ALP such that **commission of a contractual nature**, regardless of the system and mode of payment, should form part of an employee's wages for the purpose of calculating HP and ALP. This is to ensure certainty of the law for the purposes of compliance and enforcement.

10. We are aware of the fact that the CFA's ruling may have read-across implications on other provisions of the EO. Given that the provisions for WILON, EYP, MLP or SA have a construction similar to that of HP and ALP, for the avoidance of doubt and ambiguity, we propose to make similar clarifications to the mode of calculation of these statutory benefits.

11. Accordingly, legislative amendments would be required in respect of the calculation methods for the following statutory entitlements under the EO:

(i) Sections 7 and 8A on WILON;
(ii) Sections 11A, 11D and 11F(2) on EYP;
(iii) Sections 14(3), 15(2) and 15(3) on MLP;
(iv) Sections 33(4BA) and 35 on SA;

(v) Section 41 on HP; and

(vi) Section 41C on ALP.

12. These sections would need to be amended to ensure that all components of wages inclusive of **commission of a contractual nature** would be netted in the calculation of the relevant statutory entitlements. As regards the mode of calculation, it is proposed that the existing and well-tried mode, which makes reference to the average daily wages of an employee during the latest month (i.e. the average of the daily wages earned by an employee on each day on which he worked during every complete wage period, comprising not less than 28 days and not more than 31 days, immediately preceding or expiring on the statutory holiday, first day of the annual leave, or other relevant dates), should be maintained as the basis for the calculation of statutory entitlements.

13. It must be emphasized that the proposed amendments do not seek to introduce any new rights and benefits for employees, or create new obligations for employers. Nor do they seek to make any fundamental change to the mode of calculation of the existing statutory entitlements. They are designed solely to adequately express the original policy intention as highlighted at paragraphs 6 and 7 above, no more nor less.

Consultation

14. The Labour Advisory Board has been consulted on the proposal. Employee Members were supportive of the proposal. Employer Members accepted the need to address the problem. However, in view of the concern and worries of the business sector, they hoped to have more time to examine the issue more fully.

Way Forward

15. The LD will spare no effort in bringing the employer and employee sides of the Labour Advisory Board together with a view to formulating an amendment proposal for Members' discussion as soon as possible. At the same time, we will continue to discuss with the relevant employer groups in an effort to allay their worries and address their concerns.

Economic Development and Labour Bureau
Labour Department
May 2006

立法會CB(2)2119/05-06(03)號文件

2006年5月30日會議
資料文件

立法會人力事務委員會

修訂《僱傭條例》以充分反映有關計算法定權益的政府政策原意

目的

本文件旨在向委員簡報一項修訂《僱傭條例》的建議的最新進展，該修訂建議旨在指明在計算僱員在《僱傭條例》下可享有的法定權益時，「工資」的所有組成部分，包括根據合約需要支付的佣金，不論其名稱或計算方法，應無可置疑地包括在計算之內。

背景

2. 《僱傭條例》列明僱員可享有的法定權益及有關的計算方法。這些法定權益包括終止僱用的代通知金、年終酬金、產假薪酬、疾病津貼、假日薪酬、年假薪酬及其他項目。

3. 個別權益的計算方法分別載列於《僱傭條例》的有關條文。雖然這些條文的行文互有不同，但基本都引用《僱傭條例》第2條所界定的「工資」[1]，而「工資」的定義明確包括根據合約需要支付的佣金。

4. 在最近一宗由終審法院審理的個案中(即Lisbeth Enterprises Limited vs Mandy LUK案，以下簡稱Lisbeth案)，法院裁定由於《僱傭條例》第41及41C條並無提供可行的計算方法，因此按月結算的佣金不應計入假日薪酬及年假薪酬之內。在Lisbeth案中，有關

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[1] 《僱傭條例》第2條訂明，「工資」指付給僱員作爲該僱員根據其僱傭合約所做或將要做的工作而能以金錢形式表示的所有報酬、收入、津貼(包括交通津貼及勤工津貼、勤工花紅、佣金及超時工作薪酬)、小費及服務費，不論其名稱或計算方式，但不包括一些例外情況，例如屬賞贈性質或僅由僱主酌情付給的任何佣金。

僱員的基本月薪爲每月 5,600 元；而按其合約，她亦可根據其每月銷售的總額，按一個對照表而獲取佣金。佣金的金額每月不同，並且須在有關金額在月底確定後才獲發放。

5. 終審法院就 Lisbeth 案於 2006 年 2 月 28 日所作出的裁決，帶出了《僱傭條例》相關條文是否能充分反映政策原意的問題，亦引起不少公眾關注。

政府政策原意

6. 就計算僱員在《僱傭條例》下的法定權益，背後的政策原意是所有法定權益的計算應以包括根據合約需要支付的佣金的「工資」爲基礎。這是爲了確保僱員在享用如法定假日或年假等法定權益時，其實際收入不會受到影響。

