

For information on  
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## **Legislative Council Panel on Manpower**

### **Measures adopted by Labour Department in handling False Self-Employment**

#### **Purpose**

This paper briefs Members on the measures adopted by the Labour Department (LD) in tackling false self-employment, the statistics collected and the relevant analysis in respect of the cases involved.

#### **Background**

2. At the meeting of November 2009, we briefed Members on the measures adopted by LD in tackling false self-employment. At the meeting, Members requested LD to keep relevant statistics on cases relating to false self-employment and report back in due course. Since the briefing for Members last time, LD has adopted proactive measures in tackling false self-employment and collected statistics on cases of false self-employment for the purpose of following up and conducting analysis. Our work over the period of time and analysis are presented below for Members' information.

#### **Measures Adopted by LD in Tackling False Self-Employment**

3. In order to deter employers who purposely make use of false self-employment contract to evade paying employment benefits to their employees, LD has adopted a three-pronged approach to deal with the problem, with details set out below:

*(1) Strengthening promotion and publicity work in enhancing public awareness*

4. Since November 2009, LD has embarked on a full range of educational and publicity activities to raise the attention and alertness of the public on the differences in the rights and benefits under the Employment Ordinance (Cap. 57) (EO) between an employee and a self-employed person (SEP). Such activities include producing and distributing leaflets, displaying posters, organising seminars and talks, staging roving exhibitions, publicising

the subject through LD's homepage and interactive employment service website as well as via other networks and the media, etc. In order to further disseminate the message on how to distinguish an employee from a contractor/SEP, LD designed two sets of new posters in 2010, one with employers and employees as targets with a view to forestalling labour disputes, and the other targeting at employees under the theme of distinguishing their identities and protecting their own rights. Both posters, printed with a telephone complaint hotline (2815 2200), were widely displayed at the branch offices of the Labour Relations Division (LRD) and Job Centres of the Employment Services Division (ESD), various poster sites of the Information Services Department and other public spots.

5. In addition, we have enriched the contents of the leaflet entitled "Know Your Identity and Rights", featuring relevant court cases for reference. Apart from setting out the important factors that differentiate an employee from an SEP and illustrating the differences in the rights and benefits enjoyed by them respectively, the leaflet also highlights for the purpose of drawing the attention of people concerned that even though an employee is labelled as a contractor/SEP in a contract, he will not as a result lose his entitlements to employees' benefits or protection if in essence there exists an employer-employee relationship between the two parties concerned. Copies of the leaflet have been widely distributed to employers' associations, SME associations, trade unions, employers and human resources practitioners, etc. They are also made available at the branch offices of LRD and Job Centres of ESD, Labour Tribunal (LT), Minor Employment Claims Adjudication Board (MECAB), Public Enquiry Service Centres of the Home Affairs Department, Support and Consultation Centre for Small and Medium Enterprises of the Trade and Industry Department, Business InfoCentre of the Trade Development Council, Employees Retraining Board, Business Registration Office and Licensing Offices of the Transport Department etc.

6. To further arouse the awareness of the public on the subject, LD has newly produced a television Announcement in the Public Interest (TV API) modelling on real-life workplace scenarios to illustrate to employers, employees and the general public for publicity purpose the differences between an employee and a contractor/SEP. Emphasis has been placed on reminding the relevant parties that they should understand the terms of the contract and clarify the rights and benefits associated with different status before entering into a contract so that a sensible decision could be made. The TV API has been broadcast through major television channels since October 2010 and shown in some community halls and community centres.

7. In 2010, LD staged five roving exhibitions in different districts of the territory. During these roving exhibitions, panels specially designed for the subject on distinguishing an employee from an SEP were displayed and promotional video was shown. Promotional materials printed with the slogan “Know your employment status, protect your rights and benefits” were also distributed to arouse public attention and awareness on this subject. We have also embedded in the EO Quiz section of the exhibitions questions on false self-employment to raise the interest of the public in studying relevant exhibits through testing their knowledge in this regard.

8. LD also impressed on the relevant parties the importance of distinguishing these two identities through conducting discussions/experience sharing sessions and sharing court cases with human resources practitioners, employer association members and union members through our network of 18 Human Resources Managers Clubs and nine Tripartite Committees formed in various trades and industries. We also touched on the subject as appropriate when delivering talks on EO to remind participants of the differences in the rights and benefits enjoyed by an employee and a contractor/SEP. In addition to these initiatives, LD organised two large-scale seminars entitled “How to distinguish an employee from a self-employed person” in October 2010, attracting over 800 participants including employers, representatives of employers’ associations and trade unions, human resources practitioners, management executives and members of the public.

