

Bills Committee on Minimum Wage Bill

Administration's Response to Hon LEE Cheuk-yan's List of Questions

Introduction

Further to our earlier paper submitted to the Bills Committee (LC Paper No. CB(2)212/09-10(01)), the ensuing paragraphs deal with the rest of the questions.

Application of the Ordinance: meaning of “employee”

Question 6

2. Regarding the case of *POON Chau-nam (Appellant) v YIM Siu-cheung trading as Yat Cheung Airconditioning & Electric Co (Respondent) (FACV No. 14 of 2006 (Civil))*, it is an appeal case from the District Court and the Court of Appeal. The appellant worker suffered from personal injury in a work-related accident at a building. He was welding a part in an air-conditioner when the welding rod suddenly shattered and a fragment struck his left eye. As a result of the accident, he sustained a 45% loss of earning capacity. The issue to be adjudged was whether the appellant worker was an employee of the respondent company at the time of the accident.

3. The Court of Final Appeal (CFA) considered that there was no single test that would conclusively point to the distinction between an employee and an independent contractor in all cases. The modern approach is to examine all the features of their relationship against the background of the indicia developed with a view to deciding whether, as a matter of overall impression, the relationship is one of employment. For the present case, the CFA found these facts:

- (a) the air-conditioning business belonged to the respondent;
- (b) the appellant's venture into an air-conditioning business on his own account had failed some years previously;
- (c) the respondent decided which, if any, jobs should be assigned to the appellant and paid him to do them at the agreed daily rate, plus any overtime;

- (d) all the profits and losses of the business were for the respondent's account;
- (e) the appellant bore no financial risks and reaped no financial rewards beyond his daily-rated remuneration;
- (f) the respondent managed the business and hired several other workers, some of whom would sometimes work alongside the appellant on a job;
- (g) the appellant personally did the work assigned to him. He did not hire anyone to help;
- (h) travel expenses incurred in the course of the work were borne by the respondent;
- (i) whenever items had to be purchased by the appellant for work purposes, he was reimbursed by the respondent;
- (j) the appellant was a skilled air-conditioning worker and, like the others who were undoubtedly the respondent's employees, did not require supervision or control over the manner of carrying out the work; and
- (k) while the other indicia all point clearly to an employer-employee relationship entered into for each specific engagement, the main difference between the appellant and the other workers was that his employment was of a casual nature whereas theirs was permanent and paid on a monthly basis.

4. The CFA was of the view that the objective facts strongly supported the conclusion that the appellant was an employee at the time of the accident and the fact that he labelled himself a self-employed person for Mandatory Provident Fund purposes would not change the picture concerning the respondent's liability under the Employees' Compensation Ordinance (Cap. 282) (ECO).

Questions 7 and 10

5. The Administration has submitted a paper to the Legislative Council Panel on Manpower on the subject of "Employees vis-à-vis Self-employed Persons", which is attached at Annex A for reference. The paper sets out the rights and benefits of employees under the Employment Ordinance (Cap. 57) (EO) and the ECO, how the rights and obligations of employees and self-employed persons are determined, and the measures

adopted by the Labour Department (LD) in tackling false self-employment.

6. We have no information on the number of workers claiming to be providing cleaning or guarding services in self-employment in single block buildings. As explained in the Administration's paper above, there is no single conclusive test to distinguish an "employee" from a "self-employed person", and all relevant factors of the case should be taken into account in differentiating these two identities. In case of unresolved dispute, it should be subject to the court's determination as to whether a worker has been engaged as an employee and, if so, the identity of the employer. Depending on the facts of individual cases, for a building which is managed neither by a management company nor an owners' corporation, there may be situations where the owners and/or occupants of the flats in the building would be ruled by the court as the employer of the concerned worker.

Question 8

7. The Social Welfare Department (SWD) provides vocational rehabilitation services for persons with disabilities (PWD) who are not ready for open market so as to equip them with job skills that meet market requirements and assist them in securing suitable employment commensurate with their abilities. To meet the various needs of PWD, SWD invites non-governmental organisations (NGOs) to operate different vocational rehabilitation services, including sheltered workshops, supported employment, integrated vocational rehabilitation services centre, integrated vocational training centre, On the Job Training Programme for People with Disabilities and Sunnyway - On the Job Training Programme for Young People with Disabilities. All these vocational rehabilitation services are training-oriented. The NGO operators act as service providers and are required to formulate training plan for each individual participant. Through regular case review on the progress of performance and skill acquisition, the NGO operators will revise the training plan so as to best meet the social rehabilitation needs of individual participants.

8. Corresponding to the service delivery mode of the vocational rehabilitation services as stated above, participants are service users who receive training from the NGO operators for enhancement of their personal capabilities.

9. To sum up, vocational rehabilitation services are welfare services funded by SWD's recurrent subvention allocation to NGO operators and the relationship between the NGO operators of vocational rehabilitation services and the participants is one of service providers and service users.

Question 9

10. Our paper on the Administration's Response to Issues Raised at the Bills Committee Meeting Held on 5 November 2009 would provide information in respect of Question 9.

Application of the Ordinance: live-in domestic workers

Question 11

11. We propose to exclude all live-in domestic workers from the coverage of the Minimum Wage Bill (the Bill), regardless of their sex or race. According to legal advice, the proposed exclusion is legally in order as there are justifiable differences, mainly in working patterns and provision of in-kind benefits arising from dwelling in the households of their employers, between live-in domestic workers and other employees who would be covered by the Bill.

Question 12

12. The Government attaches great importance to protecting the rights and benefits of foreign domestic helpers (FDHs). To this end, since the early 1970s, the Government has prescribed the Minimum Allowable Wage (MAW) and a standard employment contract ("Employment Contract (For a Domestic Helper recruited from abroad)") especially for FDHs. The said contract sets out key employment terms for hiring FDHs in Hong Kong, including wages not lower than the prevailing MAW, free passage from and to the FDH's place of origin, free accommodation and free food (or food allowance), free medical treatment, etc. These benefits are not usually available to local workers. To prevent exploitation of FDHs, the standard employment contract is mandatory in nature, and employers and their FDHs are not allowed to agree on any contractual terms that fall short of the requirements set out therein and the statutory entitlements under labour legislation such as the

EO. It is also specified in the standard employment contract that any variation to the terms of the contract shall be void unless made with the prior consent of the Commissioner for Labour.

13. An employer cannot agree with an FDH to pay a lower level of wage than the MAW. Approval for the importation of FDHs is based on facts submitted to the Director of Immigration, whereby the employer has agreed to pay not less than the MAW. Even if an FDH has knowingly and voluntarily entered into another contract of employment with the employer to accept a lower wage, the latter is still liable, upon conviction under the EO, to a maximum fine of \$350,000 and three years' imprisonment. The employer would also be committing serious offences of making false representation to an Immigration Officer and conspiracy to defraud. Any employer who is guilty of making false representation to an Immigration Officer is liable: (a) on conviction on indictment, to a maximum fine of \$150,000 and imprisonment for 14 years; and (b) on summary conviction, to a maximum fine of \$100,000 and imprisonment for two years. Any employer convicted of the offence of conspiracy to defraud is liable to imprisonment for 14 years.

14. Where there is sufficient evidence that employers have committed wage offences by paying FDHs at a monthly rate lower than the MAW, LD would take prosecution action. From January to October 2009, there were 92 convicted summonses against FDH employers for wage offences, an increase of 124% over the same period in 2008. One of the employers received a three-month jail term.

15. Notwithstanding that an FDH has knowingly and voluntarily entered into another contract of employment with the employer to accept a lower wage, the helper is still entitled to be paid at a wage rate as stipulated in the standard employment contract. As for other relevant court judgments for reference as requested in the question, we have consulted the Department of Justice and are not aware of them.

Question 13

16. The Administration regularly reviews the MAW. In accordance with the long-established mechanism in reviewing the MAW and deciding whether the level is to be adjusted, the Administration takes into account the prevailing general economic condition and employment situation, as reflected through economic indicators which include the

relevant income movement, price change and labour market situation. The outcome of the review will be made public.

