

For discussion on
16 April 2009

Legislative Council Panel on Manpower

Statutory minimum wage – Coverage of employees

Purpose

This paper seeks Members' views on issues pertaining to the coverage of employees under the proposed statutory minimum wage (SMW) legislation.

Background

2. The overall review of the voluntary Wage Protection Movement for cleaning workers and security guards conducted in October 2008 revealed the limitations in promoting wage protection through voluntary participation. As the voluntary route could not achieve the purpose of wage protection, the Chief Executive announced in his 2008-09 Policy Address that an SMW would be introduced. In view of the mobility of workers amongst different low-paying sectors, the difficulty in defining "cleaning workers" and the fact that there are other occupational groups which are paid less than cleaning workers and security guards, an across-the-board approach would be adopted.

Coverage under the proposed SMW legislation

3. To ensure as seamless an interface as possible in enforcing employees' rights and benefits under the Employment Ordinance (Cap. 57) (EO), the provisions of the SMW legislation should follow as closely as possible those under the EO, including the coverage of employees, definition of "wages", allowable wage deductions, employees' statutory entitlements and offence and penalty provisions. Such alignment would greatly facilitate compliance by employers and employees as well as investigation and prosecution by the law enforcement agencies. Nevertheless, in the light of the views and concerns of the respective stakeholders, there is a need to consider whether exemptions should be provided under the proposed SMW legislation with respect to certain groups of employees, namely people with disabilities (PWDs), students undertaking internship and domestic workers. The case of PWDs was fully considered by the Manpower Panel on 19 February 2009 and this paper covers the other two groups of employees.

Exclusion or otherwise of students undertaking internship

Local circumstances

4. Internship programmes are commonly adopted by post-secondary and other education institutions for training and education purposes. While the proposed SMW legislation will only apply upon the establishment of an employer-employee relationship and full-time students would unlikely be caught under normal circumstances, some internship programmes do involve employer-employee relationship between the students and the hosting organisations during the work attachment period. In such cases, employers would be obliged to pay at least the SMW to their interns after the legislation is enacted.

5. Universities and other education institutions have expressed concern over the unavoidable reduction in training opportunities should employers be required to pay students on internship at a rate not lower than the SMW. They appeal for exemption of students on genuine internship programmes from the coverage of SMW legislation in order to preserve opportunities for students to acquire on-the-job training and practical knowledge which are integral to the concerned curriculum.

6. The duration of internship programmes can vary widely, ranging from less than one month to one year. Regarding salary, some interns are not paid any wages or allowances, while some could get as much as \$10,000 a month or more. Despite the great diversity in employment terms and remuneration packages, the nature of the internship programmes can be broadly classified into three categories —

Category I

- The internship is for meeting academic or programme requirements. It is either credit-bearing/an elective or a compulsory requirement for obtaining the concerned academic qualification. The programme is usually arranged or endorsed by the concerned education institution which assumes an active coordinating and supervising role.

Category II

- The internship is non-credit-bearing but curriculum-related. While it might also be arranged or endorsed by the education institution, the institution's coordinating or supervising role is relatively less structured compared with those under Category I.

Category III

- The internship is neither credit-bearing nor curriculum-related. The involvement of the education institution is minimal, if any, and it does not have a role to play in monitoring students' progress during the attachment period.

Community views and expectations

7. We have consulted major post-secondary institutions, including the 12 degree-awarding institutions and other education institutions providing sub-degree programmes and above, the Vocational Training Council, as well as employers offering internship opportunities and other relevant stakeholders. Their views and concerns are as follows –

- (a) The education institutions, while acknowledging the importance of internship for the holistic development of students, are not in favour of a blanket exemption of all students on internship from SMW as unscrupulous employers could easily abuse the arrangement. Displacement of low-skilled workers is a real and serious concern, though the magnitude of the adverse impact would very much hinge on the SMW level.
- (b) The institutions consider that the exemption of students under Category I in paragraph 6 above from the application of the SMW would be reasonable as the internships provide essential training as an integral part of the education to prepare students for a career in the specific industries concerned, and abuse would be unlikely as such internships are closely monitored by the institutions.
- (c) Regarding students under Category II, although some institutions consider that they should be exempted, the majority considers otherwise, given the difficulty in monitoring the hosting companies to prevent abuses. In addition, the term “curriculum-related” is not foolproof and hard to define for general disciplines. Following this, it is unanimously agreed that students under Category III should not be exempted either.
- (d) Some employers offering internship programmes consider that interns should be exempted from the SMW altogether, otherwise they may refrain from taking in interns in future or cut down the number of internships being offered at present.