9. Other than organising the aforesaid publicity and promotional activities to enhance the awareness of the public, LD targeted its publicity efforts towards employers, in particular those of SMEs. On the one hand, employers are reminded to cautiously assess the risks involved before entering into a contract to engage someone as a contractor/SEP. On the other hand, employers are also warned not to unilaterally change the status of a person from an employee to a contractor/SEP, particularly vis-à-vis the legal consequences that may arise. To this end, apart from publishing feature articles on this subject in several local newspapers, LD has also liaised with the associations and organisations of SMEs, in particular those trades such as transportation and personal services industries etc. where purportedly false self-employment is more common, to solicit their assistance in publishing the feature articles through their newsletters, publications and websites. By disseminating information to their members through respective networks, we hope that it would help enhance the understanding of the practitioners in these industries and trades on false self-employment.

10. In 2011, LD has rolled out another round of publicity activities, including sending promotional materials early this year to major trade unions for distribution to members through their respective channels. Between January and June, we have staged four roving exhibitions in different locations of the territory. We have also put up banners of “Know your employment status, protect your rights and benefits” onto taxi bodies in May and June. The banners will carry the telephone hotline of LD for enquiry and reporting by the public.

11. In future, LD will continue to remind the public of the differences between an employee and a contractor/SEP through various publicity means, including producing a new radio API, broadcasting TV API, staging roving exhibitions, delivering talks, distributing promotional publications and materials, etc. We will also make use of suitable channels to promote and encourage employees who suspect that their rights are impeded because of false self-employment to report their cases to LD for protection of their own rights.

*(II) Providing a user-friendly consultation and conciliation service*

12. LRD of LD provides consultation service to people who are involved in false self-employment disputes to help them understand the differences between an employee and an SEP, as well as their respective benefits. To this end, we have produced a simple guide for the easy reference of enquirers. Where a suspected false SEP and the responding party have disputes regarding their relationship and entitlements/responsibilities under EO, LRD would provide conciliation service for both parties to resolve their differences. Should the dispute remain unresolved after conciliation and where the claimant so wishes, the case would be referred to LT/MECAB for adjudication.

13. Apart from providing consultation and conciliation services to people suspected to be engaged under false self-employment, conciliation officers of LRD will also follow up with employers/contractors of suspected false SEPs where appropriate. The conciliation officers will discuss with and offer advice to the employers/contractors concerning whether the people working in their establishments are employees or SEPs. They will also remind the employers/contractors to cautiously assess the risks involved before entering into a contract to engage SEPs. They will be warned that even if a worker is called or labelled as an SEP in a contract, the employer is still required to fulfil his responsibilities under the relevant legislation by paying back the statutory benefits retroactively to the worker who is labelled as an SEP if in essence there exists an employer-employee relationship between

them. Moreover, the employer may be liable to criminal sanctions under the relevant legislation.

14. In work injury cases, if there is dispute on the employer-employee relationship, LD will, according to the circumstances of each case, provide assistance and advice to both parties by making reference to factors adopted by the courts in determining employment relationship and to the stipulations in the Employees' Compensation Ordinance (Cap. 282) (ECO). Where a dispute cannot be resolved upon advice, the case will be referred to the District Court for adjudication. LD would also refer the employee to the Legal Aid Department for further assistance where necessary.

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

15. LD endeavours to protect the statutory rights of employees through proactive enforcement actions. Labour Inspectors conduct workplace inspections rigorously to check employers' compliance with and educate employees on their protection under labour laws. Suspected breaches, when detected, will be thoroughly investigated and prosecution will be instituted against the offending employers whenever there is sufficient evidence.

16. Between October 2009 and May 2011, Labour Inspectors, apart from routine workplace inspections, conducted special enforcement inspections of establishments in industries which were prone to have false self-employment disputes, such as transportation and personal services industries. A total of 452 establishments were inspected and five cases of suspected false self-employment in breach of EO or ECO were detected. Prosecution action was taken out against two of the employers. Besides, LD had received a total of 15 complaints on false self-employment via the complaint hotline and other means. Labour inspectors conducted follow-up inspections to the concerned workplaces for investigation. At the same time, persons met at the workplaces were briefed on their rights under the labour legislation. Subsequent prosecution was taken out in four of the complaint cases.

17. Including those cases mentioned in paragraph 16 above, LD has taken out prosecution in respect of 28 cases, with 21 of them convicted, two dismissed, and the remaining five still being processed.