7. 勞工顧問委員會於 1996 年 3 月通過一項修訂「工資」定義的建議，明確訂明工資包括根據合約需要支付的佣金、勤工花紅／津貼、交通津貼及超時工作薪酬(如這些款項屬經常性質或佔其工資的一定比例)。有關修訂，即《1997 年僱傭(修訂)(第 2 號)條例》，隨後在 1997 年 6 月獲得通過。此項修訂主要是消除「工資」定義中任何含糊或不足之處，及明確地指出在計算《僱傭條例》下的法定權益時，佣金及其他支付給僱員的款項乃僱員工資不可分割的組成部分。有關的立法會參考資料摘要第 20 段清楚闡明此政策原意，現輯錄如下：

> 「這些擬議修訂[把佣金及其他款項列入「工資」定義內]不會令僱主須另外承擔責任，支付佣金、勤工花紅、勤工津貼、交通津貼及超時工作薪酬。反之，這些修訂旨在闡釋已在僱傭合約內載明的款項的性質，以訂明根據《僱傭條例》計算僱員可依法領取的款額時，上述款項應算作僱員工資的一部分。根據僱員工資計算的法定應得款項，包括終止僱用的代通知金、遣散費、長期服務金、產假薪酬及疾病津貼(包括不當解僱的賠償罰金)、假日薪酬、年假薪酬及年終酬金。」

調解及仲裁勞資糾紛

8. 自《1997 年僱傭(修訂)(第 2 號)條例》在 1997 年 6 月獲得通過以來，勞工處勞資關係科一直協助受屈的僱員在其追討各項法定權益的申索時，以《僱傭條例》第 2 條所界定的「工資」爲計算基礎。在勞資關係科協助解決這些申索及糾紛的過程中，根據合約需要支付的佣金(不論其計算及支付方法)均會被視作「工資」的一部份，以計算法定權益。任何未能透過調解而獲得完滿解決的個案，都會根據申索的金額和涉及的申索人數獲轉介到勞資審裁處或小額薪酬索償仲裁處以作出仲裁。儘管終審法院 2006 年 2 月 28 日的裁決，我們仍然一如以往，繼續將未能成功調解的個案轉介勞資審裁處和小額薪酬索償仲裁處，讓法院根據案情，決定終審法院的裁決是否適用。

修訂建議

9. 最近 Lisbeth 案顯示有關條文未能充分反映政府的政策原意，因此我們需要修訂有關假日薪酬及年假薪酬的條文，即在計算假日薪酬及年假薪酬時，根據合約需要支付的佣金(不論其計算及支付方法)應納入爲「工資」的一部分，以確保有清晰的法律可供遵循和執行。

10. 我們留意到終審法院的裁決，可能會影響《僱傭條例》的其他條文。由於有關代通知金、年終酬金、產假薪酬或疾病津貼的條文行文與有關假日薪酬和年假薪酬的條文相似，我們建議對它們的計算方法作出類似的澄清，以避免出現疑問或不明確的情況。

11. 因此，下列《僱傭條例》中法定權益的計算方法，需要相應作出修訂：

(i) 第 7 及 8A 條 (有關代通知金)；
(ii) 第 11A、11D 及 11F(2)條 (有關年終酬金) ；
(iii) 第 14(3)、15(2)及 15(3)條 (有關產假薪酬) ；
(iv) 第 33(4BA)及 35 條 (有關疾病津貼) ；
(v) 第 41 條 (有關假日薪酬) ；及
(vi) 第 41C 條 (有關年假薪酬) 。

12. 這些條文將會被修訂，以確保在計算有關的法定權益時，所有「工資」的組成部分，包括根據合約需要支付的佣金，均會被包括在內。至於計算法定權益的方法，我們建議繼續沿用現時行之有效的方法，以僱員最近一個月的平均每日工資〔即僱員在緊接或截至法定假日、年假首天或其他有關日期爲止爲期不少於28 天及不多於 31 天的完整工資期內每日平均所賺取的工資〕爲計算基礎。

13. 我們必須強調，這次法例修訂無意爲僱員訂立新的權益或爲僱主帶來新的責任，亦無意在計算現有法定權益的方法上作出任何基本的改變。建議只旨在不折不扣地充分反映上文第 6 及第7 段所強調的政策原意。