Overseas experience in treating students undertaking internship under an SMW

8. While local circumstances and the nature of duties should determine if exemption should be made to certain class of employees, it would be useful to draw on the experience of other jurisdictions. Quite commonly found from those jurisdictions is the exemption of students who are on training programmes as part of an academic course from the SMW, such as the arrangements in the following countries –

- (a) The United Kingdom (UK) – The National Minimum Wage Regulations 1999 provides for the exemption of students who undertake internship as part of UK-based higher education courses or further education courses, where the internship does not exceed one year.
- (b) Canada – In Ontario, the Employment Standards Act 2000 provides that SMW does not apply to (i) secondary school students who work under a work experience programme authorised by the school board; or (ii) individuals who work under a programme approved by a college of applied arts and technology or a university.

Notwithstanding the above examples, there are also countries, such as South Korea, putting in place an SMW covering students on training programmes and other workers in a like manner.

Exclusion or otherwise of domestic workers

Local circumstances

9. Domestic workers in Hong Kong are broadly divided into domestic helpers and other workers such as gardeners, chauffeurs, boat boys, etc. Post-natal care workers are yet another domestic worker group which has newly emerged in recent years. By and large, though, domestic helpers should still make up the bulk of the domestic working population in Hong Kong to date.

10. Generally speaking, whether a household would hire a certain kind of domestic workers depends very much on its own needs and circumstances. For instance, according to a survey conducted by the Census and Statistics Department (C&SD) in early 2000s, employers of domestic helpers tend to hire full-time and live-in ones when there is the need for care for the elderly or small children. Otherwise, employers would more likely hire domestic helpers on a part-time basis to help with cleaning, cooking and other household chores.

11. Like those of other employees, the employment terms of domestic workers vary, depending largely on the agreement between the concerned parties. Notwithstanding this, the remuneration package for live-in domestic helpers is usually distinctive for it includes more in-kind benefits not available to non-live-in workers. For example, live-in domestic workers are given free accommodation on top of their wages. It is also common for employers to provide free meals given the round-the-clock attendance expected of live-in domestic workers. Since they live in their employer's residence, such workers are also spared the cost to commute between home and workplace.

12. For live-in domestic helpers hired from abroad (i.e. foreign domestic helpers (FDHs)), in particular, their basic employment terms are prescribed by the Government in the standard employment contract¹, including free medical treatment, free passage from and to the helper's place of origin, free meals, free accommodation with reasonable privacy, etc. To protect such helpers against exploitation by their employers, the Government has since the early 1970s prescribed for them a minimum allowable wage (MAW). The MAW is currently set at \$3,580 and is subject to regular reviews².

Community views and expectations

13. With the large number of households at stake, it is expected that there would be community-wide concern over the inclusion or otherwise of domestic workers under the SMW regime.

14. From the consultation that the Labour Department has conducted so far with the relevant stakeholders, including employer groups, employee groups and unions, views against the inclusion of domestic workers, especially live-in domestic workers, are mainly as follows –

(a) Difficulty in ascertaining the number of hours worked

Many consider that domestic work is rather distinct from “work” in common sense, especially when the workers are required to be live-in, i.e. residing with the employers. They consider that there is practical

¹ The contract is entitled “EMPLOYMENT CONTRACT (For A Domestic Helper recruited from abroad)” (ID 407 (10/2003)) issued by the Immigration Department. A sample is at **Annex** for reference.

² In setting and reviewing the MAW, the Administration, according to the established mechanism, takes account of Hong Kong's general economic and employment situation, as reflected through a basket of economic indicators including the relevant income movements, price change and labour market situation.

difficulty for SMW to cover live-in domestic workers, as the multifarious domestic duties and possible tasks varying from day to day and from time to time would render it quite impossible to ascertain the actual hours worked in order to determine the hourly wages due. This would cause difficulty with the proposed SMW regime based on hourly wage rates. Given the fact that live-in domestic workers work and rest in the same place (i.e. “home”), most consider that it may not be practicable for a household to keep a clear record of such working hours and tasks as required of other employers under the SMW regime.

If SMW is to cover live-in domestic workers, in order to ascertain the hours worked and to “minimise” the wages payable to the workers, some employers may ask the workers to leave “home” during the day when there is not much work for him/her to do at “home”. This would in turn cause much inconvenience to both parties, let alone the possible resultant social problems.

