

For discussion on  
16 December 2010

## **Legislative Council Panel on Manpower**

### **Guidelines on statutory minimum wage for employers and employees**

#### **Purpose**

This paper seeks Members' views on the draft reference guidelines on statutory minimum wage (SMW) for employers and employees. The paper also provides information on the treatment of meal break and employment terms under the relevant legislation as requested by Members.

#### **Background**

2. The Minimum Wage Ordinance (MWO) seeks to establish an SMW regime and provide a wage floor which will strike a reasonable balance between forestalling excessively low wages and minimising the loss of low-paid jobs while sustaining Hong Kong's economic growth and competitiveness. The Administration has accepted the recommendation of the Provisional Minimum Wage Commission to set the initial SMW rate at \$28 per hour. The relevant subsidiary legislation was published in the Gazette on 12 November 2010 and tabled at the Legislative Council (LegCo) on 17 November 2010. Subject to LegCo's approval of the subsidiary legislation, SMW will come into force on 1 May 2011 – the next Labour Day.

#### **Draft reference guidelines on SMW for employers and employees**

3. The Labour Department (LD) is working at full steam to prepare for the smooth and effective implementation of SMW. In the course of scrutinizing the Minimum Wage Bill (the Bill), some Members of the LegCo Bills Committee and stakeholders pointed out that because of the wide application of this completely new SMW system, there was a need for the Administration to formulate reference guidelines to explain to employers and employees, supplemented by examples, the relevant provisions and application of the MWO. We have therefore drawn up a set of draft reference guidelines on SMW, which is attached at **Annex**, to facilitate employers and employees in

understanding their respective obligations and entitlements under the MWO. In preparing this draft version, we took into account relevant views and concerns expressed by various stakeholders during the consultation and legislative process of the Minimum Wage Bill and in our continued engagement with the stakeholders.

4. We are consulting stakeholder groups for their comments on this set of draft reference guidelines. In parallel, LD will work with industry-based Tripartite Committees and liaise with the relevant stakeholders to discuss and formulate industry-specific guidelines addressing the particular needs and characteristics (e.g. mode of operation) of individual sectors. To tie in with the implementation of SMW, we will launch extensive educational and promotional activities to enhance public awareness of the MWO. These activities include production of tailor-made publications, television and radio announcements of public interest, press releases; dissemination of relevant information on LD's website; and holding of roving exhibitions, seminars, briefings, etc.

#### **Meal breaks and employment terms**

5. All along, employers and employees can agree on their employment terms having regard to the circumstances of individual enterprises and personal needs of employees, including whether meal breaks constitute hours worked by employees, and whether they are remunerated or not.

6. In the course of scrutinizing the Bill, the LegCo Bills Committee had thoroughly deliberated whether meal breaks should be counted in computing SMW. After rounds of deliberation, the MWO as ultimately passed has stipulated the circumstances under which meal breaks should constitute hours worked for the purpose of computing SMW. Accordingly, if an employee is, during his meal breaks, in attendance at a place of employment in accordance with the contract of employment or with the agreement or at the direction of the employer, such time shall be included in the hours worked by the employee for computing SMW, irrespective of whether he is provided with work or not. Furthermore, if meal breaks are regarded as working hours of the employee according to his employment contract or agreement with his employer, such hours should also be taken into account in computing SMW.

7. SMW is totally new to Hong Kong. It will take time for the community, especially employers and employees, to get used to it. When employers and employees seek to clarify unclear terms in their existing employment contracts, there should be thorough staff consultation with a view to reaching consensus on lawful, sensible and reasonable grounds through labour-management communication and negotiation. It is pertinent to note that

unilateral variation of employment terms and conditions by employers is not allowed under the Employment Ordinance. Employees who find their employment rights undermined may seek help from LD. Moreover, any provision in the contract of employment seeking to reduce the employee's SMW entitlement shall be void.

8. Employees are the most valuable asset of an enterprise. It is always in the interest of employers to bear in mind the well-being, morale and sentiments of their employees, to treat them well and maintain harmonious labour relations. Employers should not reduce employees' existing remuneration and employment benefits upon the implementation of SMW. To this end, LD will continue to promote good people management practices. We will also launch extensive promotion and publicity on the MWO to enhance employees' understanding of their rights and benefits.

