

Bills Committee on Minimum Wage Bill

Administration's proposed changes to the Minimum Wage Bill

Introduction

This paper sets out the Administration's proposed changes to the Minimum Wage Bill (the Bill) in response to concerns and suggestions made by Members of the Bills Committee.

Proposed major changes to the Bill

Exemption of employees on student internship

Proposed relaxation

2. Student internship does not necessarily involve employer-employee relationship and the Bill, being aligned with the Employment Ordinance (EO), does not apply if there is no contract of employment between a student intern and the host organisation. Similarly, neither the EO nor the Bill covers pupillage or a volunteer not being in an employment status. Where a student internship involves an employer-employee relationship, the Bill exempts from statutory minimum wage (SMW) an internship which is arranged or endorsed by an education institution specified in Schedule 1 and forms a compulsory or elective component of the requirements for the award of the academic qualification in a full-time locally-accredited programme. This strikes a reasonable balance between preserving students' internship opportunities as necessitated by their curricula on the one hand and preventing abuse and displacement of other employees, particularly elementary workers, school leavers and graduates, on the other.

3. In response to the requests and suggestions made by Members and some stakeholders to widen the exemption for student-employees so as to preserve their internship opportunities, we would like to propose, after careful consideration, additional exemptions under the Bill as follows:

- (a) An intern employee who is a Hong Kong resident pursuing full-time non-local education at undergraduate level or above and undertaking internship in Hong Kong which is arranged or endorsed by his education institution and forms a compulsory or elective component of the requirements for the award of the academic qualification will also be exempted from SMW. In other words, similar exemption in the Bill would be extended to intern employees who are Hong Kong residents studying in full-time non-local education programme at undergraduate level or above.
- (b) (i) An intern employee studying in a full-time locally-accredited programme in an education institution specified in Schedule 1, irrespective of whether the internship is curriculum-related or not and whether there is involvement of the institution or not in arranging the internship, will also be exempted from SMW, subject to the conditions that the employment is for 59 calendar days or less¹ and the employee is below 26 years of age² at the beginning of the employment. In case of an intern employee working for the same employer, the exemption from SMW is limited to once in a year.
- (ii) The exemption, together with the duration and age caps, will also apply to intern employees who are Hong Kong residents pursuing full-time non-local education at undergraduate level or above.

4. The exemption proposals in paragraph 3(a) and (b)(ii) related to non-local education must be confined to student-employees who are Hong Kong residents. The Labour Advisory Board (LAB) strongly supports this restriction, as the absence of which could open a floodgate for people from other jurisdictions to work in Hong Kong under intern status, which would be hard to verify. This would also displace our students from those available internship places.

5. We also propose that in engaging an intern employee exempted from SMW, the wage and employment records kept by the employer under the EO should include the document(s) issued by the concerned

1 For reference, employees engaged for 60 days or more must be enrolled in a mandatory provident fund scheme.

2 For reference, the Financial Assistance Scheme for Post-secondary Students has an age requirement of 25 or below.

institution containing relevant information. For the existing exemption in the Bill and the additional exemption in paragraph 3(a), the information should indicate that the institution has arranged or endorsed the internship which forms a compulsory or elective component of the requirements for the award of the academic qualification. As for the additional exemption in paragraph 3(b), it should show that the employee is studying in the concerned full-time programme.

Potential enforcement challenges

6. The proposals seek to address the grave concerns expressed by Members and some stakeholders regarding the impact of SMW on internship opportunities of student-employees. However, it is pertinent to note the potential enforcement problems as stated below.

7. In extending the exemption to full-time students of non-local institutions proposed in paragraph 3(a) and (b)(ii) above, since there are numerous education institutions around the world, it would not be possible to draw up a comprehensive list of non-local institutions for quick and easy determination of whether the student-employees are indeed bona fide full-time students of those institutions as claimed. Offence and complaint investigations in enforcing the SMW provisions would not be easy as we would require the cooperation of those non-local institutions and this could take considerable time.

8. For the exemption proposal in paragraph 3(b), the limit on the duration of employment is designed to reduce as far as possible part-time and summer jobs being re-packaged as internship not subject to SMW. However, since the employment is no longer linked to internship which is arranged or endorsed by the education institution and forms a compulsory or elective component of the requirements for the award of the academic qualification, the number of students that could qualify for exemption would be considerably larger. For reference, the number of full-time post-secondary students stood at 158 220 for the school year 2008/09. This could pose an enforcement challenge should the number of complaints be high.

Other suggestions

9. We do not propose exempting secondary school students from SMW since the extent of enforcement problems would be even greater

because of their large numbers (231 659 students at secondary 4 to 7 levels for the school year 2008/09) and the fact that summer jobs taken up by secondary school students are mostly elementary work.

10. As regards the suggestion to exempt graduate-employees on internship from SMW, since graduates are no longer students, they should, as a matter of principle, be protected by SMW when an employment relationship exists, just like other employees. This principle is unanimously supported by LAB.

Requirement of keeping the total number of hours worked by employees

11. Compliance with the minimum wage requirement is checked by multiplying the total number of hours worked by the employee in the wage period by the SMW rate and comparing against the actual wages payable during that wage period. It is therefore essential for the total number of hours worked to be included in the wage and employment records required under the EO. However, in view of the strong concerns of Members and some stakeholders over the related administrative costs of employers, we propose to exempt employers from recording the total number of hours worked of employees whose wages are not less than an amount in the concerned month to be prescribed in a schedule to the Bill.³

Recommendation of the SMW rate by the Minimum Wage Commission

12. As now proposed in the Bill, the Minimum Wage Commission (MWC) would advise on the timing and frequency of reviews of the SMW rate. This is consistent with the principle of adopting an evidence-based approach in setting and reviewing the SMW rate. It also preserves flexibility to cater for the needs and circumstances prevailing in Hong Kong at the time. We appreciate the suggestions by Members that the MWC should review the SMW rate regularly although the review may not necessarily result in any change to the rate in force. We will propose change to the Bill to specify a regular review interval of not less than once every two years. To enhance greater transparency of the work of the MWC, the Bill will provide that the Administration will make public the contents of the MWC's report.