諮詢

14. 我們已就修訂建議諮詢勞工顧問委員會。僱員委員支持有關建議。至於僱主委員方面，他們表示有需要處理有關問題，但鑑於業界的關注和疑慮，他們希望有多點時間就此課題作更深入及全面的探討。

未來路向

15. 勞工處會就此事在勞工顧問委員會的層面努力斡旋，以便盡快提交修訂方案供議員討論。與此同時，勞工處將繼續與有關的僱主團體磋商，以釋除他們的疑慮和回應他們的關注。

經濟發展及勞工局
勞工處
2006 年 5 月

『香港各界商會聯席會議』信箋

香港珠寶製造業廠商會 香港鐘表業總會 香港表廠商會 香港機械金屬業聯合總會 香港金屬製造業協會
香港中華眼鏡製造廠商會 香港電子業商會 香港塑膠再生原
香港鞋業商會 香港塑料袋業廠商會 香港製刷業協會
港九塑膠製造商聯合會 香港中小型企業商會 香港食品
香港電鍍業商會 香港金屬表面處理學會 香港中小企經貿促進會
香港壓鑄業協會 香港合成皮革暨金屬物料供應商商會
香港中藥聯商會 國際中小企聯合商會 國際金融及管理專

致：經濟發展及勞工局
常任秘書長(勞工)兼勞工處處長
張建宗先生

關於：修改「勞工條例」並把「所有佣金」計算為工資一部份（「修例一事」）

對於上述修例一事，【香港各界商會聯席會議】重新表態反對。

於2006年2月28日終審庭法官 Chief Justice Li、Mr Justice Bokhary PJ、Mr Justice Chan PJ、Mr Justice Rebelro PJ 及 Sir Ivor richardson NPJ 在 LISBETH ENTERPISES LIMITED (FACV No. 17 of 2005) 一案中已審決有關之佣金不應計算為薪金一部份。在情、理及法任何一方面來看， 貴處在積極進行上述修例一事有欠公允，並且有分化勞資立場及製造社會不和諧之疑。

無可否應，上述修例一事對香港企業，包括旅遊業、地產業、金融業及零售業等等影響極為深遠。亦因這原故，【聯席會議】認為 貴處作為一政府機構是需要「直接」諮詢市民及各業界意見才決定是否提出上述修例一事。

【聯席會議】在本年6月初已開始就上述修例一事諮詢有關業界。相信在短期內【聯席會議】可提供 貴處各業界的書面意見及立場。

如有任何聯繫，請致電【聯席會議】召集人陳國民先生，電話：9487 0707 或義務秘書處孫小姐，電話：2122 5082。

專此 並祝

台安！

【香港各界商會聯席會議】
秘書長 沈運龍 謹啟
2006年8月22日

副本抄送：何世柱先生
麥建華博士
楊國琦先生
尹德勝先生
劉展灝先生
陳鎮仁先生
各大商會會長

義務秘書處：香港珠寶製造業廠商會
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香港中華眼鏡製造廠商會 香港電子業商會 香港塑膠再生原料協會 香港塑膠原料商會 潮汕塑膠廠商會
香港鞋業商會 香港塑料製業廠商會 香港製刷業協會 香港中小型企業聯合會 香港瓦通紙業廠商會
港九塑膠製造商聯合會 香港中小型企業商會 香港食品商會 香港五金商業總會 香港鑄造業協會
香港電鍍業商會 香港金屬表面處理學會 香港中小企經貿促進會 香港電器製造業協會 右釷汽車商會(香港)有限公司
香港壓鑄業協會 香港合成皮革暨金屬物料供應商商會 香港中成藥商會 香港商業專業評審中心
香港中藥聯商會 國際中小企業合商會 國際金融及管理專業人員協會 國際商貿協會 港九電器商聯會

致： 勞工顧問委員會
何世柱先生
麥建華博士
楊國琦先生
尹德勝先生
劉展灝先生
陳鎮仁先生

關於：修改「勞工條例」並把「所有佣金」計算為薪金一部份（下稱為「修例一事」）

【香港各界商會聯席會議】(下稱為【聯席會議】)，強烈反對上述修例一事。

根據東方日報於2006年8月18日所稱，勞工顧問委員會中有某些資方代表曾表態同意上述修例一事。現附上該報導之副本。

【聯席會議】重申以下立場及意見：-

1. 修例一事對香港企業有莫大及深遠的影響；
2. 在未有廣泛向香港企業諮詢前，「香港政府」是不應該進行修例一事；
3. 因上述原因，勞工顧問委員會的資方代表是不應該表態支持上述修例一事；及
4. 對資方代表於2006年5月29日表態拒絕修例一事，【聯席會議】重申表態支持資方代表之意見，並於6月15日致函「立法會人力事務委員會」，要求收回對資方代表有關出爾反爾之譴責。