**Statistics on Disputes of False Self-Employment and Case Analysis**

18. LD has since October 2009 collected statistics on cases with false self-employment disputes for the purpose of better understanding and more effective handling of the problem of false self-employment.

19. In the twenty months from October 2009 to May 2011, LRD registered 397 claim cases in which the claimants alleged to have disputes on false self-employment, or an average of 20 cases per month, representing 1.4% of the total number of claim cases in the period. These cases involved 526 claimants, mostly from transportation and personal services. The claimants in 186 cases, i.e. 47% of all alleged cases of false self-employment, had signed self-employment contracts. These claims normally arose after the employment/self-employment relationship had ceased and the claimants wished to claim back the employment benefits due to them during the period.

20. Out of the 397 alleged false self-employment disputes, 128 cases were settled after intervention or conciliation of LRD; 251 cases were referred to LT/MECAB for adjudication; and 18 cases are still under processing. Among the 251 cases which had been referred to LT/MECAB, there were 148 cases in which the respondents (i.e. employers/contractors) were either ordered to pay to or reached settlement with the claimants; 34 cases in which the claimants withdrew their claims or failed to complete the claim procedures; eight cases were transferred to other courts by LT; three cases were dismissed by LT/MECAB; and the remaining 58 cases were still under processing.

21. In one of the cases concluded at LT, two cross-border truck drivers claimed against their employer for statutory holiday pay, annual leave pay, long service payment and terminal payment. Although they had signed contracts for service with the respondent company, after consideration of all relevant facts of the case, LT still ordered the respondent company to pay to the two claimants the above items amounting to more than \$370,000. In another case, a construction worker lodged claims against his employer for wages in lieu of notice, annual leave pay, statutory holiday pay and long service payment. The employer, however, argued that the claimant was an SEP and produced an agreement of co-operation signed by the claimant. The parties could not reach settlement after conciliation and the employer was subsequently ordered by LT to pay the claimant the afore-mentioned items totalling more than \$70,000 in the end. In another case, a kitchen worker lodged claims against the sole proprietor of a restaurant for wages in lieu of notice, annual leave pay, statutory holiday pay and rest day compensation. However, the employer denied the employee status of the claimant and claimed that he only paid to the claimant and his business partner a service fee. The claimant was finally awarded the annual leave pay, rest day compensation and statutory holiday pay for the employment period in the sum of more than \$40,000, which was close to the amount claimed. The above cases demonstrate that employers cannot evade their responsibilities under labour laws by merely labelling their employees as self-employed, as long as the employment relationship between employers and employees in essence still exists.

22. The same also applies to employees' compensation cases. From November 2009 to May 2011, the Employees' Compensation Division (ECD) received 52 cases with disputes of false self-employment involved. Out of these cases, the employers/principal contractors of five cases no longer disputed the employee status of the injured persons upon the assistance of ECD; the injured persons of 12 cases either reached settlement agreement with their employers/principal contractors or decided not to pursue further; the injured persons of 30 cases have lodged or are going to lodge claims under ECO in the court; in one case the court ordered the employer to pay employees' compensation to the employee; another four cases are still under processing. To sum up, if the affected persons in these cases are in fact employees, their entitlements to employees' compensation under labour laws remain protected.

23. As stated above, conciliation service apart, LD protects the statutory rights and benefits of employees through rigorous pre-emptive law enforcement actions. Among the 397 alleged false self-employment claims, it was assessed after discussion with parties to the claims and analysis of relevant work conditions that employment relationship probably existed in about a quarter of the cases. For this category of cases where false self-employment is more evident, we will examine with priority whether there is sufficient information for criminal investigation under EO. In respect of these 397 cases, after discounting cases where the claimants refused to act as prosecution witnesses or those without sufficient evidence, we have conducted investigation into 38 cases and taken out prosecution against the employers in 12 cases and they have all been convicted. In one successful prosecution case, a tutor lodged claim in LRD against a tutorial centre for wages. One of the disputes of the respondent was that the claimant was not an employee but one of the partners of the centre. Although the case was settled after conciliation by LRD, LD still undertook investigation and successfully prosecuted the employer for failure to pay wages on time. In a different case, an employee working in the personal services industry was dismissed. The employer was successfully convicted for dismissing a pregnant employee and failing to pay related payments despite his allegation that the employee was an SEP. In another case, a salesperson claimed statutory holiday pay and annual leave pay against her employer. The employer refused to pay the claimed items on the premise that the claimant had signed a self-employment contract, but LT finally ruled in favour of the claimant. The employer not only had to pay back the items to the employee, he was also convicted of relevant offences.