³ The threshold is a proportionate amount if the wage period is not monthly.

Transitional arrangement for persons with disabilities already in employment

13. As we have explained to the Bills Committee at previous meetings, a transitional arrangement is proposed to be included in the Bill to minimise the impact of the SMW legislation on persons with disabilities (PWDs) who are already in employment and earning below the SMW rate, particularly those with more severe disabilities. The principle remains that the discretion to avail oneself of the transitional arrangement can only be exercised by the PWD. The proposal has been worked out in collaboration with the rehabilitation groups, and the Equal Opportunities Commission (EOC) has been engaged throughout the discussions. We have since then taken into account the views expressed by Members at the Bills Committee meetings and improved the proposal in collaboration with the rehabilitation groups and with the participation of the EOC. Specifically, a serving PWD with a wage rate below the SMW may make the following choice prior to the implementation of SMW:

- (a) To opt for SMW;
- or (b) To opt for a productivity assessment, which can be conducted whenever the serving PWD chooses to do so (i.e. without a prescribed time limit).

For (b), the serving PWD may invoke the assessment after the SMW has taken effect in order to help determine whether he should be remunerated at not lower than the SMW rate or a level commensurate with his productivity. There is no time limit for the serving PWD to initiate the assessment. Before the assessment, he is entitled to no less than his current contractual wage rate below SMW (pitched at the same percentage of the prevailing SMW rate in case there is a change in the latter⁴) when he remains in the same employment for the same work. Both the employer and the serving PWD must jointly sign an option form to signify clearly the decision made by the PWD in opting for a productivity assessment. Otherwise, the PWD should be

⁴ For example, if the current contractual wage rate of a serving PWD is 90% of the initial SMW rate, and there is a change in the SMW rate before the assessment, then this 90% would equally apply to the new SMW rate.

paid not less than SMW.

14. It is important to reiterate that the right to make a choice is vested in the serving PWD employee, not his employer. The proposal is in compliance with the Disability Discrimination Ordinance and relevant human rights provisions of the Basic Law.

Other minor changes to the Bill

15. We propose a few technical changes to the Bill in response to the suggestions made by Members, as explained in the ensuing paragraphs.

Clause 3

16. Under clause 3(1)(a), hours that must be taken to be included in computing minimum wage is the time during which the employee is in attendance at a place of employment. Such time is qualified by the notion of “in accordance with the contract of employment or with the agreement or at the direction of the employer” in the definition of “place of employment” in clause 2. To avoid doubt, clause 3 will be refined to incorporate this notion into the provision on the time when the employee is in attendance at a place of employment.

17. Clause 3(2)(a) serves to clarify that meal break is not included in computing minimum wage if the employee is not doing work under the contract of employment or with the agreement or direction of the employer. It does not seek to change the existing arrangements under the EO whereby employers and employees are free to agree between themselves the employment terms on meal break, viz. the duration of meal break and whether it is regarded as working hours. We appreciate the views of Members that clause 3, without clause 3(2)(a), remains clear enough to employers and employees. We will therefore propose to remove clause 3(2)(a). This will not change the spirit of clause 3. Specifically, meal break falling outside clause 3(1) is not hours worked under clause 3 for calculating minimum wage. If meal break is regarded as working hours under the employment contract or agreement between the employer and the employee, it is hours worked in computing minimum wage under the Bill, notwithstanding that it is not covered by clause 3 which does not seek to give an exhaustive list of hours worked for SMW computation.

Clause 5(5)

18. Clause 5(5) sets out how commission should be counted for SMW computation in respect of a wage period in order to provide clear guiding principles to determine whether the employee is remunerated at not less than the SMW rate. We will refine clause 5(5) to clarify the counting of commission in a wage period when it is paid with prior agreement of the employee. It is also pertinent to note that under the EO, the employer and the employee can agree between themselves that a particular commission is payable in respect of a certain wage period or a number of wage periods, and the Bill does not change this.

Clause 10 and section 1(2) of Schedule 4

19. For the composition of the MWC, clause 10 will be refined to make it clear that not more than three non-official members will be appointed each from the labour sector, the business sector and the relevant academia. In appointing the members, regard will be given to a balanced number of members with labour, business, academia and government backgrounds. As for section 1(2) of Schedule 4, “任期” will be revised to read as “任免” since Members consider that the latter corresponds better with the English version.

Publicity and promotion

20. Prior to the implementation of SMW, the Labour Department will vigorously launch a wide range of publicity and promotional activities to enhance public awareness of the SMW requirement and facilitate employers and employees to understand their respective obligations and entitlements under the SMW regime. We will include in the publicity materials illustrative examples drawn from different trades and industries to elucidate the application of the provisions on hours worked and wages, including commission, for determining employees' entitlement to SMW. Our engagement process with stakeholder groups will also continue in respect of the preparatory work for implementation, such as the drawing up of guidelines for the concerned sectors.

Way forward

21. The Administration will proceed with the preparation of the necessary Committee Stage Amendments to the Bill.

Labour and Welfare Bureau
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