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Panel on Manpower

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 12 July 2011**

False self-employment

Purpose

This paper summarizes past discussions by the Panel on Manpower ("the Panel") on false self-employment.

Background

2. In recent years, some Legislative Council Members and trade unions have expressed grave concerns over the growing number of employees being labelled by their employers as "self-employed" despite the fact that they have all the characteristics of an employee. They pointed out that some job seekers, eager to look for employment, were ignorant of their status being labelled as "self-employed".

Deliberations of the Panel

3. The Panel discussed the subject of self-employment and false self-employment at its meeting on 19 November 2009. The deliberations are summarized in the following paragraphs.

Measures adopted by the Labour Department ("LD") to tackle false self-employment

4. Members noted that the Administration adopted a three-pronged approach to tackle the problem of false self-employment, which included strengthening promotion and publicity work in enhancing public awareness; providing a user-friendly consultation and conciliation service to employees in false self-employment in case of disputes; and stepping up enforcement action to

safeguard employees' statutory rights. Concerns were raised about the growing number of employees being labeled by their employers as self-employed despite the fact that these employees had all the characteristics of an employee. Some members were concerned that subsequent to the implementation of the Mandatory Provident Fund ("MPF") Scheme in 2000, some employers had arranged for their employees to become self-employed in a deliberate attempt to evade their responsibility for making MPF contributions. They envisaged that the implementation of a statutory minimum wage would aggravate the problem of false self-employment. Members called on the Administration to introduce legislative amendments to the Employment Ordinance (Cap. 57) ("EO") and the Employees' Compensation Ordinance (Cap. 282) ("ECO") to prevent the proliferation of false self-employment.

5. According to the Administration, it had carefully considered the suggestion of amending the law to clearly distinguish an employee from a self-employed person. However, there was no single conclusive test to distinguish an employee from a self-employed person or contractor. As a matter of fact, it was not what the parties to an engagement called their relationship, but what it was in substance, that mattered. Whether an employer-employee relationship existed was often determined after considering all relevant facts. Even if an employer had engaged a self-employed person, he still had to fulfil his obligations under the law where the relationship between the parties was in essence one of employer-employee. In previous rulings on cases involving claims under EO and ECO, the court had not simply looked at the labeling of a person to determine the employment relationship, but would apply a number of tests to examine whether a worker was an employee or a self-employed person. The Administration stressed that it had been making proactive efforts to safeguard the statutory rights and benefits of employees through rigorous enforcement of the law.

6. Members noted that the Labour Advisory Board ("LAB"), which had been consulted on the subject, shared the Administration's views regarding the practical difficulties in amending EO and ECO to clearly distinguish employees from self-employed person. They agreed with LD that the three-pronged approach currently adopted by LD was a more pragmatic and fruitful way forward. Against this background, LAB had asked LD to step up promotional efforts with a view to encouraging employees to provide LD with intelligence to facilitate enforcement. LD was also asked to launch publicity programmes targeting small and medium enterprises, especially those in the construction and logistics sectors, where false self-employment might be more prevalent. The Administration had also undertaken to keep relevant statistics on cases relating to claims of false self-employment to facilitate better understanding of the problem.

7. Some members were of the view that although there was no single conclusive test to distinguish an employee from a self-employed person or contractor, the Administration could simply adopt the wider coverage rendered by a business reality test to determine whether an employer-employee relationship existed.

8. The Administration explained that notwithstanding the good intention behind the suggestion of amending the law to clearly distinguish an employee from a self-employed person, an exhaustive list of criteria to define those on false self-employment might be counterproductive, as unscrupulous employers might translate them into convenient clues to circumvent the law. Furthermore, an authoritative and legally-prescribed list of indicia to define people on genuine employment or false self-employment might fail to account for possible specific features in individual occupational groups and sectors. This might, in addition, inadvertently hinder the development of entrepreneurship, innovation and contractual freedom.

Relevant papers

9. A list of the relevant papers on the Legislative Council website is in the **Appendix**.

Relevant papers on false self-employment

Committee	Date of meeting	Paper
Panel on Manpower	19.11.2009 (Item III)	Agenda Minutes
Legislative Council	15.6.2011	Official Record of Proceedings (Question 19)

Council Business Division 2
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