17. The list of the MAW levels and the press releases in the past 10 years (1999 to 2009) are at Annex B.

Labour and Welfare Bureau/Labour Department
November 2009

For information on
19 November 2009

Legislative Council Panel on Manpower

Employees vis-à-vis Self-employed Persons

Purpose

This paper briefs Members on the rights and benefits of employees under the Employment Ordinance (Cap. 57) (EO) and the Employees' Compensation Ordinance (Cap. 282) (ECO), how the rights and obligations of employees and self-employed persons are determined, and the measures adopted by the Labour Department (LD) in tackling false self-employment.

An overview of the rights and benefits of employees under the EO and the ECO

2. The EO is the main piece of legislation governing conditions of employment in Hong Kong. It covers a comprehensive range of employment protection for every employee engaged under a contract of employment. Such benefits include wage protection, rest days, holidays with pay, paid annual leave, sickness allowance, maternity protection, severance payment, long service payment, employment protection, protection against anti-union discrimination, etc.

3. The ECO is applicable to all employees employed under a contract of service or apprenticeship. It operates on the basis of individual employer liability whereby an employer is liable to pay compensation to his employees who are injured by accidents or suffer from specified occupational diseases that arise out of and in the course of their employment.

4. The EO and the ECO are applicable only to employees both in terms of the rights conferred and the obligations imposed on them. For a person who is self-employed or who is an independent contractor, his interests and obligations are defined by the terms of the service contracts or agreements drawn up with the other party in consideration of the services to be performed.

Self-employment as an alternative form of participation in the labour market

5. Self-employment forms an important part of economic activities in many countries around the world. Freelance professionals (e.g. event photographers), craftworkers (e.g. hand-knitters) and traders (e.g. antiques dealers) are the more traditional forms of self-employment. In an era of technological advancement and economic diversification, there may be various ways in which a person can actively participate in the labour market. Apart from entering into a contract of employment, some people may prefer working on their own account for greater autonomy instead of being bound by a monotonous work pattern or fixed working hours, while others may opt to develop their own business or prefer to provide services to different clients for the purpose of maximising profits. There are also those who, owing to family, health or a host of other personal reasons, may prefer or are obliged to take up freelance jobs at home or jobs that are paid on completion of projects or assignments, both of which fall outside the remit of an employment relationship.

6. As an economic reality and occupational necessity, sub-contracting and genuine self-employment exist in various sectors of the economy, though in certain sectors such as construction, logistics and insurance this form of service provision may be more prevalent in respect of certain work processes. With the advancement of information and communication technologies, particularly in a web-based environment, self-employed workers have also emerged in other occupations such as graphic design, programming and on-line trading. Genuine self-employment can be a driving force for economic development and can preserve and create job opportunities. For some, self-employment may also represent a viable alternative to unemployment before they settle down in gainful employment.

7. According to the General Household Survey conducted by the Census and Statistics Department, in Q2 2009 there were around 241 600 self-employed persons (representing about 6.9% of the total employed population in Hong Kong), a slight drop when compared with 253 900 persons (7.2% of total) in Q2 2008.

Protection for employees in false self-employment

8. Recently, some Legislative Council Members and trade unionists have expressed grave concerns over the growing number of employees being labelled by their employers as “self-employed” despite the fact that they have all the characteristics of an employee. They pointed out that some job seekers, eager to look for employment, were ignorant of their status being

labelled as “self-employed”. At times, there were also claims that an employer had unilaterally changed the status of his employee to a contractor or self-employed person.

9. As a matter of fact, it is not what the parties to an engagement call their relationship, but what it is in substance, that matters. Whether an employer-employee relationship does, or does not, exist is often determined after looking at all relevant facts. Even if an employer has engaged a person as a self-employed person, he still has to fulfil his obligations under the law where the relationship between the parties is in essence one of employer-employee. In previous rulings on cases involving claims under the EO and the ECO, the Court has not simply looked at the labelling of a person to determine the employment relationship, but would apply a number of tests to examine whether a worker is an employee or a self-employed person, as set out in paragraph 15 below.

10. To avoid misunderstanding/dispute and safeguard mutual rights/benefits, LD has in its various publicity activities and service delivery promoted an important message that the contracting parties should understand clearly their mode of cooperation according to their intention and clarify whether the person concerned is engaged as an employee or a contractor/self-employed person before entering into a contract. If necessary, before the commencement of employment, the employee may make a written request to the employer for written information on conditions of employment in accordance with the EO.

11. We have also emphasised that an employer should carefully assess the risks involved if he enters into a contract to engage someone as a contractor or self-employed person. If in essence there exists an employer-employee relationship, the employer is still required to fulfil his responsibilities under the relevant legislation even though his worker is called or described as a contractor or self-employed person in the contract. This is of utmost importance as the employer will have to pay back statutory benefits retroactively to employees who are falsely labelled as “self-employed”. The employer may also have to bear the legal consequences for having committed an offence under the EO or the ECO, as the case may be.

12. Besides, an employer is not allowed to unilaterally change the status of his employee to a contractor or self-employed person. In such cases, the employee may lodge a claim for remedies against his employer on the ground of unreasonable variation of the terms of the employment contract under the EO. He may also make a claim for termination compensation against his employer on the ground of constructive dismissal under common law.

13. If an employee intends to change his status to a contractor or self-employed person, he must carefully weigh the pros and cons involved, including the employment rights and benefits that he may lose in such a change. Moreover, to protect himself against injuries sustained at work, it is advisable for a self-employed person to make his own insurance arrangements like taking out personal accident insurance policy.

14. In cases of winding-up/bankruptcy, employees are protected by the Protection of Wages on Insolvency Ordinance (Cap. 380) (PWIO). A flexible approach is adopted in considering the applications from so-called “self-employed” persons who may not necessarily be self-employed in every sense of the word. All relevant factors are taken into account when investigating the essence of the relationship. Where an employer-employee relationship does exist, ex-gratia payment from the Protection of Wages on Insolvency Fund will be effected in accordance with the PWIO.

Differentiating between employees and self-employed persons

15. There is no single conclusive test to distinguish an “employee” from a “self-employed person”/ “contractor”. While all relevant factors of the case should be taken into account in differentiating these two identities, there is no hard and fast rule as to how important a particular factor should be.¹ Over the years, a series of tests has been developed through case law to enable the Court to determine whether a worker has been engaged as a self-employed person/contractor or as an employee. Such tests include, but are not limited to:

- whether there is any mutual obligation between the two parties to provide and accept work;
- the parties’ own view of their relationship;
- the degree of control exercised by the party alleged to be the employer over the work of the person alleged to be self-employed;
- the traditional structure of the trade or profession concerned and the arrangements within it;
- whether the person alleged to be self-employed -

¹ As stated by Cook J in *Market Investigations v Minister of Social Security* [1969] 2 QB 173 and applied in *Lee Ting-sang v Chung Chi-keung* [1990] ICR 409 Privy Council, no exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining whether a worker is an employee or a sub-contractor, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases.

- is carrying on business on his own account or carrying on the business of the other party to the contract;
- has invested any capital to the business for the purpose of generating revenue and profit;
- has undertaken any entrepreneurial activities;
- is exposed to financial risk by having to bear the cost of faulty or substandard work carried out under the contract, and the nature and extent of the risk;
- has control over the job he does, how he does it, when and where he does it and whether he does it himself;
- controls his own working hours in fulfilling the job obligations;
- provides the required material to complete the job;
- provides equipment and machinery necessary for the job, other than the small tools of the trade;
- is free to hire other people, on terms of his own choice, to do the work that he has agreed to undertake; and
- is properly regarded as part of the organisation of the party alleged to be the employer.

On the basis of the tests applied, the Court of Hong Kong has in many cases come to the conclusion that the person who was labelled or treated as a self-employed or independent contractor by his employer was an employee. These cases have vindicated that the law is concerned with the facts, and will ignore any mechanism an employer might use to conceal the true employment status of an employee.