### **Consultation with the Labour Advisory Board**

9. The Labour Advisory Board (LAB) members were invited to give their comments on the draft reference guidelines on SMW at its meeting on 6 December 2010. LAB members agreed that the guidelines were necessary and some suggested that to enhance the clarity of the guidelines, the examples in the draft reference guidelines should be consolidated. We will carefully consider the views of LAB members, together with those from other stakeholder groups, in finalising the guidelines.

### **Advice sought**

10. Members' views are invited on the draft reference guidelines on SMW.

Labour and Welfare Bureau  
Labour Department  
December 2010

# **Statutory Minimum Wage :**

## **Reference Guidelines for Employers and Employees**

### **Draft Version**

**Labour Department**

**December 2010**

**Statutory Minimum Wage :  
Reference Guidelines for Employers and Employees**

**Draft Version**

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## **1 Introduction**

- The Government has tabled at the Legislative Council the subsidiary legislation on the commencement date of the Minimum Wage Ordinance (Cap. 608) and the initial statutory minimum wage (SMW) rate. Subject to the approval of the Legislative Council, the SMW will come into force on 1 May 2011 and the initial SMW rate is \$28 per hour.
- In the course of scrutinizing the Minimum Wage Bill, some Members of the Bills Committee of the Legislative Council and stakeholders pointed out that because of the wide application of this completely new SMW system, there was a need for the Administration to formulate reference guidelines to explain to employers and employees in simple terms, supplemented by examples, the relevant provisions and the application of the Minimum Wage Ordinance. We have therefore prepared this set of draft Reference Guidelines.
- Given the great varieties in the mode of employment, we do not aim to cover all situations exhaustively in the draft Reference Guidelines. We have nonetheless included some relatively common examples to cover different situations and low paying sectors (such as cleaning, security, catering, retail etc.) in the draft Reference Guidelines to facilitate employers and employees in understanding the Minimum Wage Ordinance and its application.
- It should be noted that the interpretation of the Minimum Wage Ordinance would be based on its original text. For the full text of the Minimum Wage Ordinance which has been uploaded to the Bilingual Laws Information System of the Department of Justice, please refer to <http://www.legislation.gov.hk/eng/index.htm>.
- In addition to this set of Reference Guidelines, the Labour Department will continue to work with industry-based Tripartite Committees and liaise with the relevant stakeholder groups to discuss and formulate industry-specific guidelines to address the particular needs and characteristics (e.g. mode of operation) of individual sectors.
- This set of draft Reference Guidelines is prepared for consultation purposes. We will carefully consider the views of stakeholders in finalising the guidelines and will continue to enhance the guidelines

base on actual operational experience after commencement of the SMW.

## 2 Statutory minimum wage protects grassroots employees

- The Minimum Wage Ordinance aims to establish a SMW regime which strikes an appropriate balance between forestalling excessively low wages and minimising the loss of low-paid jobs while sustaining Hong Kong's economic growth and competitiveness.
- SMW is expressed as an hourly rate. In essence, wages payable to an employee in respect of any wage period should be no less than the SMW rate **on average** for the total number of hours worked in the wage period. SMW does not change or affect the existing employment and wage payment mode (e.g. monthly-rated, daily-rated, weekly-rated, piece-rated, etc) formulated between employers and employees in accordance with their employment contracts and the Employment Ordinance (Cap. 57).
- The major provisions of the Minimum Wage Ordinance (e.g. definition of wages) are aligned as closely as possible with those of the Employment Ordinance to ensure consistency and effective enforcement, avoid confusion to employers and employees and minimise the compliance cost for employers.
- SMW provides a wage floor to protect the grassroots employees. If employers and employees have different interpretations of their existing employment terms (e.g. whether meal breaks are part of the working hours and whether they are remunerated or not, whether rest days are paid or not, wage period, wage calculation, reckoning and payment arrangement of commission, etc), disputes may easily arise in the computation of minimum wage. When employers and employees seek to clarify unclear terms in their existing employment contracts, there should be thorough staff consultation with a view to reaching consensus on lawful, sensible and reasonable grounds through labour-management communication and negotiation. Unilateral variation of employment terms and conditions by employers is not allowed under the Employment Ordinance. Employees who find their employment rights undermined may seek help from the Labour Department. Moreover, any provision in the contract of employment seeking to reduce the employee's SMW entitlement shall be void.
- Employees are the most valuable asset of an enterprise. It is always in the interest of employers to bear in mind the well-being, morale

and sentiments of their employees, to treat them well and to maintain harmonious labour relations. The aim of SMW is to protect low-paid employees. Employers should not reduce employees' existing remuneration and employment benefits upon the implementation of SMW. Apart from complying with the legislative provisions, employers should carefully assess the impact on labour-management in contemplating any change to the employment terms. Factors to be considered include employees' request and whether the change is fair and reasonable. Employees will always have a greater commitment to work as well as a stronger sense of belonging when employers respond positively to their reasonable requests. This will enhance the employees' enthusiasm and sense of belonging to the company, and in turn be beneficial to the operation and productivity of the business and achieve a win-win situation for both employers and employees.