24. In the above successful prosecution cases, all respondents have disputed the employee status of the claimants on the pretext that they were SEPs. Yet, with sufficient evidence rigorously gathered, LD was able to take out prosecution and successfully convicted the employers despite their attempt to evade responsibilities under EO. These prosecution cases send out clear messages to employers that they could not absolve themselves of their employer responsibilities by unilaterally denying the status of their employees. And worse still, they might be liable to prosecution apart from being unable to disclaim their civil liabilities.

25. Notwithstanding that prosecution cannot be taken out against each and every employer suspected of being involved in false self-employment owing to lack of sufficient evidence, an all-out effort will be made to follow up on suspected cases. Employers will be advised to carefully assess the risks involved should they wish to enter into contracts to engage someone as an SEP. They are advised that they will still be required to fulfil their responsibilities under relevant legislation if in essence there exists an employer-employee relationship. Not only will he be required to pay back statutory benefits retroactively to employees who are falsely labelled as “self-employed”, he may also have to bear the legal consequences for having committed offences under relevant labour legislation. In individual cases, conciliation officers will continue to follow up with employers by telephone calls or visits, with a view to impressing upon them the above messages through detailed discussion on the issue of false self-employment and advising employers to review and improve the situation. With our follow-up actions, some employers who had been involved in false self-employment disputes indicated that they had changed from hiring SEPs to directly employing employees across-the-board.

26. As for cases which were not clear as to whether an employment relationship existed, the main problem involved was that the two parties to a claim had factual disputes on the conditions of the contracts, e.g. their control over how and when jobs were done, whether the worker had the right to hire assistants, etc. In handling these cases, we would once again remind the parties of the relevant factors, with a view to facilitating them to have a clear understanding of the boundary between employment and self-employment before reaching a mutually acceptable solution. In some cases, the parties to the claims no longer held different views on the employment status of the claimant after LD’s intervention. In one case involving disputes of false self-employment by a coach driver, the claimant and the employer eventually reached settlement subsequent to the follow-up of a conciliation officer. The employer in that case also informed us that the contracts of all self-employed drivers had been changed to employment contracts.

## **Overseas Experience**

27. At present, not many countries have legislated on the definition of SEPs for the purpose of employment protection. Even among European countries such as Belgium, Sweden and Germany where legislation on the definition of the term “self-employment” is in place, such definitions are only applicable in the areas of social security, tax laws and national statistical systems rather than employment protection<sup>1</sup>.

28. For example, in Belgium, an SEP is broadly defined as someone who exercises a professional activity without an employee status, which is different from the fiscal criterion of the same term which refers to the way taxes are paid out of professional income. In Sweden, incomes derived from self-employment are taxed according to rules for “incomes from commercial activities”, while incomes derived from regular employment are taxed according to the rules of “incomes from employment”. The main criterion for distinguishing the former is that the activity has to be performed professionally, independently and with the ambition to make profit. Germany passed an act on the Promotion of Self-Employment in the social security aspect in 1999. Despite that there is a legal definition of self-employment, with a view to taking care of the dynamic aspect of forms of work and encompassing more situations, the German Courts still need to use an open, flexible and case-by-case approach in handling relevant cases.

29. To sum up, the above examples of legal definitions of SEPs in different countries tend to be simple and flexible, but may not necessarily provide clear and accurate guidelines in employment aspect. For example, in Germany, the different types of working relationships still need to be decided by the Courts in accordance with particular circumstances of individual cases.

## **Way Forward**

30. As a result of economic restructuring, many SEPs opt to be self-employed because of their own preferences or circumstances. Their reasons include the attempts to develop their own business, maximise profits in their own ways, unwilling to be restricted to work for one single employer or under rigid working hours, wish for free choice of modes of work or partners at work, or the need to take up freelance jobs at home owing to family, health

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<sup>1</sup> Source of information: European Foundation for the Improvement of Living and Working Conditions, ‘Self-employed workers: industrial relations and working conditions’, 2009.

or other personal reasons, etc. Forms of self-employment include traditional freelance professionals such as event photographers, hand-knitters and brokers, and as a result of diversified development of the modern economy, occupations such as programming, on-line trading, certain types of transport services, sub-contract works, door-to-door beauty and health services provided by individuals, etc. Although these forms of service provision fall outside the remit of employment relationships, they are an important part of multifarious economic activities. They allow a freer and more flexible relationship between the service provider and receiver and can serve the specific circumstances and needs of some individuals.