(b) Higher disposal income from provision of other in-kind benefits

Free accommodation, free meals and savings in travelling costs enjoyed by live-in domestic workers are indeed payment in kind. Thus, such domestic workers in effect enjoy a higher degree of disposable income compared with other low-skilled workers.

(c) Higher cost in hiring live-in domestic helpers

Employer groups express grave concern over the inevitable cost increase in hiring live-in domestic helpers, whose services-rendered-on-demand are much needed by many working couples to help raise children and/or take care of the elderly at home, if such workers are covered by the SMW legislation under which their wages are to be computed on an hourly basis.

Some consider that if SMW applies to live-in domestic helpers generally, such increase in hiring cost would dampen the incentive for women to stay in the job market. This sentiment is especially strong amongst those employers whose live-in domestic helpers are FDHs subject to the MAW arrangement. The affected women would rather stay at home and take care of their children on their own when it is no longer more “cost-effective” to hire live-in domestic helpers.

As background reference, from the figures provided by the C&SD, female labour participation rate (age 25 to 45) increased from 66.5% to 76.6% from 1998 to 2008, whereas their median monthly earnings stood at around \$10,000 as at the end of 2008.

15. On the other hand, some unions, including FDH unions, consider that domestic workers should be included in the SMW coverage on the following grounds –

(a) Protection under other labour laws

FDH unions consider that since they are given equal and full protection under all other labour laws in Hong Kong, it is not justifiable for them to be exempted from the SMW.

(b) Stipulation of “hours worked”

To counter the argument that the round-the-clock attendance of live-in domestic workers in a household would render computation of SMW infeasible, the unions propose that the Government may prescribe a “standard working hours”, say 10 or 12 hours, as the basis for computation of wages, regardless of how long they actually work.

(c) Removal of “live-in” requirement

In the case of FDHs, to enable computation of working hours, some advocate that the Government should remove the existing “live-in” requirement.

Overseas experience in treating domestic workers under an SMW

16. While local circumstances and the nature of duties should determine if exemption should be given to certain class of employees, it would be useful to make reference to the experience of other jurisdictions. Some jurisdictions, such as Ontario in Canada, include domestic workers under the coverage of SMW while others, such as UK and South Korea, exempt them. For example –

- (a) UK – The National Minimum Wage Regulations 1999 provides for the exemption of domestic workers from the minimum wage, provided that, *inter alia*, the worker is, while performing duties relating to the concerned household, treated like a member and an integral part of the employer’s family.

- (b) South Korea – The Minimum Wage Act does not cover workers hired for household work, as households are not considered “businesses” or “workplaces” captured by the Act.

Views of the Labour Advisory Board (LAB)

17. The LAB discussed the coverage of employees under the proposed SMW legislation on 30 March 2009. After careful deliberation, members agreed that students undertaking internship programmes for meeting academic or programme requirement should not be covered by the SMW legislation. Such academic or programme requirement should be either credit-bearing/an elective or a compulsory requirement for obtaining the concerned academic qualification.

18. For domestic workers, members of the LAB considered in detail the different views expressed by stakeholders and acknowledged the need to take into account the unique “live-in” condition and the possible socio-economic impacts on Hong Kong as the cardinal considerations in mapping out the way forward. The majority of LAB members supported that live-in domestic workers should not be covered by the SMW legislation, while some expressed reservation about their exclusion or remained open-minded on the matter.

Way Forward

19. We are working closely with the Department of Justice and relevant bureaux/departments in preparing the draft bill on SMW. Meanwhile, consultations with relevant stakeholders on implementation details are continuing in parallel. Our plan is to introduce the Minimum Wage Bill into the Legislative Council before the current legislative session ends in July 2009.