### 3 Application of statutory minimum wage

- SMW applies to all employees, including full-time, part-time and casual employees regardless of whether or not they are employed under a continuous contract<sup>1</sup> as defined in the Employment Ordinance, with the following exceptions :
  - persons to whom the Employment Ordinance does not apply<sup>2</sup>;
  - live-in domestic workers

This refers to domestic workers (including domestic helpers, carers, chauffeurs, gardeners, boat-boys or other personal helpers) who dwell free of charge in their employing household, irrespective of their sex or race.

*Points to note :*

The following employees are not live-in domestic workers and SMW applies to them :

- domestic workers not dwelling free of charge in their employing household
- live-in employees who are not domestic workers

- student interns as well as work experience students during a period of exempt student employment (Please refer to **Appendix 1** for details)

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1 According to the Employment Ordinance, an employee engaged under a “continuous contract” is defined as one who has been employed under a contract of employment by the same employer for four weeks or more and has worked for 18 hours or more each week (i.e. the so-called “4-18” requirement).

2 These include: (a) a family member who lives in the same dwelling as the employer; (b) an employee as defined in the Contracts of Employment Outside Hong Kong Ordinance; (c) a person serving under a crew agreement under the Merchant Shipping (Seafarers) Ordinance, or on board a ship which is not registered in Hong Kong; (d) an apprentice whose contract of apprenticeship has been registered under the Apprenticeship Ordinance. As for (d), while certain provisions of the Employment Ordinance apply to registered apprentices, SMW is not applicable.

*Points to note :*

- SMW applies to employees with disabilities and able-bodied employees alike. In order to strike a reasonable balance between providing wage protection to persons with disabilities and safeguarding their employment opportunities, special arrangement is provided under the Minimum Wage Ordinance so that persons with disabilities may choose to undergo a productivity assessment. To avoid abuse, the right to invoke such an assessment is vested in the persons with disabilities rather than the employers. The Labour Department will publish guidelines to explain the details of this special arrangement.
- SMW is aligned closely with the Employment Ordinance and does not apply to contractors and self-employed persons. For information about the difference between an “employee” and a “contractor or self-employed person”, please refer to the leaflet on “Know your Identity and Rights – Employee? Contractor / Self-employed person?”.
- Even though a worker is called or described as a contractor or self-employed person in the contract, the employer is still required to fulfill his responsibilities under the relevant legislation if in essence there exists an employer-employee relationship between the parties. The employer may also be liable to criminal sanctions for contravention of the relevant legislation.
- An employer cannot unilaterally change the status of the employee to a contractor or self-employed person. Otherwise, the employee may lodge a claim for remedies against the employer under the Employment Ordinance and common law. If an employee intends to change his status to a contractor or self-employed person, he must carefully assess the pros and cons involved, including the employment rights and benefits that he may lose in such a change.

## **4 Employees' entitlement to minimum wage**

### **A. Hours worked for the purpose of computing minimum wage**

- An employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage.
- The minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate.
- For the purpose of computing minimum wage, hours worked include any time during which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer :
  - in attendance at a place of employment, irrespective of whether he is provided with work or training at that time; or
  - travelling in connection with his employment excluding travelling (in either direction) between his place of residence and his place of employment other than a place of employment that is outside Hong Kong and is not his usual place of employment.
- A place of employment means **any** place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training.

### **In attendance at a place of employment – examples of application**

#### **Example 1 :**

A shop assistant works in the shop from 9:00 a.m. to 1:00 p.m. and from 2:00 p.m. to 6:00 p.m. in accordance with the contract of employment. He also works overtime from 6:00 p.m. to 7:00 p.m. with the agreement or at the direction of the employer. The time from 9:00 a.m. to 1:00 p.m. and from 2:00 p.m. to 7:00 p.m. is hours worked for computing minimum wage. (**Note:** As for whether meal break is hours worked for computing minimum wage, please refer to the section on “meal break” below.)

