

LS/B/3/06-07

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By Fax (2545 2959) and By Post

9 February 2007

Dear Miss Fong,

**Employment (Amendment) Bill 2006**

I refer to the drafting and legal aspects of the Employment (Amendment) Bill 2006 and wonder if you could provide information with regard to the following issues –

**Clause 3 of the Bill (Termination of contract by payment in lieu of notice)**

Proposed section 7(1)

1. Paragraph (a)(i) of the proposed section 7(1) of the Employment Ordinance (Cap. 57) (“EO”) (clause 3 of the Bill) seeks to provide that either party to a contract of employment *may at any time terminate the contract without notice* by agreeing to pay to the other party, where the length of notice required to terminate the contract is a period expressed in days/weeks, a sum calculated by multiplying the number of days in the period for which wages would normally be payable to the employee by the daily average of the wages earned by the employee during the period of 12 months immediately before the date on which *the party terminating the contract gives notice of the termination* to the other party (“date of notification”).

2. Please clarify whether the phrase “the party terminating the contract gives notice of the termination to the other party (‘date of notification’)” refers to the lawful termination provided in section 6 of EO.

3. Please explain that in terms of law drafting and operation how the provision of “termination of contract without notice” reconciles with the concept of

“date of notification” (i.e. the party terminating the contract gives notice of the termination to the other party).

4. The reference “date of notification” is used in other parts of the Bill, e.g. proposed section 8A(3). Does the reference apply only to new section 7 of the Bill or to other provisions of the Bill as well?

Proposed section 7(1A)

5. New section 7(1A) seeks to provide that in calculating the daily or monthly average of the wages earned by an employee,

- (a) any period in the preceding 12 months for which the employee was not paid his wages or full wages by reason of any leave (假期) taken by him in accordance with the provisions of EO or the Employees’ Compensation Ordinance (Cap. 282) or with the agreement of his employer (“在僱主同意下”), or by reason of his not being provided by his employer with work on any normal working day, and
- (b) any wages or other sum paid to him for that period,

are to be disregarded. Similar provision is found in other parts of the Bill, e.g. new sections 11A(3), 14(3A), 15(2A), 33(4BAAA), 35(2), and 41(2).

6. Section 2(2) of EO provides that no account of overtime pay shall be taken in calculating the wages of an employee for the purposes of, inter alia, year end payment, maternity leave pay, sickness allowance, holiday pay and annual leave pay unless certain conditions specified in section 2(2), (2A) and (2B) of EO are met. Please explain whether these conditions will be applicable in the calculation of daily or monthly average of the wages under new section 7(1A) of the Bill.

***“Full Wages”***

7. What is the meaning of “full wages”? What is the difference, if any, between “full wages” in the Bill and “wages” as defined in section 2(1) of EO? Are contractual wages contained in the employment contract same as “full wages” provided in the Bill?

***“Leave”***

8. In certain parts of EO, the employee is entitled to statutory protection or benefits while they take days off from work if certain conditions are met, e.g. rest days (Part IV), holidays with pay (Part VIII), and sickness allowance (Part VII), etc. The word “leave” is not used in these provisions although “leave” is used for certain other purposes in EO, e.g. maternity leave (Part III) and annual leave with pay (Part VIIIA).

9. Furthermore, if, under the contract of employment, the employee may take days off from work with (full or partial) pay or without pay (e.g. study leave, extended maternity leave, etc), is such “leave” to be disregarded in the calculation of the daily/monthly average under proposed section 7(1A)?

10. Is it preferable to provide a definition of “leave” in the Bill?

**“Normal work day”**

11. What is meant by “normal working day”? The phrase also appears in section 2(d) of EO. What is the difference, if any, between a normal working day and a day on which under the contract of employment the employee is required to work?

12. Are full time work and full time pay expected on a normal working day?

13. How are the “normal working day” and “full wages” to be determined if during the preceding 12-month period, the employment contract has been lawfully varied in terms of working hours and/or wages on various occasions? (For example, if the employer and employee for their own reasons agreed that the employee would not work on a full time basis intermittently during the preceding 12-month period and the employee was paid less than full time pay, would the situation be described as “not being provided by his employer with work on any normal working day”?)

Proposed section 7(1B)

14. In new section 7(1B), it is provided that if for any reason it is impracticable to calculate the daily or monthly average of the wages earned by an employee in the manner provided in new section 7(1), the amount “*may be calculated* by reference to the wages earned by a person who was employed in the same trade or occupation and at the same work in the same district” (“the similar wages approach”) during the preceding 12-month period. This seems to be an adaptation of the deeming provision in the existing section 7(3) of EO regarding piece or task remuneration. Similar provision is found in other parts of the Bill, e.g. proposed section 41C(3).

15. Please provide further information on the following issues -

- (a) Who has the burden of proof to establish that it is impracticable to calculate the daily or monthly average of the wages?
- (b) If it impracticable to calculate the daily or monthly average of the wages, is it mandatory, permissive or discretionary to adopt the similar wages approach?
- (c) What kind of evidence, whether documentary or oral, is required to be

produced to prove “the wages earned by a person who was employed in the same trade or occupation and at the same work in the same district”? Please also advise if there is any case law or authority where the similar wages approach in the existing section 7(3) of EO has been considered.

**Clause 4 of the Bill (Wrongful termination of contract)**

16. New section 8A(1) of the Bill seeks to provide that where a contract of employment is terminated otherwise than in accordance with section 6 (termination of contract by notice) or 7 (termination of contract by payment in lieu of notice) of EO, a sum equal to the amount of wages that would have been payable had the contract been terminated in accordance with section 7 (instead of a sum which would have accrued to the employee during the period of notice required by section 6 as provided in the existing section 8A(1)) shall be payable by the party terminating the party to the other party.

17. Please explain whether in effect there will be any change in the amount of the statutory entitlement under new section 8A(1) and if so, the reason for introducing the change.

I look forward to your reply in bilingual form on or before 22 February 2007.

Yours sincerely,

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Assistant Legal Adviser

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