20. We would welcome Members’ views on the matter.

Labour and Welfare Bureau
Labour Department
April 2009

D.H. Contract No. _____

Employment Contract
(For A Domestic Helper recruited from abroad)

This contract is made between _____
("the Employer", holder of Hong Kong Identity Card/Passport No.* _____) and
_____ ("the Helper") on _____ and
has the following terms:

1. The Helper's place of origin for the purpose of this contract is _____

2. (A)[†] The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on the date on which the Helper arrives in Hong Kong.
(B)[†] The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on _____, which is the date following the expiry of D.H. Contract No. _____ for employment with the same employer.
(C)[†] The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on the date on which the Director of Immigration grants the Helper permission to remain in Hong Kong to begin employment under this contract.
3. The Helper shall work and reside in the Employer's residence at _____

4. (a) The Helper shall only perform domestic duties as per the attached Schedule of Accommodation and Domestic Duties for the Employer.
(b) The Helper shall not take up, and shall not be required by the Employer to take up, any other employment with any other person.
(c) The Employer and the Helper hereby acknowledge that Clause 4 (a) and (b) will form part of the conditions of stay to be imposed on the Helper by the Immigration Department upon the Helper's admission to work in Hong Kong under this contract. A breach of one or both of the said conditions of stay will render the Helper and/or any aider and abettor liable to criminal prosecution.
5. (a) The Employer shall pay the Helper wages of HK\$ _____ per month. The amount of wages shall not be less than the minimum allowable wage announced by the Government of the Hong Kong Special Administrative Region and prevailing at the date of this contract. An employer who fails to pay the wages due under this employment contract shall be liable to criminal prosecution.
(b) The Employer shall provide the Helper with suitable and furnished accommodation as per the attached Schedule of Accommodation and Domestic Duties and food free of charge. If no food is provided, a food allowance of HK\$ _____ a month shall be paid to the Helper.
(c) The Employer shall provide a receipt for payment of wages and food allowance and the Helper shall acknowledge receipt of the amount under his/her* signature.
6. The Helper shall be entitled to all rest days, statutory holidays, and paid annual leave as specified in the Employment Ordinance Chapter 57.
7. (a) The Employer shall provide the Helper with free passage from his/her* place of origin to Hong Kong and on termination or expiry of this contract, free return passage to his/her* place of origin.
(b) A daily food and travelling allowance of HK\$100 per day shall be paid to the Helper from the date of his/her* departure from his/her* place of origin until the date of his/her* arrival at Hong Kong if the travelling is by the most direct route. The same payment shall be made when the Helper returns to his/her* place of origin upon expiry or termination of this contract.
8. The Employer shall be responsible for the following fees and expenses (if any) for the departure of the Helper from his/her place of origin and entry into Hong Kong:-
 - (i) medical examination fees;
 - (ii) authentication fees by the relevant Consulate;
 - (iii) visa fee;
 - (iv) insurance fee;
 - (v) administration fee or fee such as the Philippines Overseas Employment Administration fee, or other fees of similar nature imposed by the relevant government authorities; and
 - (vi) others: _____

In the event that the Helper has paid the above costs or fees, the Employer shall fully reimburse the Helper forthwith the amount so paid by the Helper upon demand and production of the corresponding receipts or documentary evidence of payment.

9. (a) In the event that the Helper is ill or suffers personal injury during the period of employment specified in Clause 2, except for the period during which the Helper leaves Hong Kong of his/her* own volition and for his/her* own personal purposes, the Employer shall provide free medical treatment to the Helper. Free medical treatment includes medical consultation, maintenance in hospital and emergency dental treatment. The Helper shall accept medical treatment provided by any registered medical practitioner.

(b) If the Helper suffers injury by accident or occupational disease arising out of and in the course of employment, the Employer shall make payment of compensation in accordance with the Employees' Compensation Ordinance, Chapter 282.

(c) In the event of a medical practitioner certifying that the Helper is unfit for further service, the Employer may subject to the statutory provisions of the relevant Ordinances terminate the employment and shall immediately take steps to repatriate the Helper to his/her* place of origin in accordance with Clause 7.

10. Either party may terminate this contract by giving one month's notice in writing or one month's wages in lieu of notice.

11. Notwithstanding Clause 10, either party may in writing terminate this contract without notice or payment in lieu in the circumstances permitted by the Employment Ordinance, Chapter 57.

12. In the event of termination of this contract, both the Employer and the Helper shall give the Director of Immigration notice in writing within seven days of the date of termination. A copy of the other party's written acknowledgement of the termination shall also be forwarded to the Director of Immigration.

13. Should both parties agree to enter into new contract upon expiry of the existing contract, the Helper shall, before any such further period commences and at the expense of the Employer, return to his/her* place of origin for a paid/unpaid* vacation of not less than seven days, unless prior approval for extension of stay in Hong Kong is given by the Director of Immigration.

14. In the event of the death of the Helper, the Employer shall pay the cost of transporting the Helper's remains and personal property from Hong Kong to his/her* place of origin.