### Example 2 :

For [Example 1 above](#), owing to personal reasons (e.g. to avoid busy traffic), the employee returns to the shop at 8:30 a.m. However, he is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the shop for the purpose of doing work or receiving training. As such, for the purpose of computing minimum wage, the shop from 8:30 a.m. to 9:00 a.m. is not his place of employment as defined under the Minimum Wage Ordinance. Such time from 8:30 a.m. to 9:00 a.m. is not included in the hours worked for computing minimum wage.

### Example 3 :

The working hours of an assistant clerk finish at 6:00 p.m. according to the contract of employment. However, he stays in the office from 6:00 p.m. to 6:15 p.m. for personal reasons, and is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the office for the purpose of doing work or receiving training. Therefore, for the purpose of computing minimum wage, the office from 6:00 p.m. to 6:15 p.m. is not his place of employment as defined under the Minimum Wage Ordinance. Such time from 6:00 p.m. to 6:15 p.m. is not included in the hours worked for computing minimum wage.

### Example 4 :

When a real estate agent is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance at a property sales office or another place for the purpose of doing work such as awaiting customers, such place is his place of employment as defined under the Minimum Wage Ordinance. Such time being in attendance at the place of employment is hours worked for computing minimum wage.

### Example 5 :

In the airline industry, an employer may arrange the cockpit and cabin crew to have a layover in a destination outside Hong Kong after they have performed work during the course of a flight. The employer may also provide free accommodation and/or meals for the crew during the layover. If an employee in his personal time (such as sleeping time) during the layover is not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the

contract of employment or with the agreement or at the direction of the employer, such personal time is not hours worked for computing minimum wage.

#### Example 6 :

In the tourism industry, when a tour escort accompanying a tour group outside Hong Kong is in his personal time (such as sleeping time) and is not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the contract of employment or with the agreement or at the direction of the employer, such personal time is not hours worked for computing minimum wage. However, when the tour escort works because, for instance, a client in the tour group falls sick at midnight and seeks his assistance, the time spent in attending to and assisting the client is hours worked for computing minimum wage.

#### Example 7 :

An operative works in the factory in Hong Kong on Mondays, and in the factory in Dongguan from Tuesdays to Fridays. The employer may also provide free accommodation and/or meals for this employee when he is in Dongguan. If the employee in his personal time (such as sleeping time) in Dongguan is not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the contract of employment or with the agreement or at the direction of the employer, such personal time is not hours worked for computing minimum wage.

#### Example 8 :

A customer service staff attends a 3-hour training course at the direction of the employer to enhance client service skills. Since the employee is, at the direction of the employer, in attendance for the purpose of receiving training, these 3 hours are hours worked for computing minimum wage.

#### *Points to note :*

- As illustrated in the above examples, whether a particular place is a place of employment as defined under the Minimum Wage Ordinance for computing minimum wage depends on whether the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance at the place for the

purpose of doing work or receiving training. This is a question of fact and must be determined by reference to the facts and circumstances of individual cases.

- Should the employer and the employee have different understanding on whether or not the employee is in attendance at a place of employment during a certain period of time (e.g. during the time beyond the working hours specified in the employment contract) and whether or not the employee is in attendance with the agreement or at the direction of the employer under various circumstances, they should clarify between themselves as soon as practicable in order to avoid dispute when computing minimum wage.

### **Travelling – examples of application**

#### **Example 9 :**

An office assistant resides at Sheung Shui and works in a company at Kowloon Bay. The travelling time between his place of residence and the company is not hours worked for computing minimum wage.

On a day, this employee delivers some documents from the company at Kowloon Bay to a client's office at Tsuen Wan, and then returns to the company. For the travelling time between his company at Kowloon Bay and the client's office at Tsuen Wan during which he is, in accordance with the contract of employment or with the agreement or at the direction of the employer, travelling in connection with his employment, the time is hours worked for computing minimum wage.

#### **Example 10 :**

An operative works in the factory at Chai Wan on Mondays, and in the factory in Dongguan from Tuesdays to Fridays. He resides at Sheung Shui. For the travelling time between his place of residence at Sheung Shui and the factory at Chai Wan, it is not hours worked for computing minimum wage. Since the factory in Dongguan is also his usual place of employment, the time during which he is travelling between his place of residence at Sheung Shui and the factory in Dongguan is not hours worked for computing minimum wage.