Problems of amending the EO and the ECO to cover people on self-employment and/or employees falsely labelled as “self-employed”

16. The purpose of the EO and the ECO is to protect employees. If the scope of these ordinances were extended to cover all self-employed persons, it would be a major departure from the legislative intent of protecting employees only and would take on a new dimension in protecting all persons who are engaged under a contract for service. The amendment would inevitably bring about serious economic and financial implications if every person or company who hires the service of another person were required to confer on him the

rights and benefits under the EO and take out compulsory accident insurance cover under the ECO. There is also the practical problem of law enforcement given the diverse nature of service contracts, particularly if the service contracts are one-off or very short-term in nature.

17. There has also been suggestion that the law should be amended to clearly distinguish an employee from those self-employed. Despite its good intention, an exhaustive list of criteria to define those on false self-employment may be counterproductive as unscrupulous employers may translate them into convenient clues to circumvent the law. An authoritative and legally-prescribed list of indicia to define people on genuine employment or false self-employment may fail to account for possible specific features in individual occupational groups and sectors.² This may, in addition, inadvertently hinder the development of entrepreneurship, innovation and contractual freedom.

Three-pronged approach adopted by LD to tackle false self-employment

18. In response to the concerns of the public over the alleged proliferation of false self-employment, LD adopts a three-pronged approach to tackling the problem, as set out below.

(I) Strengthening promotion and publicity work in enhancing public awareness

19. LD has published leaflets to enhance the understanding of the public on how to distinguish an employee from a contractor or self-employed person. The leaflets, at Appendices I and II, set out the differences in the rights and benefits between the two under the EO and the ECO respectively with important points to note for employers and employees, and highlight the factors or criteria commonly adopted by the Court in determining the employment status of workers by citing relevant court cases. Apart from being uploaded to LD's homepage for easy public access, the leaflets have

² It was stated by Mummery J in *Hall v Lorimer* as quoted in *Poon Chau-nam v Yim Siu Cheung trading as Yat Cheung Airconditioning & Electric Co.* [FACV No. 14 of 2006] that –
“In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.”

been widely distributed through different channels. Furthermore, feature articles have been published in newspapers and the relevant messages highlighted on panels for display in territory-wide roving exhibitions on the EO to enhance public understanding on this subject. This topic and related court cases have also been discussed and shared with human resources practitioners regularly at meetings of the 18 Human Resources Managers Clubs and at talks on EO delivered by staff of LD to forestall any misunderstanding and possible disputes.

20. In addition to the existing channels and activities to promote public awareness of the subject, LD will step up its promotional efforts targeting in particular employers of small and medium enterprises to enhance their awareness of the possible legal consequences of false self-employment. Specifically, LD will:

- produce specially designed posters to drive home the message to employers and employees of the importance of clarifying the type of engagement before entering into a contract, highlighting the message that employment rights and protection would not be forfeited even though a worker is called or labelled as a contractor or self-employed person in a contract if in essence there exists an employer-employee relationship;
- display the poster at targeted locations and channels with a view to reaching out to those whose occupations are commonly considered to be self-employed; and
- forge closer collaboration with trade unions and employer associations of relevant trades in promoting the awareness of the relevant parties of the distinction between an employee and a self-employed person/contractor.

(II) Providing a more user-friendly consultation and conciliation service to employees in false self-employment in case of disputes

21. LD always advises employees to be vigilant and clarify their employment status before entering into contract. They are welcome to approach its Labour Relations Offices for advice in case of doubt. LD officers will explain to them the rights and benefits enjoyed by employees vis-à-vis the self-employed. An information kit has been produced to help enquirers differentiate employees from self-employed persons. If two parties dispute the employer-employee relationship and thus entitlements of the person concerned under the EO, LD will provide conciliation service to help

resolve such disputes in the light of previous court rulings. Should the dispute remain unresolved after conciliation, it would be referred to the Labour Tribunal or the Minor Employment Claims Adjudication Board for adjudication.

22. Where there is a dispute on whether there exists an employer-employee relationship in an employees' compensation case, LD will provide assistance and advice, having regard to the facts of the case and the factors commonly adopted by the Court in determining the employment status of workers and the provisions of the ECO. If the dispute remains unresolved in spite of our assistance, the case shall be adjudicated by the Court and we would refer the employee to the Legal Aid Department for assistance, where appropriate.

(III) Stepping up enforcement action to safeguard employees' statutory rights

23. LD has been sparing no effort in safeguarding the statutory rights and benefits of employees through rigorous enforcement of the law. Labour inspectors conduct active inspections to workplaces to check employers' compliance with the law and to educate employees on the protection accorded to them under labour laws. Suspected breaches, when detected, will be thoroughly investigated and prosecution will be instituted against the offending employers wherever there is sufficient evidence. We encourage employees who suspect that they are deprived of statutory rights and benefits to come forward to lodge complaints and to provide us with the details of their employment terms for our investigation. A Complaint Hotline (2815 2200) is in place to facilitate the reporting of such cases. Employees may rest assured that provision of information to enable LD to conduct surprise inspections will not jeopardise their employment opportunity as LD is obliged under the law to observe strict confidentiality of the identity of those who provide intelligence to facilitate enforcement.

24. If a claimant complains that an employer has committed offences by failing to pay wages or statutory benefits under the EO, and the latter defends that the complainant is a self-employed person rather than its/his employee, LD would conduct investigation by examining the "substance" of relationship between both parties, rather than just focusing on the "form" of relationship. Where there is sufficient evidence that the claimant should be regarded as an employee and his employer has breached the EO, LD will take out prosecution against the latter.

Consultation with the Labour Advisory Board

25. The Labour Advisory Board was consulted on the subject on 4 November 2009. Both the employer and employee members shared LD's views regarding the problems of amending the EO and the ECO to cover people on self-employment and/or employees falsely labelled as "self-employed" (regarding paragraphs 16 and 17 above). Employee members indicated that while they would not rule out the option of pursuing legislative change in the future, they agreed with LD and the employer members that, in the present circumstances, the three-pronged approach as proposed by LD would be a more pragmatic and fruitful way forward. Specifically, the Board asked LD to step up promotional efforts with a view to encouraging employees to provide LD with intelligence to facilitate enforcement (paragraph 23). They also asked LD to launch publicity drives targeting SMEs especially those in sectors where false self-employment was a more common practice. Employers must be made aware that false self-employment is costly and counterproductive (paragraphs 11 and 12). At the request of members, LD has also undertaken to keep relevant statistics on cases relating to claims of false self-employment to facilitate better understanding of the problem.

Way Forward

26. Genuine self-employment contributes to economic development and allows individuals greater flexibility in procuring and rendering services taking into account their particular circumstances. False self-employment should be discouraged as it would detract from employees' rights and benefits as well as resulting in legal breaches on the part of the employers. Attempts to set out categorically in the law what constitutes self-employment may be counterproductive since it would provide inadvertently guidance for those who intend to exploit. Despite their apparent imprecision, the present general provisions in the EO and ECO should, on balance, be a more preferred approach given its catch-all capacity. Irrespective of how the law is crafted, the key to tackling the issue is education and promotion, including encouragement of those who may feel aggrieved by suspected false self-employment to report to LD, as well as rigorous enforcement.

Know Your
Identity
and **Rights**

“Employee” and “Contractor
or Self-employed Person”



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Know Your Identity and Rights



“Employee” and “Contractor or Self-employed Person”

- ◆ To avoid misunderstanding or dispute, the relevant persons should understand clearly their mode of cooperation according to their intention and clarify their identities, whether the person is engaged as an employee or a contractor/self-employed person, before entering into a contract. This will help safeguard mutual rights and benefits.