31. Genuine self-employment can be a driving force for economic development and can preserve and create more job opportunities. While contributing to economic development, it allows individuals greater flexibility in procuring and rendering services taking into account their particular circumstances and capabilities. However, false self-employment should be discouraged as it would extinguish employees' rights and benefits. Hence, we have to preserve the option for self-employment in the economy, but at the same time protect the rights and benefits of employees. Judging from current statistics, the number of false self-employment cases is not big. The labour market in Hong Kong is relatively mature and there is free flow of information. Besides, whether a service provider is an SEP or an employee depends on facts rather than a label. As such, we consider that a more effective way to curb false self-employment is to provide workers and employers/contractors with sufficient channels to learn the characteristics of and differences between self-employment and employment relationships so that they can make a wise decision when determining the service relationship between them. For those who are less clear about their own circumstances, the consultation and conciliation services provided by LD can effectively help them clarify the responsibilities and rights of all parties concerned. Besides, we believe that, through encouraging affected employees to come forward to claim for their rights and benefits and stepped-up prosecution against employers who intentionally cause employees to lose their employment benefits, these employers will find their unscrupulous acts not worth the cost and the practice of false self-employment can thus be more effectively curbed.

32. We know that there are views in the community for legislating to clearly distinguish self-employment from employment relationship. Nevertheless, to define self-employment by legislation is not easy. Having regard to past court cases involving self-employment disputes, there is no single conclusive test to distinguish whether a person is an employee or an SEP. Instead, all the relevant factors of the case must be taken into account and

there is no hard and fast rule as to how important a particular factor should be<sup>2</sup>. Hence, it is difficult to list out all the possible scenarios clearly through legislative provisions. On the other hand, attempts to set out categorically in the law what constitutes self-employment may be counterproductive, as those who intend to exploit their employees may conveniently take this as guidance in circumventing the law.

33. We also wish to emphasise that, as observed from the court cases in the past, employers who try to evade their responsibilities intentionally under the guise of false self-employment cannot get rid of their responsibilities under labour laws when their employees file employment claims against them. On the other hand, they have to face risks as, apart from civil liabilities, they may be liable for prosecution if there is sufficient evidence to prove their unscrupulous acts.

34. Recently, some people have expressed concern over the possible increase of false self-employment cases after the implementation of the Minimum Wage Ordinance (Cap. 608) on 1 May. LD fully understands the concerns over the possible changes and impact brought about by new legislation. However, we must stress again that an employer cannot unilaterally change the status of his employee to an SEP, lest the employee may claim remedies under EO and common law against him. Moreover, even though an employer unilaterally claims that his employee has changed to be hired in the form of self-employment, if the concerned worker has always been working as an employee and in the absence of significant changes to the nature of service of his post and forms of remuneration, his identity of employee in essence will not change. We will continue to monitor cases involving disputes of false self-employment and provide consultation service to both employers and employees for them to understand the differences between employees and SEPs as well as the rights and benefits they are entitled accordingly. Conciliation service will also be provided when needed. If employees suspect that their employers attempt to deprive them of their statutory rights and benefits under the guise of false self-employment, they can report to the telephone complaint hotline. We will conduct investigation at once and institute prosecution against the offending employers whenever there is sufficient evidence.

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<sup>2</sup> 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.

35. To conclude, whilst we consider deterring false self-employment an important task, we need at the same time to maintain the flexibility of economic activities such that individuals may provide service as an SEP according to their own choices and needs. To achieve these targets, educating people and employers on the differences and pros/cons of the two contractual relationships, reminding them to clarify the relevant modes of co-operation before entering into contracts, providing sufficient channels for those aggrieved by suspected false self-employment to report, as well as taking out rigorous enforcement, are the effective measures in tackling the issue.

### **Views of the Labour Advisory Board**

36. At the meeting of the Labour Advisory Board (LAB) on 9 May 2011, members agreed that the problem that needed to be tackled at present was how to deter unscrupulous employers from deliberately evading their statutory responsibilities under the pretext of self-employment. Some members pointed out that legislating against false self-employment might stifle the business relationship that both parties genuinely wish to forge through entering into a self-employment contract. Members agreed that at the present stage LD should continue the three-pronged approach by strengthening publicity and enforcement efforts to tackle false self-employment.

37. In view of the possible impact arising from the implementation of the Minimum Wage Ordinance, LAB members were of the view that LD should help employers and employees distinguish the differences between “(genuine) self-employment” and “false self-employment”, their pros and cons as well as the respective legal rights and responsibilities involved through stepping up promotional, publicity and educational efforts. LAB members also advised that the Administration should continue to closely monitor and rigorously tackle the false self-employment situation, and take targeted actions to deter employers who attempt to deprive their employees of their statutory rights and benefits through the use of self-employment contracts.