#### **Example 11 :**

A technician works in a factory in Hong Kong. On a day, the employer assigns him to go to a client's office in Zhuhai which is not his usual place of employment. The time during which he is, in accordance with

the contract of employment or with the agreement or at the direction of the employer, travelling between his place of residence and the client's office in Zhuhai is hours worked for computing minimum wage.

#### Example 12 :

A tour escort accompanies the tour group travelling by air during which he is, in accordance with the contract of employment or with the agreement or at the direction of the employer, travelling in connection with his employment between Hong Kong and the destination. Such time is hours worked for computing minimum wage.

#### Meal break

- When an employee during his meal break also falls under the circumstances of hours worked<sup>3</sup> as specified in the Minimum Wage Ordinance, such meal break is hours worked for computing minimum wage. Hence, if an employee is, during his meal break, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at a place of employment, irrespective of whether he is provided with work or not, such time should be included in the hours worked for computing minimum wage (Example 13, Example 14). On the contrary, meal break falling outside the provisions on hours worked in the Minimum Wage Ordinance is not included in the hours worked for computing minimum wage (Example 15).
- Besides, if meal break is regarded as working hours of the employee according to his employment contract or agreement with the employer, such time must also be taken into account in computing minimum wage (Example 16). Although the Employment Ordinance does not provide specific regulation for meal break, after

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3 That is, the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer :

- in attendance at a place of employment, irrespective of whether he is provided with work or training at that time; or
- travelling in connection with his employment excluding travelling (in either direction) between his place of residence and his place of employment other than a place of employment that is outside Hong Kong and is not his usual place of employment.

A place of employment means any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training.

an employer and his employee have included meal break as hours worked by the employee in accordance with their employment contract or agreement, the employer shall not unilaterally vary or remove such contractual terms or agreement concerning working hours.

#### Example 13 :

A security guard has his meal break from 1:00 p.m. to 2:00 p.m.. At the same time, he remains in attendance at his post for the purpose of doing work in accordance with the contract of employment or with the agreement or at the direction of the employer. Such meal break is hours worked for computing minimum wage.

#### Example 14 :

A tour escort, when accompanying a tour group, has to make arrangements for meals en route. When the tourists take their meal, the tour escort is in attendance in the restaurant in accordance with the contract of employment or with the agreement or at the direction of the employer, for the purpose of doing work, such as for overseeing the meal arrangements, acting as interpreter for the tourists or helping them in ordering refreshments as necessary. Although the tour escort is also taking his meal, he is at the same time in attendance in the restaurant in accordance with the contract of employment or with the agreement or at the direction of the employer. Therefore, such meal break is hours worked for computing minimum wage.

#### Example 15 :

A workshop general worker has his meal break from 1:00 p.m. to 2:00 p.m.. Owing to personal reasons, he takes his meal in the workshop. Although he is in the workshop during the period from 1:00 p.m. to 2:00 p.m., he is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the workshop for the purpose of doing work or receiving training. For the purpose of computing minimum wage, the workshop from 1:00 p.m. to 2:00 p.m. is not his place of employment as defined under the Minimum Wage Ordinance, and the hours worked for computing minimum wage do not include such meal break.

### Example 16 :

For [Example 15 above](#), if meal break is regarded as working hours under the employment contract or agreement between the employer and the employee, such time from 1:00 p.m. to 2:00 p.m. is included in computing minimum wage.

### **“Leaving the field” arrangement in the catering sector**

- It is the existing practice of some catering establishments to arrange their employees to be off duty for a period of time in the afternoon during the interval between the service hours of lunch and dinner. It is commonly known as the time of “落場” (literally meaning “leaving the field”). Various catering establishments may have their different “leaving the field” arrangements.
- If an employee during this “leaving the field” period also falls under the circumstances of hours worked<sup>3</sup> as specified in the Minimum Wage Ordinance, such time is hours worked for computing minimum wage. Therefore, when an employee during the “leaving the field” period is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance at a place of employment, irrespective of whether he is provided with work or not, such time should be included in the hours worked for computing minimum wage. However, if an employee during the “leaving the field” period is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance at a place of employment for the purpose of doing work or receiving training, such time is not hours worked for computing minimum wage.
- Moreover, if the “leaving the field” period is regarded as working hours of the employee in accordance with the employment contract or agreement between the employer and the employee, such time should be counted in computing minimum wage. If the employer and the employee have included the “leaving the field” period as hours worked by the employee in accordance with their employment contract or agreement, the employer shall not unilaterally vary or remove such contractual terms or agreement concerning working hours.

