

**EMPLOYMENT (AMENDMENT)
BILL 2009**

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PART IXB

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A BILL

To

Add a new Part IXB to the Employment Ordinance to create an offence relating to an employer's failure to pay any sum payable under an award of the Labour Tribunal or Minor Employment Claims Adjudication Board that provides, in whole or in part, for the payment of any specified entitlement under that Ordinance; and to make consequential amendments to section 31O of that Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Employment (Amendment) Ordinance 2009.

2. Commencement

This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

3. Making of severance payment

(1) Section 31O(1A) of the Employment Ordinance (Cap. 57) is repealed.

(2) Section 31O(3)(a) is amended by repealing "or (1A)".

4. Part IXB added

The following is added—

“PART IXB

OFFENCE OF EMPLOYER’S FAILURE TO PAY ANY SUM PAYABLE
UNDER AWARD OF LABOUR TRIBUNAL OR MINOR
EMPLOYMENT CLAIMS ADJUDICATION BOARD**43N. Interpretation of Part IXB**

(1) In this Part—

“award” (判令) includes an order;

“registrar” (主任), in relation to a tribunal, means the Registrar of the Labour Tribunal or the Registrar of the Minor Employment Claims Adjudication Board (as the case may be);

“specified entitlement” (指明權利) means—

- (a) any wages or any other sum payable under section 23, 24 or 25, or interest payable under section 25A on the wages or sum;
- (b) any end of year payment payable under Part IIA;
- (c) any maternity leave pay or sum payable under Part III;
- (d) any severance payment payable under Part VA;
- (e) any long service payment payable under Part VB;
- (f) any sickness allowance or sum payable under Part VII;
- (g) any holiday pay payable under Part VIII;
- (h) any annual leave pay payable under Part VIIIA;
- (i) any sum payable in respect of rest days, maternity leave, holiday or annual leave which the employer is required under this Ordinance to grant to an employee but fails to grant, to the extent that the sum is not covered by paragraph (a), (b), (c), (d), (e), (f), (g) or (h); or
- (j) an award of terminal payments under section 32O to the extent that the award covers entitlements referred to in paragraph (a), (b), (c), (d), (e), (f), (g), (h) or (i);

“tribunal” (審裁處) means the Labour Tribunal or Minor Employment Claims Adjudication Board.

(2) A reference in this Part to an award of a tribunal includes—

- (a) a settlement treated as an award of the Labour Tribunal under section 15(9) of the Labour Tribunal Ordinance (Cap. 25); and
- (b) a settlement treated as an award of the Minor Employment Claims Adjudication Board under section 14(4) of the Minor Employment Claims Adjudication Board Ordinance (Cap. 453).

(3) A reference in this Part to the date of an award means, in relation to a settlement referred to in subsection (2)—

- (a) the date of filing of the settlement in the Labour Tribunal under section 15(8) of the Labour Tribunal Ordinance (Cap. 25); or
- (b) the date of filing of the settlement with the Registrar of the Minor Employment Claims Adjudication Board under section 14(3) of the Minor Employment Claims Adjudication Board Ordinance (Cap. 453).

43O. Application

(1) This Part applies to an award of a tribunal that is made on or after the commencement date.

(2) In this section, “commencement date” (生效日期) means the date on which the Employment (Amendment) Ordinance 2009 (of 2009) comes into operation.

43P. Offence of employer’s failure to pay any sum payable under award of tribunal

(1) If—

- (a) an award of a tribunal provides, in whole or in part, for the payment by an employer of any specified entitlement; and
- (b) the employer wilfully and without reasonable excuse fails to pay—
 - (i) any sum payable under the award (other than a sum to which subparagraph (ii) applies) within 14 days after the date of the award; or
 - (ii) any sum payable under the award that is, by the terms of the award, payable otherwise than on the date of the award, within 14 days after the date on which the sum is, by those terms, payable,

the employer commits an offence and is liable on conviction to a fine of \$350,000 and to imprisonment for 3 years.

(2) A reference in subsection (1)(b)(i) or (ii) to any sum payable under an award includes—

- (a) any part of a sum payable under the award; and
- (b) in the case of a sum payable by instalments, any instalment or part of an instalment.

- (3) For the purposes of subsection (1), if—
- (a) an award of a tribunal provides for the payment of a sum but does not indicate whether or not that sum includes any specified entitlement; and
 - (b) the claim to which the award relates consists, in whole or in part, of any specified entitlement,
- then, unless there is evidence to the contrary, the award is to be treated as providing for the payment of a specified entitlement.