【聯席會議】相信，勞工顧問委員會將會在修例一事表決前廣泛諮詢香港企業之意見及與【聯席會議】作緊密溝通。

如有任何聯繫，請致電【聯席會議】召集人陳國民先生，電話：9487 0707 或義務秘書處孫小姐，電話：2122 5082。

專此 並祝

台安！

【香港各界商會聯席會議】
秘書長 沈遐龍 謹啟
2006年8月19日

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香港製刷業協會 香港中小型企業聯合會 香港瓦通紙業廠商會
企業商會 香港食品商會 香港五金商業總會 香港鑄造業協會
香港中小企經貿促進會 香港電器製造業協會 右駕汽車商會(香港)有限公司
金屬物料供應商商會 香港中成藥商會 香港商業專業評審中心
國際金融及管理專業人員協會 國際商貿協會 港九電器商聯會

港各界商會聯席會議】
有關修改《僱傭條例》之事件摘要

1	13/4/2006	【聯席會議】代表聯同立法會代表工業界及商界3位議員呂明華、梁君彥和林健鋒及勞顧會工業總會代表劉展灝與經濟發展及勞工局葉澍堃局長及常任秘書長張建宗等會面，探討政府擬修訂現行《僱傭條例》，希望當局能聽取多方面的意見，慎重考慮修例所帶來的負面影響。葉局長表示希望澄清「立法原意」，令1996年所訂之法例更清晰，不加亦不減，不會增加僱主的負擔，因此僱主毋須擔心。葉局長建議各商會綜合有關意見，交給勞顧會討論。
2	19/4/2006	【聯席會議】代表於香港工業總會召開緊急會議，與立法會梁君彥、林健鋒議員及勞工顧問委員會僱主代表會面，討論有關佣金的計算方式。陳鎮仁表示各行業的特性不同，所受到的影響也不同，提議各商會將資料匯集(包括現行計算佣金之方式)，交予勞顧會。梁君彥建議業界諮詢法律意見，再作探討。
3	28/4/2006	【聯席會議】代表於香港工業總會再次召開緊急會議，就媒體報導政府及勞工顧問委員會勞資雙方委員原則上均同意有關修例建議，將佣金納入為「工資」的一部份，共同商議對策。業界認為僱主與僱員的關係是工作拍檔，而佣金其實是profit-sharing，希望政府能清晰佣金的定義。
4	4/5/2006	【聯席會議】代表於香港工業總會與勞工處吳家光及古超成會面。勞工處提出修例的有關建議，在計算假日薪酬及年假時，佣金（不論其計算方式）應納入為「工資」的一部份，這是1996年修訂法例時的「立法原意」。業界十分尊重終審法院的判決，並不同意勞工處所指有關「工資」定義的解釋。此外，全港數十萬名僱員於1997年法例通過後十年來一直與僱主和諧共處，勞資雙方對佣金是否包括在假日及年假薪酬存有一定的共識，從未就有關佣金計算方式有任何衝突，因此『聯席會議』建議勞工處對修例一事要慎重考慮，並尊重香港法治精神。
5	6/5/2006	【聯席會議】秘書處將有關「工資」的定義傳真予各大商會。

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6	9/5/2006	【聯席會議】代表及勞顧會僱主代表及法律顧問與資深大律師張健利會面，聽取他的法律意見。
7	19/5/2006	【聯席會議】致函經濟發展及勞工局局長葉澍堃，就該局提出修訂現行《僱傭條例》發表立場聲明，並呈交一份資深大律師張健利之法律意見；另抄送副本予經濟發展及勞工局常任秘書長兼勞工處處長張建宗及勞工顧問委員會僱主代表，希望於 5 月 23 日之勞工顧問委員會會議，【聯席會議】能派出數名主要代表列席旁聽。
8	23/5/2006	【聯席會議】與經濟發展及勞工局常任秘書長兼勞工處處長張建宗、勞工顧問委員會及工業總會代表會面，業界強烈反對政府修訂現行《僱傭條例》。張建宗處長改口指出 1997 年之《僱傭條例》是按當時之「政策原意」修訂，助理處長黃國倫答允提供有關政策原意的文件予各商會傳閱。
9	24/5/2006	【聯席會議】致函經濟發展及勞工局常任秘書長張建宗，希望該局在勞顧會於 5 月 29 日會議前給予【聯席會議】有關「政策原意」的文件作參考。
10	24/5/2006	【聯席會議】致函香港工業總會、香港中華總商會、香港中華廠商聯合會、香港總商會及香港僱主聯合會會長/主席，希望各會能一致行動，在勞顧會於 5 月 29 日的會議中授權該會的僱主代表投反對票。
11	25/5/2006	陳國民、沈運龍、陳其鑣及律師江德昌列席香港中華廠商聯合會常董會議，爭取該會的支時。同日，與香港中華總商會名譽會長何世柱會面，爭取該會的支時。
12	26/5/2006	【聯席會議】晚上收到勞工處傅真之「政策原意」文件，察覺「政策原意」文件中當年修例是將工資定義包括以工作換取的固定報酬，正是我們對修例的爭議重點。
13	29/5/2006	【聯席會議】致函經濟發展及勞工局常任秘書長張建宗，另抄送副本予 6 位勞顧會僱主代表，要求勞顧會不要在當日之會議倉卒定案。