How to distinguish an “employee” from a “contractor or self-employed person”

- ◆ There is no one single conclusive test to distinguish an “employee” from a “contractor or self-employed person”. In differentiating these two identities, all relevant factors of the case should be taken into account. Moreover, there is no hard and fast rule as to how important a particular factor should be. The common important factors include:

- calculation of remuneration and scope of work
- control over work procedures
- ownership and provision of production tools and materials
- whether the person can hire other helpers
- bearing of financial risk over business (e.g. any prospect of profit or risk of loss)
- responsibilities in insurance and tax
- traditional structure and practices of the trade or profession concerned

- ◆ **Since the actual circumstances in each case are different, the final interpretation will rest with the court in case of a dispute.**

Important Points to Note for Employees

- ◆ An employee should identify who his employer is before entering into an employment contract. If necessary, before the commencement of employment, the employee may make a written request to the employer for written information on conditions of employment in accordance with the Employment Ordinance.
- ◆ An employer should not unilaterally change the status of his employee to a contractor or self-employed person. Otherwise, the employee may lodge a claim for remedies against his employer on the ground of unreasonable variation of the terms of the employment contract under the Employment Ordinance. Moreover, the employee may also make a claim for termination compensation against his employer on the ground of constructive dismissal under common law.
- ◆ **If an employee intends to change his status to a contractor or self-employed person, he must cautiously assess the pros and cons involved, including the employment rights and benefits that he may lose in such a change.**

Some differences in the rights and benefits enjoyed by an “employee” and a “contractor or self-employed person”

Rights and benefits	Employee	Contractor or Self-employed person
Entitled to basic protection under the Employment Ordinance. If engaged under a “continuous contract” ^{Note1} , also entitled to benefits such as paid annual leave, statutory holiday pay, sickness allowance, severance payment or long service payment etc.	✓	X
Entitled to protection under the Employees’ Compensation Ordinance, including sick leave and compensation arising from work injuries	✓	X ^{Note2}
Entitled to protection under the Mandatory Provident Fund Schemes Ordinance, including employer’s contribution	✓	X ^{Note3}

Note1 An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract.

Note2 A contractor or self-employed person should consider insuring himself against personal accidents at work.

Note3 A contractor or self-employed person should enrol in a Mandatory Provident Fund scheme and make contributions on his own.

Important Points to Note for Employers

- ◆ An employer should not unilaterally change the status of his employee to a contractor or self-employed person. Otherwise, the employee may lodge a claim for remedies against his employer on the ground of unreasonable variation of the terms of the employment contract under the Employment Ordinance. Moreover, the employee may also make a claim for termination compensation against his employer on the ground of constructive dismissal under common law.
- ◆ **An employer should cautiously assess the risks involved if he enters into a contract to engage someone as a contractor or self-employed person. If in essence there exists an employer-employee relationship, the employer is still required to fulfil his responsibilities under the relevant legislation even though his worker is called or has labelled himself as a contractor or self-employed person in the contract.** Appended below are two court cases for reference:-

Court Case 1

The Plaintiff alleged that the Defendant Company employed him as a woodworker. As the Defendant Company had not paid him wages for four months, the Plaintiff lodged claims against the Defendant Company for wage arrears and severance payment or long service payment upon termination of contract. The Defendant Company, however, alleged that the Plaintiff was an independent contractor rather than its employee. It only admitted that money was due to the Plaintiff for work done and refused to pay severance payment or long service payment.

The High Court ruled that the Plaintiff was an employee of the Defendant Company on the following grounds: The Defendant Company exercised control over the work quality of the Plaintiff; the Plaintiff could not control the cost or set the price based on considerations of profit or loss; the Plaintiff had never hired workers on his own, nor had he ever been told that he could do so; all materials and equipment were provided by the Defendant Company; and the Defendant Company filed tax returns in respect of the Plaintiff on numerous occasions. Moreover, the Judge did not accept non-payment of sickness allowance, statutory holiday pay and annual leave pay as grounds of defence. Hence, the Defendant Company was ordered to pay arrears of wages and severance payment to the Plaintiff.

(For details, please refer to HCA 1418/96)

Court Case 2

The Claimant was a saleslady selling the products of the Defendant Company in the specific department stores arranged. In the beginning, both parties did not enter into any written contract. Later on, the Claimant signed a contract identifying herself as a self-employed person. Her remuneration was \$300 per day plus a commission based on daily sales. Each month, the Defendant Company would also make payment at 2.5% of the Claimant's earnings for her contributions to a Mandatory Provident Fund scheme (MPF scheme). Upon termination of contract, the Claimant lodged claims against the Defendant Company for wages in lieu of notice, annual leave pay, statutory holiday pay and severance payment. However, the Defendant Company denied any employment relationship with the Claimant.

The Labour Tribunal ruled in favour of the Claimant on a number of grounds, including: The Defendant Company paid the Claimant \$300 per day as basic salary; the Defendant Company was responsible for arranging the sale venues and providing the products, and it supervised the Claimant's attendance and work performance through the department stores concerned; the Claimant had to sell the products in accordance with the guidelines of the Defendant Company; and the Claimant did not have to make investment or bear any financial risks, nor was she allowed to hire helpers.

The Defendant Company appealed against the decision to the High Court but the appeal was dismissed. The Judge pointed out that although the Claimant refused to work at the location arranged by the Defendant Company, it was only an isolated incident which was not sufficient to override the Defendant Company's control over the Claimant as the employer. Besides, if the Defendant Company was not the employer, it was unreasonable that it would make an extra monthly payment at 2.5% of the Claimant's commission for her MPF contributions. Furthermore, even though the Claimant signed a contract identifying herself as a self-employed person and kept customers' records and information in her custody, these arguments were not sufficient to reverse the verdict that both parties were bound by an employer-employee relationship when other factors were taken into consideration.

(For details, please refer to HCLA 11/2006)

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Identity ?
and **Rights**

This leaflet aims to highlight the differences between an “employee” and a “contractor or self-employed person”. It should be noted that the relevant ordinances and court judgements remain the sole authority for the interpretation of provisions of the law and the court cases mentioned.

Enquiry



2717 1771 (the hotline is handled by the 1823 Call Centre)



<http://www.labour.gov.hk>



Enquiry in person to offices of the Labour Relations Division of the Labour Department

Offices of the Labour Relations Division of the Labour Department

HONG KONG	
Hong Kong East 34/F., Revenue Tower, 5 Gloucester Road, Wan Chai, Hong Kong	Hong Kong West 3/F., Western Magistracy Building, 2A Pokfulam Road, Hong Kong
KOWLOON	
Kowloon South 2/F., Mongkok Government Offices, 30 Luen Wan Street, Mongkok, Kowloon	Kowloon West Room 1009, 10/F., Cheung Sha Wan Government Offices, 303 Cheung Sha Wan Road, Kowloon
Kowloon East Room 1206, 12/F., Stelux House, 698 Prince Edward Road East, San Po Kong, Kowloon	Kwun Tong 6/F., Kowloon East Government Offices, 12 Lei Yue Mun Road, Kwun Tong, Kowloon
NEW TERRITORIES	
Kwai Chung 6/F., Kwai Hing Government Offices, 166-174 Hing Fong Road, Kwai Chung, New Territories	Tuen Mun Room 2720, Tuen Mun Parklane Square, 2 Tuen Hi Road, Tuen Mun, New Territories
Shatin & Tai Po Rooms 304-313, 3/F., Sha Tin Government Offices, 1 Sheung Wo Che Road, Sha Tin, New Territories	Tsuen Wan 5/F., Tsuen Wan Government Offices, 38 Sai Lau Kok Road, Tsuen Wan, New Territories

October 2009

Work Injury Compensation

Points to Note for *“Employees” and “Self-employed Persons”*



If an employee sustains an injury or dies as a result of an accident arising out of and in the course of his employment, his employer is in general liable to pay compensation under the Employees' Compensation Ordinance (ECO).

According to the ECO, an injured employee of a sub-contractor can make a claim against the principal contractor for employees' compensation if his employer has failed to pay him his entitled compensation. In such circumstances, the injured employee may issue a written request to his employer for the supply of the name and address of the principal contractor in order that he could make a claim against the principal contractor.

In employees' compensation cases, notwithstanding the production of a contract by the "employer" indicating that the worker is a self-employed sub-contractor, the court could still make adjudication on whether there exists an "employer-employee" relationship between the parties concerned, based on the facts of the case. Should an "employer-employee" relationship be established between the two parties, the employer is liable to pay compensation to the injured employee in accordance with the ECO.

A Court case for reference:

In a civil case adjudicated by the Court of Appeal of the High Court of the HKSAR (CACV 273/98), the family members of a scaffold worker who died as a result of falling from height were awarded compensation under the ECO. In the case, the employer alleged that the work was sub-contracted to the scaffold worker who was an independent self-employed person. On a detailed analysis of the relevant evidence and facts of the case, the Court eventually ruled that the scaffold worker was an employee, and not an independent sub-contractor, and the employer was obliged to pay the employees' compensation.