**43Q. Liability of directors, partners, etc.
for offence under section 43P**

(1) Where an offence under section 43P committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, the director, manager, secretary or other similar officer commits the like offence.

(2) Where an offence under section 43P committed by a partner in a firm is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any other partner in the firm or any other person concerned in the management of the firm, the other partner or the other person concerned in the management of the firm commits the like offence.

(3) An offence under section 43P committed by a body corporate is presumed to have been committed with the consent or connivance of, or to be attributable to the neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, if it is proved that, at the time the offence was committed, the director, manager, secretary or other similar officer—

- (a) was concerned in the management of the body corporate;
or
- (b) knew or ought to have known that the award of the tribunal in respect of which the offence was committed had been made against the body corporate.

(4) An offence under section 43P committed by a partner in a firm is presumed to have been committed with the consent or connivance of, or to be attributable to the neglect on the part of—

- (a) any other partner in the firm, if it is proved that, at the time the offence was committed, the other partner was concerned in the management of the firm; or

- (b) any other partner in the firm or any other person concerned in the management of the firm, if it is proved that, at the time the offence was committed, the other partner or the other person knew or ought to have known that the award of the tribunal in respect of which the offence was committed had been made against the firm.
- (5) The presumption under subsection (3) or (4) is rebutted by a person charged with an offence under section 43P by virtue of that subsection if—
- (a) there is sufficient evidence to raise an issue that the offence was committed without the person's consent or connivance and was not attributable to the person's neglect; and
 - (b) the contrary is not proved by the prosecution beyond reasonable doubt.

43R. Proof of certain matters in proceedings for offence under section 43P

(1) For the purposes of proceedings for an offence under section 43P, a document ("first-mentioned document") purporting to be a copy of a specified document, and purporting to be certified by or on behalf of the registrar of a tribunal or the registrar of a court as a true copy of the specified document, is admissible in evidence on its production without further proof and, unless there is evidence to the contrary—

- (a) the court before which the first-mentioned document is produced must presume—
 - (i) that the first-mentioned document is certified by or on behalf of the registrar of a tribunal or the registrar of a court; and
 - (ii) that the first-mentioned document is a true copy of the specified document;
- (b) in the case of the first-mentioned document purporting to be a copy of a specified document referred to in subsection (2)(a) and prepared by an officer of a tribunal or of a court, the first-mentioned document is evidence of all matters contained in it; and
- (c) in the case of the first-mentioned document purporting to be a copy of a specified document referred to in subsection (2)(b) and prepared by an officer of a tribunal or of a court, the first-mentioned document is evidence of the facts specified in subsection (4) or (5).

- (2) In subsection (1), “specified document” (指明文件) means—
- (a) a claim filed with a tribunal, or an award made by a tribunal, or any other document relating to proceedings before a tribunal or a court; or
 - (b) any document that is relevant to any fact specified in subsection (4) or (5).
- (3) For the purposes of proceedings for an offence under section 43P, a certificate purporting to be issued by or on behalf of the registrar of a tribunal or the registrar of a court and stating any of the facts specified in subsection (4) or (5) is admissible in evidence on its production without further proof and, unless there is evidence to the contrary—
- (a) the court before which the certificate is produced must presume that the certificate is issued by or on behalf of the registrar of a tribunal or the registrar of a court; and
 - (b) the certificate is evidence of the facts so stated.
- (4) The following facts are specified for the purposes of subsection (3) in relation to a certificate purporting to be issued by or on behalf of the registrar of a tribunal—
- (a) whether any payment has been made to the tribunal in full or partial discharge of an award of the tribunal and, if so, particulars of the payment (including the date, amount and, in the case of an award made in favour of 2 or more claimants, to which claimant the amount is paid);
 - (b) whether a decision has been made in any proceedings to set aside or review an award of the tribunal and, if so, the particulars of the decision;
 - (c) whether any proceedings are pending to set aside or review an award of the tribunal and, if so, the particulars of the pending proceedings;
 - (d) whether any person was present at the hearing of the tribunal at which an award of the tribunal was made or at any hearing of the claim to which the award relates; and
 - (e) whether any document relating to proceedings before the tribunal has been served on any person and, if so, the particulars of service (including the mode, time and address of service).
- (5) The following facts are specified for the purposes of subsection (3) in relation to a certificate purporting to be issued by or on behalf of the registrar of a court—
- (a) whether a decision has been made in an appeal (if any) against an award of a tribunal and, if so, the particulars of the decision; and

- (b) whether an appeal is pending against an award of a tribunal and, if so, the particulars of the pending appeal.
- (6) In this section, “registrar of a court” (司法常務官) means—
 - (a) the Registrar of the High Court; or
 - (b) the Registrar of the Court of Final Appeal.
- (7) In subsections (1) and (3), a reference to a court before which a document or a certificate is produced includes a magistrate.