15. Save for the following variations, any variation or addition to the terms of this contract (including the annexed Schedule of Accommodation and Domestic Duties) during its duration shall be void unless made with the prior consent of the Commissioner for Labour in Hong Kong:

(a) a variation of the period of employment stated in Clause 2 through an extension of the said period of not more than one month by mutual agreement and with prior approval obtained from the Director of Immigration;

(b) a variation of the Employer's residential address stated in Clause 3 upon notification in writing being given to the Director of Immigration, provided that the Helper shall continue to work and reside in the Employer's new residential address;

(c) a variation in the Schedule of Accommodation and Domestic Duties made in such manner as prescribed under item 6 of the Schedule of Accommodation and Domestic Duties; and

(d) a variation of item 4 of the Schedule of Accommodation and Domestic Duties in respect of driving of a motor vehicle, whether or not such vehicle belongs to the Employer, by the helper by mutual agreement in the form of an Addendum to the Schedule and with permission in writing given by the Director of Immigration for the Helper to perform the driving duties.

16. The above terms do not preclude the Helper from other entitlements under the Employment Ordinance, Chapter 57, the Employees' Compensation Ordinance, Chapter 282 and any other relevant Ordinances.

17. The Parties hereby declare that the Helper has been medically examined as to his/her fitness for employment as a domestic helper and his/her medical certificate has been produced for inspection by the Employer.

Signed by the Employer _____
(Signature of Employer)

in the presence of _____
(Name of Witness) _____
(Signature of Witness)

Signed by the Helper _____
(Signature of Helper)

in the presence of _____
(Name of Witness) _____
(Signature of Witness)

* Delete where inappropriate.

+ Use either Clause 2A, 2B or 2C whichever is appropriate.

Schedule of Accommodation and Domestic Duties

1. Both the Employer and the Helper should sign to acknowledge that they have read and agreed to the contents of this Schedule, and to confirm their consent for the Immigration Department and other relevant government authorities to collect and use the information contained in this Schedule in accordance with the provisions of the Personal Data (Privacy) Ordinance.

2. Employer's residence and number of persons to be served

A. Approximate size of flat/house _____ square feet/square metres*

B. State below the number of persons in the household to be served on a regular basis:

_____ adult _____ minors (aged between 5 to 18) _____ minors (aged below 5) _____ expecting babies.

_____ persons in the household requiring constant care or attention (excluding infants).

(Note: Number of Helpers currently employed by the Employer to serve the house/old _____)

3. Accommodation and facilities to be provided to the Helper

A. Accommodation to the Helper

While the average flat size in Hong Kong is relatively small and the availability of separate servant room is not common, the Employer should provide the Helper suitable accommodation and with reasonable privacy. Examples of unsuitable accommodation are: The Helper having to sleep on made-do beds in the corridor with little privacy and sharing a room with an adult/teenager of the opposite sex.

Yes. Estimated size of the servant room _____ square feet/square metres*

No. Sleeping arrangement for the Helper:

Share a room with _____ child/children aged _____

Separate partitioned area of _____ square feet/square metres*

Others. Please describe _____

B. Facilities to be provided to the Helper:

(Note: Application for entry visa will normally not be approved if the essential facilities from item (a) to (f) are not provided free.)

(a) Light and water supply Yes No

(b) Toilet and bathing facilities Yes No

(c) Bed Yes No

(d) Blankets or quilt Yes No

(e) Pillows Yes No

(f) Wardrobe Yes No

(g) Refrigerator Yes No

(h) Desk Yes No

(i) Other facilities (Please specify) _____

4. The Helper should only perform domestic duties at the Employer's residence. Domestic duties to be performed by the Helper under this contract exclude driving of a motor vehicle of any description for whatever purposes, whether or not the vehicle belongs to the Employer.

5. Domestic duties include the duties listed below.

Major portion of domestic duties:-

1. Household chores
2. Cooking
3. Looking after aged persons in the household (constant care or attention is required/not required)
4. Baby-sitting
5. Child-minding
6. Others (please specify)

6. The Employer shall inform the Helper and the Director of Immigration of any substantial changes in item 2, 3 and 5 by serving a copy of the Revised Schedule of Accommodation and Domestic Duties (ID 407G) signed by both the Employer and the Helper to the Director of Immigration for record.

Employer's name and signature

Date

Helper's name and
signature

Date

* delete where inappropriate.

tick as appropriate.