### **On-call or standby time**

- On-call or standby arrangements depend on the terms in the contract of employment or the agreement between the employer and the employee. Thus, there is a diversity of on-call or standby arrangements for different industries and establishments.
- If an employee while being on-call or standby is in attendance at a place of employment<sup>4</sup> in accordance with the contract of employment or with the agreement or at the direction of the employer, such on-call or standby time is hours worked for computing minimum wage. On the contrary, if he is not in attendance at a place of employment during the on-call or standby time, such time is not hours worked for computing minimum wage. Therefore, this must be determined by reference to the contract of employment or the agreement or direction of the employer.
- The employer and the employee may also agree to reckon on-call or standby time as the working hours of the employee for computing minimum wage. Should on-call or standby time be regarded as hours worked by the employee under his employment contract or agreement with the employer, such on-call or standby time should also be included in computing minimum wage. If the employer and the employee have included on-call or standby time as hours worked by the employee in accordance with their employment contract or agreement, the employer shall not unilaterally vary or remove such contractual terms or agreement concerning working hours.

### **Other situations**

- In addition to the more common patterns of working hours, different operational and work requirements may exist in various industries or establishments to cater for their sector-specific and operational needs. The job requirements also vary tremendously according to the multifarious terms of employment and agreements between employers and employees in different industries and scenarios.
- Hence, the Minimum Wage Ordinance does not seek to provide an exhaustive list of the circumstances of hours worked for the purpose

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4 A place of employment means any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training.

of computing minimum wage. Apart from the Minimum Wage Ordinance, if the time in question is regarded as hours worked by the employee under the employment contract or agreement with the employer, such time should be included in computing minimum wage.

**B. Employer to pay additional remuneration to employee whose wages are less than minimum wage**

- An employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage. The minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate.

**Example 17 :**

The total number of hours worked by a waiter in a wage period is 208.25 hours. The SMW rate is \$28. His minimum wage for that wage period is :

$$\begin{aligned} & 208.25 \text{ hours (total number of hours worked)} \times \$28 \text{ (SMW rate)} \\ & = \$5,831 \text{ (minimum wage)} \end{aligned}$$

- If the wages payable to the employee in respect of the wage period is less than the minimum wage, he is entitled to be paid the difference (i.e. additional remuneration). The contract of employment of the employee must be taken to provide that the employee is entitled to additional remuneration in respect of that wage period. This also applies, among others, to the calculation of the following :
  - wages or any other sum payable under the Employment Ordinance
  - ex gratia payment under the Protection of Wages on Insolvency Ordinance
  - mandatory contributions under the Mandatory Provident Fund Schemes Ordinance
  - monthly earnings of the employee under the Employees' Compensation Ordinance or the Occupational Deafness (Compensation) Ordinance

- The definition of “wage period” in the Minimum Wage Ordinance is aligned with that under the Employment Ordinance. Unless the contrary is proved, a wage period is one month. No matter how the wage of an employee is calculated (e.g. piece-rated, daily-rated, weekly-rated, monthly-rated, etc), the minimum wage is still derived by multiplying the total number of hours worked in a wage period by the SMW rate. Taking a piece-rated employee as an example, with his total number of hours worked in a wage period multiplied by the SMW rate, this amount is his minimum wage for that wage period.
- Minimum wage is calculated with reference to the whole wage period. The basic principle is that wages payable to an employee in respect of any wage period should be no less than the SMW rate on average for the total number of hours worked in the wage period.
- Failure to pay minimum wage amounts to a breach of the wage provisions under the Employment Ordinance. According to the Employment Ordinance, an employer who wilfully and without reasonable excuse fails to pay wages to an employee when it becomes due is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for three years.
- The Labour Tribunal and the Minor Employment Claims Adjudication Board have jurisdiction to deal with claims for sums of money arising from a breach of SMW.<sup>5</sup>
- Since statutory entitlements under the Employment Ordinance (e.g. holiday pay, annual leave pay, sickness allowance, maternity leave pay, severance payment, long service payment, wages in lieu of notice, etc) are calculated according to the definition of wages, the amount of these statutory entitlements should also take into account the additional remuneration (where applicable). If these statutory entitlements under the Employment Ordinance are calculated and paid on the basis of wages less than the minimum wage, it would amount to under-payment of such statutory entitlements. For offences and penalties, please refer to the Concise Guide to the Employment Ordinance.