43S. Prosecution of offence under section 43P

(1) No prosecution for an offence under section 43P may be commenced without the consent in writing of the Commissioner.

(2) Before giving consent to prosecute under subsection (1), the Commissioner must hear the person against whom the allegation is made, or give the person an opportunity of being heard.

(3) Subject to subsection (1), a prosecution for an offence under section 43P may be brought in the name of the Commissioner and may be commenced and conducted by any officer of the Labour Department authorized in that behalf in writing by the Commissioner.

(4) Nothing in this section derogates from the powers of the Secretary for Justice in respect of the prosecution of criminal offences.”.

Explanatory Memorandum

The object of this Bill is to amend the Employment Ordinance (Cap. 57) to create an offence relating to an employer’s failure to pay any sum payable under an award of the Labour Tribunal or Minor Employment Claims Adjudication Board that provides, in whole or in part, for the payment of any specified entitlement under that Ordinance.

2. Clause 4 adds a new Part IXB (consisting of proposed sections 43N, 43O, 43P, 43Q, 43R and 43S) to the Employment Ordinance.

3. The proposed section 43N contains definitions to be used for the interpretation of the proposed Part IXB, including—

- (a) “specified entitlement”, as defined, includes entitlements such as wages, end of year payment, maternity leave pay, severance payment, long service payment, sickness allowance, holiday pay and annual leave pay;
- (b) “tribunal” is defined to mean the Labour Tribunal or Minor Employment Claims Adjudication Board;

- (c) “registrar”, in relation to a tribunal, is defined to mean the Registrar of the Labour Tribunal or the Registrar of the Minor Employment Claims Adjudication Board; and
- (d) a reference to an award of a tribunal includes a settlement treated as an award upon its being signed by the parties and filed under the Labour Tribunal Ordinance (Cap. 25) or the Minor Employment Claims Adjudication Board Ordinance (Cap. 453).

4. The proposed section 43O limits the application of the proposed Part IXB to an award of a tribunal made on or after the day appointed for the coming into operation of the Bill, if enacted.

5. Under the proposed section 43P(1), an employer commits an offence if an award of a tribunal provides for the payment by the employer of any specified entitlement and the employer fails to pay any sum payable under the award within 14 days after the sum is due. The penalties for the offence are a fine of \$350,000 and imprisonment for 3 years.

6. Under the proposed section 43P(3), if an award of a tribunal provides for the payment of a sum but does not indicate whether or not that sum includes any specified entitlement, and the claim to which the award relates consists, in whole or in part, of any specified entitlement, then, unless there is evidence to the contrary, the award is to be treated as providing for the payment of a specified entitlement for the purposes of the proposed section 43P(1).

7. The proposed section 43Q(1) and (2) provides that where an offence under the proposed section 43P committed by a body corporate or a partner in a firm is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director or other senior officer of the body corporate, or another partner in the firm or another person concerned in the management of the firm, that director, officer, partner or person commits the like offence. The proposed section 43Q(3), (4) and (5) provides for rebuttable presumptions as to consent, connivance or neglect on the part of a director or other senior officer of the body corporate, or another partner in the firm or another person concerned in the management of the firm based on that director’s, officer’s, partner’s or person’s involvement in management or knowledge or constructive knowledge of an award.

8. The proposed section 43R provides for proof of certain matters in proceedings for an offence under the proposed section 43P. The proposed section 43R(1) and (2) provides that a copy of a claim, award or any other document relating to proceedings before a tribunal or a court or of a document relevant to certain specified facts and certified by or on behalf of the registrar of a tribunal or the Registrar of the High Court or the Registrar

of the Court of Final Appeal (“the registrar of a court”) to be a true copy is admissible in evidence. The proposed section 43R(3), (4) and (5) provides that a certificate issued by or on behalf of the registrar of a tribunal or the registrar of a court as to payment into the tribunal or as to other specified facts is admissible as evidence of those facts.

9. Under the proposed section 43S, the consent of the Commissioner for Labour is required for instituting a prosecution for an offence under the proposed section 43P.

10. As the existing offence under section 31O(1A) of the Employment Ordinance will be subsumed under the offence under the proposed section 43P, clause 3 contains consequential amendments to that section 31O.