The following are factors considered by the Court for verifying whether there exists an employer-employee relationship in the case:

1. Any agreement on lump-sum remuneration for completion of the work and any confinement on the work scope

It is to be noted that even in case of an "employer-employee" relationship, the parties involved might sometimes agree on piece-rate for computing the employee's wages.

2. Degree of control over the work

Generally, the more the control the employer has over the procedures, the pace and the manner adopted for the production, the more the likelihood that both parties are bound by an "employer-employee" relationship.

3. Provision of work equipment

Generally, an employee is provided with equipment and tools by his employer. However, it is not uncommon in some trades that the employees would carry with them their frequently-used tools when attending work.

4. Recruitment and dismissal of other helping hands

If the employer also hires some other employees to assist a worker in completing his work, there is a higher likelihood that the worker in question is just another employee of the employer.

5. Bearing of financial risks

In general, employees do not have to bear any financial risks, even if he is a piece-rated worker.

6. Responsibility for investment and management

Generally, an ordinary employee does not have to input capital for investment or assume a management role.

7. Profit making through effective work management

Generally, an employee does not have such an opportunity.

8. Other relevant factors

Including the intention of both parties.

Self-employed person should consider taking out personal accident insurance

The Employees' Compensation Ordinance does not cover self-employed persons. A self-employed person should carefully assess the possible risk at work and take out a personal accident insurance policy of appropriate amount for safeguarding the interest of himself and his family members. It is to be noted that persons taking out personal accident insurance policy may not necessarily be self-employed as employees could also take out personal accident insurance policy for securing a better insurance protection.

Notes for employees

An employee should ascertain that his employer has taken out an employees' compensation insurance policy with adequate amount of insurance cover. An insured employer (with the exception of employers of domestic helpers) is required to display, at a conspicuous place of the work place, a notice of a valid employees' compensation insurance policy. An employee should notify the Labour Department immediately if he discovers that his employer has not taken out an employees' compensation insurance policy for him (Tel:2815 2200).

Addresses of Employees' Compensation Division offices:

Hong Kong Offices (cases on Hong Kong Island and Outlying Islands)	16/F, Southorn Centre, 130 Hennessy Road, Hong Kong
Kowloon Offices (cases in Kowloon and cases involving government employees)	10/F, Cheung Sha Wan Government Offices, Cheung Sha Wan Road, Kowloon
Tsuen Wan and Kwai Chung Offices (cases in Tsuen Wan, Kwai Chung and Western New Territories)	6/F, Tsuen Wan Government Offices, 38 Sai Lau Kok Road, Tsuen Wan, New Territories
Shatin Office (cases in Shatin and Northern New Territories)	2/F, Shatin Government Offices, 1 Sheung Wo Che Road, Shatin, New Territories
Fatal Cases Office	6/F, Harbour Building, 38 Pier Road, Central, Hong Kong

Labour Department's Homepage: <http://www.labour.gov.hk>

Enquiry Phone number: 2717 1771
(Handled by "1823 Citizen's Easy Link")

Printed in December 2006

Annex B

Year	Minimum Allowable Wage
1999	\$3,670
2000	\$3,670
2001	\$3,670
2002	\$3,670
2003	\$3,270
2004	\$3,270
2005	\$3,320
2006	\$3,400
2007	\$3,480
2008	\$3,580
2009	\$3,580

Daily Information Bulletin

Minimum allowable wage for foreign domestic helpers

The Government announced today (Tuesday) that the minimum allowable wage (MAW) for employment contracts of foreign domestic helpers (FDHs) in Hong Kong to be signed on or after February 3, 1999 will be set at \$3,670 a month. This is \$190 or five per cent less than the existing minimum allowable wage of \$3,860 a month.

"As in our previous reviews, the new MAW has been arrived at after taking into account changes to wages and earnings of local workers and the economic conditions of Hong Kong since the last review," said a Government spokesman.

"The economy in Hong Kong is going through a difficult period of adjustment with a high rate of unemployment. For example, our per capita GDP is forecast to have dropped by about seven per cent in 1998; the median household income fell by 5.2 per cent in the third quarter of 1998 over the same period in 1997; and the nominal wage index of local service workers showed no increase in the third quarter of 1998 over the same period a year ago. The situation is unlikely to improve in the near future.

"Taking account of these factors, the Government has decided that the minimum allowable wage for FDHs should be adjusted downwards by about five per cent," the spokesman said.

The new MAW will be applicable to any contract to be signed on or after February 3. Contracts which have been signed before February 3 will not be affected by the change in minimum allowable wage. Employers under contracts signed before February 3 should continue to pay the stated wage until their expiry.

"Any employer who pays less than the stated wage in the effective contract commits an offence under the Employment Ordinance and the employer is liable, on conviction, to a fine of HK\$ 200,000 and one year's imprisonment. FDHs who have been underpaid by their employers should make a complaint to the Labour Department," the spokesman stressed.

"Employers are free to pay their FDHs a salary in excess of the minimum allowable wage in recognition of their loyalty, long service and experience."

As at December 31, 1998, there were about 180,000 FDHs working in Hong Kong.

For enquiries concerning submission of the employment contract in connection with entry visa or extension of stay applications for FDHs, employers can contact the Immigration Department on telephone number 2824 6111.

End/Tuesday, February 2, 1999

NNNN

Foreign domestic helpers' minimum wage remains unchanged

A Government spokesman announced today (Monday) that the minimum allowable wage for new employment contracts for foreign domestic helpers in Hong Kong would remain unchanged at HK\$3,670 a month.

He said: "As in all previous reviews, the Government has arrived at the level of the minimum allowable wage after taking into account changes to wages and earnings of local workers and the economic conditions of Hong Kong since the last review.

"Local wages have remained fairly stable. At the same time, the Hong Kong economy is still going through a period of adjustment.

"Taking these factors into account, the Government has decided that the minimum allowable wage for foreign domestic helpers should remain unchanged until the next annual review in 2001.

"Any employer who pays less than the stated minimum allowable wage in the existing contract commits an offence under the Employment Ordinance and the employer is liable, on conviction, to a fine of HK\$200,000 and one year's imprisonment", the spokesman added.

End/Monday, January 31, 2000

NNNN

Minimum wage for foreign domestic helpers remains unchanged

A Government spokesman announced today (January 31) that the minimum allowable wage for new employment contracts for foreign domestic helpers in Hong Kong would remain unchanged at HK\$3,670 per month.

The minimum allowable wage is set to protect local employees against competition from cheap labour on the one hand, and ensures that foreign domestic helpers are not exploited on the other.

The spokesman said, "Local wages have remained fairly stable, despite strong recovery in the Hong Kong economy beginning from the fourth quarter of 1999.

"After carefully studying changes to the wage and earnings of local workers in comparable sectors, and the economic conditions in Hong Kong since the last review, the Government has concluded that the minimum allowable wage for foreign domestic helpers should remain at \$3,670."

Any employer who pays less than the stated minimum allowable wage in the existing employment contract commits an offence under the Employment Ordinance and the employer is liable, on conviction, to a fine of HK\$200,000 and one year's imprisonment.

Nevertheless, employers are free to pay in excess of the minimum allowable wage should they wish to recognise and reward the loyalty, long service and experience of their foreign domestic helpers.

End/Wednesday, January 31, 2001

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Press Release

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Minimum wage for foreign domestic helpers remains unchanged

The Government announced today (January 31) to maintain the minimum allowable wage for foreign domestic helpers at the current level, that is, at \$3,670 a month.

"In view of the uncertainty surrounding the local economic and employment situation, we shall closely monitor the economic and employment situation and assess whether a further review will be required when up-to-date data, which reflect more recent economic trends, are available," the spokesman added.

The minimum allowable wage is set to protect local employees against competition from foreign labour on the one hand, and to ensure that foreign domestic helpers are not exploited on the other. The minimum allowable wage is reviewed annually.

