

Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 4 December 2009

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 4 December 2009 to examine the Minimum Wage Bill (the Bill).

Measures adopted by the Labour Department to tackle false self-employment

2. The Administration was asked to brief Members on the measures adopted by the Labour Department (LD) to tackle false self-employment.

3. The subject of false self-employment was recently discussed at the meetings of the Labour Advisory Board and the LegCo Panel on Manpower on 4 and 19 November 2009 respectively. As undertaken by the Administration at these two meetings, LD would adopt a three-pronged approach to tackle false self-employment by:

- (a) strengthening education and promotional efforts both for employers and employees, targeting small and medium enterprises and in particular sectors where false self-employment is a more common practice, so as to drive home the message that a person falsely labelled as a self-employed person or a contractor is still entitled to employment rights and benefits if in essence there exists an employer-employee relationship;
- (b) providing a more user-friendly consultation and conciliation service to employees in false self-employment in case of disputes; and
- (c) stepping up enforcement action to safeguard employees' statutory rights and benefits.

Furthermore, we encourage those who are aggrieved by suspected false self-employment to come forward and report to LD. A Complaint Hotline (2815 2200) is in place to facilitate the reporting of such cases.

4. Details of LD's measures are set out at Annex A. We will keep relevant statistics on cases related to claims of false self-employment to facilitate better understanding of the problem, and will report back to the Panel on Manpower at an appropriate time.

Local students of overseas universities undertaking internships in Hong Kong

5. A Member asked the Administration to consider the feasibility of further exempting local students who study in universities abroad and undertake internships in Hong Kong under the Bill. Another Member suggested that all students should be exempted from the Bill.

6. It is pertinent to point out that student internships do not necessarily involve employer-employee relationship and the Bill does not apply to cases where there is no contract of employment between a student intern and the host organisation. A contract of employment entails an exchange of undertaking for the employee to perform work or services for the employer in return for wages. Where a person undertakes to perform work for an organisation without pay or only with recompense for work-related expenses and with no intention to create legal relations, the essential element of a contract is missing and hence there is no contract of employment. Therefore, when a student, regardless of whether he is pursuing his studies in Hong Kong or abroad, is not engaged under a contract of employment in undertaking an internship, the proposed statutory minimum wage (SMW) regime is not applicable to him and thus there is no need for any exemption.

7. If the exemption under clause 6(4) of the Bill is extended, without a workable law enforcement system, to employees who study in overseas universities, this would give rise to abuse. Given there are numerous universities globally and the exemption of overseas university students, if any, cannot be restricted only to those studying in well-known institutions, there would be insurmountable difficulties in ascertaining or verifying that all such internships fulfill the conditions for exemption, that is, whether the work is really arranged or endorsed by an overseas university, whether it is in connection with a full-time accredited programme, and whether it is a compulsory/elective component of the

requirements for the award of the overseas academic qualification to which the programme leads. Some employers can take advantage of this practicable problem of law enforcement and use internship in disguise to replace genuine jobs.

8. Providing a blanket exemption for all the students from the SMW regime would also be prone to abuse and exploitation, e.g. bona fide jobs may be turned into internships to circumvent the SMW, and low-skilled workers could be displaced as a result. An unconditional exemption would also work against the interests of students who would otherwise be protected by SMW when they are in employment not necessitated by their curricula, such as in their summer or part-time jobs. Therefore, clause 6(4) serves to exempt employees who are students undergoing internships arranged or endorsed by specified education institutions in connection with full-time locally-accredited programmes for which the work is a compulsory/elective component of the requirements for the award of the concerned academic qualifications.

9. The Administration would continue to consider the views received on this issue.

Information on SMW systems in other jurisdictions

10. A Member asked whether SMW systems in other jurisdictions provide a different minimum wage for young people. The relevant information is at Annex B.

Labour and Welfare Bureau
December 2009

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

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

Strengthening promotion and publicity work in enhancing public awareness

2. 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 set out the differences in the rights and benefits between the two under the Employment Ordinance (Cap. 57) (EO) and the Employees' Compensation Ordinance (Cap. 282) (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 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 the EO delivered by staff of LD to forestall any misunderstanding and possible disputes.

3. 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 described 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.

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

4. 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 the 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.

5. 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.

Stepping up enforcement action to safeguard employees' statutory rights

6. 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.

7. 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.

Annex B

SMW systems in other jurisdictions

Jurisdiction	Information as to whether the SMW system provides a different minimum wage for young people
Australia	The special federal minimum wage applies to junior employees under the age of 21. Some of the Australian Pay and Classification Scales of individual trades/occupations also provide for junior rates of pay for people under the age of 21.
France	A reduced rate at 80% of the minimum wage is applicable to young workers aged below 17, and at 90% to those aged between 17 and 18. However, young workers with experience of six months or more in their respective trade are entitled to receive the full rate.
Guangdong and Shenzhen	No such provision.
Japan	No such provision.
South Korea	No such provision.
Taiwan	A reduced rate at 70% of the minimum wage is applicable to employees aged above 15 and below 16.
The United Kingdom	There are two lower minimum wage rates which are applicable to workers aged 18 to 21 and those aged 16 to 17 respectively.
The United States	A lower minimum wage is permitted for employees under 20 years of age during their first 90 consecutive calendar days of employment with a new employer, as long as their work does not displace other workers. After 90 consecutive days of employment or when the employee reaches 20 years of age, whichever comes first, the employee is eligible to receive the federal minimum wage.