

# 立法會

## *Legislative Council*

LC Paper No. LS104/08-09

### **Paper for the House Committee Meeting on 10 July 2009**

#### **Legal Service Division Report on Employment (Amendment) Bill 2009**

#### **I. SUMMARY**

- 1. Object of the Bill** To create a new offence against employers failing to make payment under an award of the Labour Tribunal (LT) or Minor Employment Claims Adjudication Board (MECAB).
- 2. Comments** To deter employers from wilful non-compliance of LT and MECAB awards, the Bill adds a new Part IXB to the Employment Ordinance (Cap. 57) to create the proposed offence and to provide for related matters including prosecution of the proposed offence, liability of directors and partners, and proof of certain matters in the relevant proceedings.
- 3. Public Consultation** According to the Administration, the proposal of making non-payment of the Labour Tribunal awards a criminal offence was reported to the Labour Advisory Board (LAB) in July 2008 and subsequently agreed by LAB in December 2008.
- 4. Consultation with LegCo Panel** The Panel on Manpower (the Panel) discussed the Administration's proposals at its meetings on 8 July 2008 and 18 December 2008. While the Panel supported in principle the proposals, members expressed concerns on the elements and burden of proof of the proposed offence as well as the relevant prosecution process.
- 5. Conclusion** Members may wish to consider setting up a Bills Committee to examine the policy aspects and the detailed provisions for the proposed offence. The legal and drafting aspects of the Bill are still under our scrutiny.

## II. REPORT

### Object of the Bill

The object of the Bill is to create a new offence against employers failing to make payment under an award of the Labour Tribunal (LT) or Minor Employment Claims Adjudication Board (MECAB).

### LegCo Brief Reference

2. LD LRD/10-3/1-6 issued by the Labour and Welfare Bureau in June 2009.

### Date of First Reading

3. 8 July 2009.

### Comments

#### The proposed offence

4. There has been increasing concern in the community over employers' failure to make payments to their employees even after a LT or MECAB award was made. As the enforcement of the award rests with the successful party, employees are usually deterred to take enforcement actions against their employers when taking into consideration the time and costs involved. According to the Administration, criminalisation of non-payment of LT awards is a viable option to address the problem.

5. While defaults in payment of wages and other statutory entitlements such as statutory holiday pay, annual leave pay, sickness allowance, maternity leave pay are already offences under the Employment Ordinance (Cap. 57) (the Ordinance), non-payment of LT or MECAB awards itself is not an offence. To enhance the enforcement of the LT and MECAB awards, the Bill adds a new Part IXB (consisting of proposed sections 43N, 43O, 43P, 43Q, 43R and 43S) to the Ordinance to create the proposed offence and to provide for related matters.

6. The proposed section 43P provides that an employer commits an offence if he wilfully and without reasonable excuse fails to pay any sum under an award of LT or MECAB within 14 days from its due date. The new offence will be applicable to an award made on or after the commencement of the Bill. The award concerned shall consist of a specified entitlement which is defined in the proposed section 43N to mean -

- (a) wages and any interest on wages;
- (b) end of year payment;
- (c) maternity leave pay;

- (d) severance payment;
- (e) long service payment;
- (f) sickness allowance;
- (g) holiday pay; or
- (h) annual leave pay.

Proposed level of penalty

7. The proposed penalty for the new offence is a maximum penalty of \$350,000 and three years' imprisonment, which is on par with the highest penalty level for offences relating to payment of wages under the Ordinance.

Liability of directors and partners

8. Under the proposed Section 43Q, where a body corporate or a firm is proved to have committed the proposed offence with the consent or connivance of, or attributable to any neglect of any director/partner or other responsible officer, such director/partner or officer commits the like offence. A rebuttable presumption of such consent, connivance or neglect is made if the prosecution can prove the accused's involvement in the management of the body corporate/firm or his knowledge about the award concerned.

Prosecution of the proposed offence

9. To facilitate proof of certain facts in the proceedings for the proposed offence, the Bill introduces a new section 43R to the effect that a copy of a relevant document (such as a claim, award or any other document relating to the proceedings before a tribunal or a court) certified by the registrar of a tribunal or the registrar of a court as a true copy shall be admissible as evidence of the facts or matters contained in it without further proof unless there is evidence to the contrary. Similar provisions are made in relation to the certificates issued by the registrar of a tribunal or the registrar of a court.

10. Under the proposed section 43S, the consent in writing of the Commissioner for Labour is required for instituting prosecution for the new offence. Before giving such consent, the Commissioner must hear the person against whom the allegation is made or give the person an opportunity of being heard.

Consequential amendments to section 31O

11. The existing 31O(1A) of the Ordinance provides that where the LT or MECAB has ordered that a severance payment is payable by an employer, it shall order the time for the payment and if no such order has been made, the sum shall be paid within 14 days from the date of the order of the payment. Section 31O(3)(a) provides that failure to pay such sum as ordered without reasonable excuse shall be guilty of an offence with a fine at level 3 (\$10,000). As this offence will be subsumed under the

proposed offence, the Bill proposes to repeal section 31O(1A) and make consequential amendments to section 31O(3)(a).

### **Public Consultation**

12. According to paragraph 19 of the LegCo Brief, the proposal of making non-payment of LT awards a criminal offence was reported to the Labour Advisory Board (LAB) in July 2008 and subsequently agreed by LAB in December 2008.

### **Consultation with LegCo Panel**

13. The Administration briefed the Panel on Manpower at its meetings on 8 July 2008 and 18 December 2008 on three proposals to enhance the enforcement of LT awards, namely, making non-payment of LT awards a criminal offence, empowering LT to order defaulting employers to pay additional sums to employees and empowering LT to order disclosure of the financial details of defaulting employers.

14. Members supported the Administration's proposals. Some members took the view that the three enhancement measures proposed by the Administration should be implemented together. The Administration responded that while it considered the three measures all important, making non-payment of LT awards a criminal offence should be accorded priority in order that employees could benefit from the new measure as soon as possible.

15. Members also expressed concerns on the elements and the burden of proof of the proposed offence and the process for instituting the relevant criminal proceedings. There was a member who questioned the need to introduce a new law to make non-payment of LT awards a criminal offence given that default in payment of wages and other statutory entitlements already carried criminal liability under the Ordinance. Members may refer to the minutes of the meetings (LC Paper No. CB(2)2755/07-08 and CB(2)865/08-09) for further information.

### **Conclusion**

16. Members may wish to consider setting up a Bills Committee to examine the policy aspects and the detailed provisions for the proposed offence. The legal and drafting aspects of the Bill are still under our scrutiny.

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