Any employer who pays less than the stated minimum allowable wage in the existing contract commits an offence under the Employment Ordinance and the employer is liable, on conviction, to a fine of HK\$200,000 and one year's imprisonment.

Nevertheless, employers are free to pay in excess of the minimum allowable wage should they wish to recognise and reward the loyalty, long service or experience of their foreign domestic helpers.

End/Thursday, January 31, 2002

NNNN

 [Email this article](#)

Statement by the Chief Secretary for Administration to the Legislative Council on the Report of the Task Force on Population Policy

Following is the statement (translation) by the Chief Secretary for Administration, Mr Donald Tsang, to the Legislative Council today (February 26) on the Report of the Task Force on Population Policy:

Madam President,

I am most grateful to you in allowing me to release the Report of the Task Force on Population Policy at this Council's meeting today.

I set up the Task Force on Population Policy in September last year to develop a population policy as pledged by the Chief Executive in his second Inaugural Speech in July last year. The Task Force comprises the Financial Secretary, eight Principal Officials and relevant Heads of Departments.

Its task was to develop a comprehensive population policy by the end of last year. Given the shortage of time, the Task Force focused on analysing the demographic characteristics of Hong Kong's population; identifying the major challenges and concerns arising from these demographic trends; setting an objective which the population policy seeks to achieve and proposing a set of policy measures to be adopted in the short to medium term to achieve this objective.

Demographic Characteristics

Our people live longer and reproduce at a much lower rate than most communities. The most recent statistics show women living to 85 and men to 78 years. This compares with approximately 75 among females and 67 among males in the early 1970s.

We also have one of the lowest fertility rates in the world. In 2001, Hong Kong women bore an average of just 0.9 children over their lifetime. This is well below the "natural" replacement level, usually regarded as 2.1 children per woman.

Together, these facts mean that the profile of Hong Kong's population, like other advanced economies, is aging rapidly. Indeed, demographic trends indicate that one quarter of our population will be aged 65 or above by the year 2031. Among them, those older than 85 are expected to triple from the current 67,000 to 209,000. During that period, the total population is forecast to rise 30 per cent from 6.72 million in 2001 to 8.72 million but the labour force will grow by only

8 per cent, from 3.43 million to 3.7 million.

This indicates that 5 million people, or 58 per cent of the population, will be economically inactive by 2031.

We are also committed to a programme of admitting almost 55,000 immigrants from the Mainland each year. Apart from births, the entry of One Way Permit holders is one of the main sources of our population growth. Many of the adult new arrivals when they first arrive have few work skills and little education. Hong Kong faces a serious task to upgrade their skills to increase their competitiveness in the labour market and to meet the needs of our economy.

Meanwhile, though the education attainment profile of our local population is continuing to improve, our workforce will increasingly need to demonstrate higher skills as globalisation intensifies competition among developed economies in the shift towards high value-added and knowledge-based activities. We are also experiencing a growing population of migrant workers filling a diminishing number of unskilled jobs available.

Policy Objectives

Madam President, our people are hardworking and resilient. They know the importance of Hong Kong's transformation to a knowledge-based economy for our future success. All of us are alert to the need to ensure our emerging population profile can sustain our economic vitality in the long run. We all cherish the goal to continually improve the quality and standard of living.

With these in mind and in the light of our demographic characteristics, the Task Force considers the primary objective of the population policy is to nurture a population that can sustain Hong Kong's long-term economic and social development.

Our proposed population policy should strive to improve the overall quality of our population in fulfilment of our vision of Hong Kong as a knowledge-based economy and world-class city. In this context, we should also aim to redress population aging, foster the concept of active and healthy aging, promote social integration of new arrivals, and, most of all, to ensure the long-term sustainability of our economic growth. We believe the achievement of these goals will lead to a steady improvement of the standard of living of our people.

Population is a very complex subject. Almost all Government policies directly or indirectly impact on our demography in varying degrees. For this reason, this Report covers a wide spectrum of public policies. We hope that this exercise will lead to a set of coherent and consistent measures being put in place to achieve the objective of the population policy.

Addressing Population Aging and Low Fertility

The Task Force considered our extremely low fertility very carefully.

We need to ensure new blood to rejuvenate our population - literally. Yet, parenthood is a very personal matter. We should respect the decisions of individual couples. Accordingly, we have concluded that it is not appropriate for the Government to adopt special policies to promote childbirth.

However, we consider the current tax deduction for third and subsequent children is out of line with the need to increase our numbers. The Task Force recommends that the Government should consider granting the same level of tax deduction for all a family's children, regardless of number.

The One Way Permit Scheme is the single most important factor in our demographic growth and composition. Our population grew by 0.7 per cent last year, only 28 per cent of which was due to net natural increase. Some 72 per cent of growth was generated by the net inflow of people, mostly coming under the One Way Permit Scheme. Given its importance, we reviewed this Scheme. The SAR Government has approached the Mainland authorities, which administer the scheme, in the course of this exercise.

The Task Force came to the view that, unless our fertility rate rebounds significantly, Hong Kong will be increasingly reliant on inward migration for our population growth. We respect the right of family reunion and the Right of Abode conferred by the Basic Law, and we have concluded that the present daily allocation of 60 within the 150 quota for children with right of abode in Hong Kong is appropriate. We have proposed that we should strictly enforce this daily allocation of 60 children and should not allow other categories of One Way Permit holders to make use of it.

This will also help to have children arrive in Hong Kong as young as possible. Academic studies show that there is little difference in the subsequent academic performance of children who come to Hong Kong by the age of nine.

As an improvement to the present arrangement, they will be provided with the added flexibility of choosing to settle in Hong Kong together with their Mainland parents and meanwhile retaining their residence status in the Mainland. This will help to alleviate the distressing problem of split families that has become quite common.

We have agreed with the Mainland Authorities that spouses in Guangdong will be allowed to continue to use un-utilised sub-quotas for long-separated families, which at present is 30 per day. We expect that this will reduce waiting time for spouses in Guangdong. In addition, we will encourage them to take out a Two Way Permit as soon as they have applied for a One Way Permit to allow them to become familiar with life in Hong Kong. This will help them to make an informed decision on whether to settle in Hong Kong while maintaining strong family connections.

For the time being, the total daily quota of 150 will remain unchanged. The SAR Government will liaise closely with the

Mainland authorities with regard to the numbers and the allocation among the categories. If there is evidence that the demand falls, we will discuss with the Mainland authorities to reduce the quota.

The main changes to the One Way Permit Scheme I have just described will be put into force subject to agreement and legislation by the Central People's Government.

Fostering Positive Aging

The size of our workforce will shrink as the prime working age population declines. Steps must be taken to reduce dependency of the elderly and raise the productivity of old people. I also urge all people to view aging in a proper perspective. Notwithstanding the challenges presented by a growing population, aging represents first and foremost a success story for our public health policies as well as social and economic development.

To promote positive aging, we believe that we need to revisit and redefine the notion of retirement and old age. We need to promote a new awareness of elderly people, not as individuals needing help, but as people having much to offer and wanting to give. This should form the essence of our policy for the elderly.

Neither the younger generation nor the Government should shy away from shouldering the costs of taking care of our elderly population. They have contributed to the upbringing, education and acquisition of productive power of our entire younger generation. But we must also accept that the more a society spends proportionally on the healthcare of its elderly, the less can be devoted to productive investment or to the society's younger and more productive members. It is essential for us to look far ahead to find feasible and practical ways to develop a sustainable financial support system for the needy elderly. The Health, Welfare and Food Bureau is now undertaking this task.

Quality Improvement

In the immediate future, the simple population numbers do not constitute a crisis. We shall continue to admit new arrivals to reduce population aging and labour force shrinkage. However, quantity alone will not resolve the problem. We do need to attend to the quality of our population, upgrading our skill levels to meet the requirements of economic restructuring.

As most of the new immigrants are admitted for family reunion, we cannot, as in the case of skilled immigrants, exclude those without high education or skills. We shall continue to provide education, training and skills upgrading programmes to new arrivals of different age groups.