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14	29/5/2006	勞顧會會議上僱主代表一致反對政府倉卒修例，勞方代表拉隊離場。
15	1/6/2006	【聯席會議】召開第 23 次全體會議及舉行新聞發佈會，就政府提出修訂《僱傭條例》將佣金納入年假及有薪假期工資計算，對外發表了立場聲明，【聯席會議】的分析與立場以符合「法、理、情」作為出發點，希望政府能夠詳細研究與多方面諮詢，並不贊成倉卒定案修例，以免導致分化勞資雙方，破壞社會和諧。
16	13/6/2006	沈運龍出席香港總商會"SME Committee"之特別會議，就有關"Changing Human Resources Regulatory Environment"，表達【聯席會議】之立場。
17	15/6/2006	【聯席會議】致函立法會主席范徐麗泰議員，對「立法會人力事務委員會」動議譴責勞顧會僱主代表出爾反爾，表示極不同意及遺憾，並促請立法會立即收回有關譴責，以示向勞顧會僱主代表討回公道。
18	15/6/2006	【聯席會議】應香港工業總會之邀，出席工商界之意見大會，與勞顧會委員及香港工業總會代表會面，並向與會者提交資深大律師張健利之法律意見。 地產界代表表示若根據建議，僱主支付的薪酬及佣金將會大幅上升，影響營運成本。有些僱主表示可能會考慮將僱員轉為自僱人士，減少或取消僱員的佣金；而中小企業或會因前景不明朗而結業。香港工業總會建議【聯席會議】將具體數字提交予勞顧會。
19	17/6/2006	【聯席會議】委託律師致函經濟發展及勞工局常任秘書長及勞工處處長張建宗，要求提供「政策原意」之解釋。
20	19/6/2006	【聯席會議】代表與資深大律師會面，諮詢有關「工資的定義」之法律意見。
21	20/6/2006	立法會主席范徐麗泰議員回覆【聯席會議】，表示已於 6 月 15 日「立法會人力事務委員會」會議上將【聯席會議】的意見呈交予各委員，而有關的議題預計於本年 10 月再與政府商討。

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22	24/6/2006	【聯席會議】致函勞顧會香港工業總會代表，就有關勞工處於 5 月 30 日之會議文件：「修訂《僱傭條例》以充份反映有關計算法定權益的政府政策原意」，提出反對意見。
23	19/8/2006	【聯席會議】致函勞顧會僱主代表，就政府修例一事提出強烈反對，並重申有關立場及意見，包括： a. 修例一事對香港企業有莫大及深遠的影響； b. 在未有廣泛向香港企業諮詢前，「香港政府」是不應該進行修例； c. 因上述原因，勞工顧問委員會的僱主代表是不應該表態支持修例； d. 對僱主代表於 2006 年 5 月 29 日表態拒絕修例一事，【聯席會議】重申表態支持僱主代表之意見，並於 6 月 15 日致函「立法會人力事務委員會」，要求收回對僱主代表有關出爾反爾之譴責。
24	21/8/2006	【聯席會議】致函香港總商會常務副主席蔣麗莉，希望香港總商會代表向勞顧會提出【聯席會議】強烈反對修例，並要求香港總商會維護我們的意見。
25	22/8/2006	【聯席會議】致函勞工處處長張建宗，指出勞工處在積極進行修例一事有欠公允，並且有分化勞資立場及製造社會不和諧之疑。而修例一事對香港企業，包括旅遊業、地產業、金融業及零售業等影響極為深遠。因此【聯席會議】認為勞工處需要「直接」諮詢市民及各業界意見才決定是否提出有關修例。
26	28/8/2006	陳國民、沈運龍、陳其鑣與律師江炳滔及江德昌會面，商討向 5 大行業商會及聯席會議成員集資及未來之行動。

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