Indeed, investment in education is one of the Chief Executive's major priorities. We are taking two main approaches to meet the manpower needs of our economy. First, to upgrade the general level of education for all, and second to promote and facilitate skills upgrading and life-

long education among the existing workforce. With the establishment of the Manpower Development Committee, we will adopt a strategic and coordinated approach to manpower planning and development to meet the changing demands of our economy.

Madam President, in order that Hong Kong may emerge successfully from this challenging process of economic restructuring, we cannot rely solely on the pool of home grown talent to raise the overall quality of our human capital. Indeed, the quest for talent and skills becomes a primary factor in determining economic success of developed economies around the globe.

Hong Kong has to attract the best and brightest from all over the world. This includes, of course, the populous and fast-developing Mainland of our nation. We will relax admission of Mainland professionals and talent to live and work in Hong Kong. The present restrictions on specific business sectors and admission of dependent family members will be lifted. We will also take active measures to attract more Mainland businessmen to set up business in Hong Kong. These measures, which we intend to implement in July 2003, will allow Hong Kong to enlarge the pool of talent needed to meet the requirements of a knowledge-based economy and enhance the competitiveness of our demographic structure.

Apart from business talent, we will also attract Mainland talent from more diversified fields, such as the arts and sports, as part of building a multi-faceted, world-class city. The Education and Manpower Bureau will implement a series of measures in September this year to attract more overseas students to pursue their tertiary and postgraduate education in Hong Kong. We think that this will help to create a multi-lingual and multi-cultural environment at our tertiary institutions. This will also further the essential process of building a critical mass of knowledge and skills that will fortify Hong Kong's status as a world city.

Furthermore, as more and more children of Hong Kong families are educated overseas, we should also step up efforts to encourage these young people to return to live and work in Hong Kong.

We will relax our current policy to attract investment immigrants to enhance our economic strength. We propose to allow foreign investors to settle here with effect from the second half of this year. This relates to people who have the financial means to make a substantial investment in Hong Kong but who do not wish to run a business.

We recommend that the threshold should be set at HK\$6.5 million. Prospective applicants will be allowed a reasonable flexibility in their choice of investments. Qualifying asset classes will include real estate and specified financial assets. The new policy will apply to foreign nationals, Macau SAR residents and residents of Taiwan. Because of foreign exchange controls, the new policy will not, at this stage, apply to Mainland residents. For Mainland businessmen, we propose to encourage them to make greater use of the current multiple visit

permit system in coming to Hong Kong to look for investment opportunities. We will consider amending our immigration law to allow visitors to engage in a wider range of business-related activities in Hong Kong. We believe that these new measures will help generate greater economic activity and in turn more employment opportunities in the SAR.

Integration and Long-term Sustainability

Madam President, Hong Kong has a significant transient population. It consists of imported low-skilled workers who are allowed to stay in Hong Kong so long as they remain employed.

They currently number almost 240,000, most of them employed as domestic helpers. A much smaller number is mainly admitted under the Supplementary Labour Scheme.

Despite the economic downturn in the past few years, there is no indication that the admission of foreign domestic helpers has slowed down. They make use of a wide range of local facilities and services. Because of their considerable and growing number, we have to include a review of our foreign domestic helper policy as part of our exercise.

The Task Force recognises the contribution by foreign domestic helpers in providing help to families who require full-time live-in domestic helpers. This may not be readily available from local domestic helpers and we recognise that there are two distinct markets for foreign and local domestic helpers.

The Task Force considers that several improvements should be made to enhance the integrity of the mechanism of admitting foreign domestic helpers with the aim of minimising abuse and displacement of local jobs by foreign domestic helpers.

Since the enactment of the Employees Retraining Ordinance in 1992, employers importing workers other than foreign domestic helpers have been paying a levy. It is a well-established principle that employers turning to imported workers, rather than local employees, should contribute towards the training and retraining programmes. At present, only employers under the Supplementary Labour Scheme are required to pay a levy. We recommend that the same levy, currently \$400 a month, should also apply in the employment of foreign domestic helpers. The levy will be imposed under the Employees Retraining Ordinance. This will take effect from October 1, 2003. According to existing arrangements under the Supplementary Labour Scheme, the levy will be paid upfront by the employer and will apply to new contracts and renewal of contracts. To provide flexibility to employers, we will allow an option for the levy to be paid by four instalments, i.e. \$2,400 each. The first instalment should be paid before the granting of a visa to the foreign domestic helper. Employers under the Supplementary Labour Scheme will enjoy the same flexibility.

The Employees Retraining Ordinance also stipulates that if an imported employee fails to arrive in Hong Kong having been granted a visa or having arrived but fails to complete the contract of employment, there will be no refund of the levy paid, but the Director of Immigration will take into account the relevant balance if a fresh application for an imported employee is submitted by the employer within four months.

As I have said, there is an urgent need to upgrade the skill levels and to provide for the life-long education of our workforce, against the backdrop of economic downturn, high employment and restructuring of our economy. Given the increased demand for resources in this regard, there is a strong case for expanding the source of levy income. Given all these considerations, we believe that employers of foreign domestic helpers, like employers of other imported workers, should contribute towards the training and retraining of the local workforce.

Along with the significant downward adjustment in various local economic indicators since the last adjustment to the minimum allowable age for foreign domestic helpers in 1999, the minimum allowable wage for foreign domestic helpers will be reduced by \$400 per month for employment contracts signed on or after April 1 this year. The Labour Department and Immigration Department will step up enforcement actions against abuse of foreign domestic helpers, such as underpayment, undertaking non-domestic work or moonlighting. We hope that these actions will help to prevent exploitation of migrant workers and promote employment opportunities for local domestic helpers.

Madam President, it has become clear that Hong Kong faces a severe fiscal situation and is running a sizeable deficit.

Many public services in Hong Kong are heavily subsidised and various sectors in the community have expressed the view that the Government needs to take urgent steps to address rising public spending on social and other services, particularly in the light of population aging and continuing influx of new immigrants.

Some of the subsidised services such as public rental housing and social security benefits currently require applicants to meet a certain length of residence in Hong Kong; others such as public health services do not. Public health services are available not only to permanent and non-permanent Hong Kong residents, but also to the transient population such as foreign domestic helpers, migrant workers and visitors including Two-Way Permit holders.

The Task Force considers that in developing the population policy, the opportunity should be taken to address this anomaly. We have focused our attention initially on the Comprehensive Social Security Assistance Scheme (CSSA) and public health services which together took up 22 per cent of total public recurrent expenditure in 2001/02.

We consider that there is a strong case for applying a uniform seven-year residence rule for providing all heavily subsidised social services

and public health and hospital benefits.

Eligibility based on a seven-year residence reflects a resident's contribution towards our economy over a sustained period. For CSSA, the Director of Social Welfare will have discretionary power to grant the allowance for exceptional cases on compassionate grounds. This measure will take effect from a date to be decided. All current residents will not be affected. Young children will be exempted and the measure will apply only to those aged 18 and above.

We further propose that, in principle, the same residence requirement should apply to users of subsidised hospital and public health benefits. We will initially apply it to Two Way Permit holders and visitors. This will take effect from April 1 this year. For the rest of the affected population, the Health, Welfare and Food Bureau will need to conduct an in-depth study to assess the impact before considering when and how this will be applied to them in the longer term.

Madam President, I would like to stress that these measures are to ensure resources are allocated on a rational basis for the provision of benefits to Hong Kong people.

In approaching this complex issue, we have to strike a very fine balance between the interests of different sectors and pay due regard to our long-term fiscal balance. We have noted the practices in other places regarding eligibility for public benefits.

Hong Kong is a free, open and cosmopolitan society. We will continue to open wide our doors to immigrants who treasure the free, enterprising, innovative society that Hong Kong offers and who are ready to capitalise on the bountiful opportunities that we provide. At the same time, we encourage new arrivals to be self-reliant.

We believe that our continuous efforts to promote retraining and skill upgrading will enhance their skills level and integration of the new immigrants with the rest of the community. We also encourage the community to take a positive attitude towards the new immigrants, some of whom have already achieved remarkable results in their academic and business pursuits in Hong Kong.

The Need for Regular Review

Within the six months it was given to work, the Task Force sought to analyse the main social and economic challenges that our demographic trends readily present to us and have explored a set of practical measures to be taken in the short and medium term to address these challenges.

Having worked on this subject, I have come to realise that many factors affecting the demographic conditions in Hong Kong are beyond the control of the Government. There are market forces in action and we have to respect the choices individuals make. We also accept the issues involved will inevitably change.

Above all, Hong Kong is integrating more and more closely with the Pearl River Delta. This will carry far-reaching consequences on demographic developments in Hong Kong as more and more people move across the Hong Kong and Pearl River Delta boundary in both directions.

The continuing review of our population policy is therefore essential. The Task Force recommends that there should be dedicated resources in the Government to continue to oversee the population policy, to follow up on the longer-term issues and to review the implementation of the various policy measures regularly.

The publication of this Report denotes not the end but rather the beginning of a mammoth task. I appeal to Members of this Council and the community to support this important exercise, which carries long-term consequences for us and for generations to come.

Madam President, we may not have sufficient time today to go into details of each and every aspect of the proposed population policy. If Members so wish, I would be more than happy to discuss the subject at my meeting with the House Committee on Friday. Relevant Bureaux are also prepared to brief their respective Panels on individual policy measures as appropriate.

End/Wednesday, February 26, 2003

NNNN

 [Floor/ English/ Cantonese](#)

 [Email this article](#)

Minimum allowable wage for foreign domestic helpers remains unchanged

The Government announced today (May 10) that the minimum allowable wage for foreign domestic helpers (FDHs) in Hong Kong would be maintained at the current level of \$3,270 per month.

The minimum allowable wage for FDHs is reviewed regularly in the light of the general economic and employment situation of Hong Kong as reflected through a basket of economic indicators which includes the relevant income movement, price change and labour market situation.

Any employer who pays less than the stated minimum allowable wage in the existing contract commits an offence under the Employment Ordinance and the employer is liable, on conviction, to a fine of \$200,000 and one year's imprisonment.

Employers are free to pay more than the minimum allowable wage.

Ends/Monday, May 10, 2004

NNNN

Adjustment of minimum allowable wage for foreign domestic helpers

The Government announced today (May 18) that, with effect from tomorrow (May 19), the minimum allowable wage (MAW) for foreign domestic helpers (FDHs) in Hong Kong would be increased by \$50 (or 1.5%) from \$3,270 to \$3,320 per month.

The new MAW will apply to employment contracts signed on or after May 19 this year.

The MAW for FDHs is reviewed regularly in the light of Hong Kong's general economic and employment situation as reflected through a basket of economic indicators which includes the relevant income movement, price change and labour market situation.

Employment contracts signed on or before May 18 this year at a salary level not lower than the prevailing MAW of \$3,270 per month then will be processed by the Immigration Department, provided the application reaches the department on or before June 15 this year.

Any employer who pays less than the wages as stated in the existing employment contract commits an offence under the Employment Ordinance and the employer is liable, on conviction, to a fine of \$200,000 and one year's imprisonment.

Employers are free to pay more than the MAW to their FDHs.

Ends/Wednesday, May 18, 2005

NNNN

Press Releases

Adjustment of minimum allowable wage for foreign domestic helpers

The Government announced today (May 30) that, with effect from tomorrow (May 31), the minimum allowable wage for foreign domestic helpers in Hong Kong would be increased by \$80 from \$3,320 to \$3,400 per month.

The new minimum allowable wage will apply to employment contracts signed on or after May 31, this year.

The minimum wage for foreign domestic helpers is reviewed regularly in the light of Hong Kong's general economic and employment situation as reflected through a basket of economic indicators which include the relevant income movement, price change and labour market situation.

Employment contracts signed on or before May 30 this year at a wage level not lower than the prevailing minimum wage of \$3,320 per month will still be processed by the Immigration Department, provided that the applications reach the department on or before June 27 this year. This is to allow time for employers whose contracts are signed on or before May 30 to complete the necessary procedure before submitting their applications to the department.

Any employer who pays less than the wage as stated in the existing employment contract commits an offence under the Employment Ordinance and is liable, on conviction, to a maximum fine of \$350,000 and three years' imprisonment.

Employers are free to pay more than the minimum wage to their helpers.

Ends/Tuesday, May 30, 2006
Issued at HKT 16:31

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Press Releases

Adjustment of minimum allowable wage for foreign domestic helpers

The Government today (June 5) announced that the minimum allowable wage for foreign domestic helpers in Hong Kong would be increased by \$80 from \$3,400 to \$3,480 per month, with effect from tomorrow (June 6).

The new minimum allowable wage will apply to employment contracts signed on or after June 6 this year.

The minimum wage for foreign domestic helpers is reviewed regularly in the light of Hong Kong's general economic and employment situation as reflected through a basket of economic indicators which include the relevant income movement, price change and labour market situation.

Employment contracts signed on or before June 5 this year at a wage level not lower than the prevailing minimum wage of \$3,400 per month will still be processed by the Immigration Department, provided that the applications reach the department on or before July 3 this year. This is to allow time for employers whose contracts are signed on or before June 5 to complete the necessary procedure before submitting their applications to the department.

Any employer who pays less than the wage as stated in the existing employment contract commits an offence under the Employment Ordinance and is liable, on conviction, to a maximum fine of \$350,000 and three years' imprisonment.

Employers are free to pay more than the minimum wage to their helpers.

Ends/Tuesday, June 5, 2007
Issued at HKT 16:30

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Press Releases

Minimum wage increased for foreign domestic helpers

The Government announced today (July 9) that with effect from tomorrow (July 10) the minimum allowable wage (MAW) for foreign domestic helpers (FDHs) in Hong Kong would be increased by \$100 from \$3,480 to \$3,580 per month.

The new minimum allowable wage is applicable to employment contracts signed on or after July 10, 2008.

The MAW for FDHs is reviewed regularly in the light of Hong Kong's general economic and employment situation, as reflected through a basket of economic indicators including the relevant income movement, price change and labour market situation.

Employment contracts signed on or before July 9 at a wage level not lower than the prevailing MAW of \$3,480 per month will still be processed by the Immigration Department (ImmD) on such wage terms, provided that the applications would have reached ImmD on or before August 6, 2008. This is to allow time for employers whose contracts were signed on or before July 9 to complete the necessary procedures before submitting their applications to ImmD.

Any employer who pays less than the wage as stated in the employment contract commits an offence under the Employment Ordinance and is liable, upon conviction, to a maximum fine of \$350,000 and three years' imprisonment.

Employers are free to pay more than the MAW to their FDHs.

Ends/Wednesday, July 9, 2008

Issued at HKT 16:30

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Press Releases

Minimum Allowable Wage and food allowance for foreign domestic helpers

The Government announced today (September 2) that the Minimum Allowable Wage (MAW) for foreign domestic helpers (FDHs) in Hong Kong would remain at \$3,580 per month.

In addition, the food allowance in lieu of free food for FDHs will be increased from not less than \$300 per month to not less than \$740 per month. The new level will apply to all contracts signed on or after tomorrow (September 3).

A Government spokesman said, "The Government regularly reviews the MAW for FDHs and has decided to freeze the MAW level this year. The review takes account of Hong Kong's general economic and employment situation, as reflected through a basket of economic indicators including the relevant income movement, price change and labour market situation."

The Government has also reviewed the food allowance in lieu of free food this year and decided to raise it to the new level after taking account of the movement in the relevant consumer price indices.

"Under the Standard Employment Contract for hiring FDHs, employers are required to provide FDHs with food free of charge, but may choose to pay a food allowance in lieu of free food to FDHs."

"The option to allow employers to pay food allowance in lieu of free food serves merely to give them the flexibility to cater for special circumstances. In fact, the vast majority of employers at present provide food free of charge to FDHs."

Contracts signed today or before with the existing food allowance of not less than \$300 will still be processed by the Immigration Department (ImmD) provided that the applications reach ImmD on or before September 30, 2009.

"This arrangement should allow sufficient time for employers to send the signed contracts to ImmD for completion of the necessary application procedures," he said.

Employers are free to pay their FDHs more than the MAW and minimum food allowance.

Ends/Wednesday, September 2, 2009
Issued at HKT 16:30

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