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5 The Minor Employment Claims Adjudication Board adjudicates employment claims involving not more than 10 claimants for a sum of money not exceeding \$8,000 per claimant. Employment claims falling outside the jurisdiction of the Board are heard by the Labour Tribunal.

## How to determine

- In determining whether the wages meet the minimum wage, the following two factors should be considered :
  - (1) What is the minimum wage for the employee for the wage period?  
(i.e. total number of hours worked  $\times$  SMW rate)
  - (2) What is the wages payable to the employee in respect of the wage period?  
(Please refer to the following section **C. Wages payable to employee in respect of wage period**)

|  |
|--|
| If (2) is not less than (1) $\Rightarrow$ the minimum wage requirement is met  |
| If (2) is less than (1) $\Rightarrow$ employer has to pay additional remuneration<br>$\text{additional remuneration} = \text{minimum wage} - \text{wages payable}$ |

## **C. Wages payable to employee in respect of wage period**

- The definition of wages for SMW is aligned closely with that under the Employment Ordinance. Unless otherwise specified, “wages” in the Employment Ordinance means all remuneration, earnings, allowances including travelling allowances, attendance allowances, commission, overtime pay, tips and service charges<sup>6</sup>, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done, subject to certain exclusions. For the definition of wages under the Employment Ordinance, please refer to the Concise Guide to the Employment Ordinance.
- For the purpose of computing minimum wage, the Minimum Wage Ordinance sets out whether certain sums should be counted as **wages payable to an employee in respect of a wage period** in specific situations in order to determine whether the wages meet the minimum wage, as explained below.

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6 According to the Employment Ordinance, tips and service charges, in relation to wages, means sums of money received, directly or indirectly, by an employee in the course of and in connection with his employment which are -

- paid or derived from payments made by persons other than the employer; and
- recognised by the employer as part of the employee’s wages.

**(1) Payment made to an employee for any time that is not hours worked**

- Minimum wage is derived by multiplying an employee's total number of hours worked in a wage period and the SMW rate. Since the calculation of minimum wage excludes the time that is not hours worked, payment made to the employee for any time that is not hours worked (e.g. holiday pay, annual leave pay, sickness allowance, maternity leave pay, rest day pay, etc) must **not** be counted as part of the wages payable to the employee.

**Examples on monthly-rated, daily-rated and piece-rated employees**

**Example 18 :**

Assuming

- the following employment terms according to the contract of employment :
  - remuneration : \$7,000 per month with paid rest days on Sundays
  - working hours :  
Monday to Saturday – 9:00 a.m. to 5:00 p.m. including 1-hour paid lunch break
- total number of hours worked in this month : 216 hours<sup>7</sup>
- SMW rate : \$28

Calculation

(1) Minimum wage for this month : **\$6,048** (216 hours × \$28)

(2) Wages payable to the employee in respect of this month :

**\$6,097** (\$7,000 – rest day pay of \$903<sup>8</sup>)

⇒ Since (2) is not less than (1), the minimum wage requirement is met.

**Example 19 :**

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<sup>7</sup> Assumptions : There are 31 days (including 4 Sundays) in this month and the total number of hours worked is 216 hours (27 days from Monday to Saturday × 8 hours per day). In this example, as meal break is regarded as working hours of the employee in accordance with the contract of employment or agreement with the employer, it is included in computing minimum wage.

<sup>8</sup> Assumptions : Rest day pay is the payment made to the employee for time that is not hours worked. Rest day pay for 4 Sundays is : \$7,000 ÷ 31 days × 4 days = \$903. For illustration purpose, figures are rounded to the nearest integers in these examples.

### Assuming

- the following employment terms according to the contract of employment :
  - remuneration : \$6,500 per month with paid rest days on Sundays
  - working hours :  
Monday to Friday – 9:00 a.m. to 5:00 p.m. excluding 1-hour lunch break which is paid; Saturday – 9:00 a.m. to 1:00 p.m. (same daily wages for Monday to Saturday)
- total number of hours worked in this month : 170 hours<sup>9</sup>
- SMW rate : \$28

### Calculation

- (1) Minimum wage for this month : **\$4,760** (170 hours × \$28)
- (2) Wages payable to the employee in respect of this month :  
**\$5,037** (\$6,500 – rest day pay of \$867<sup>10</sup> – payment for lunch break of \$596<sup>11</sup>)

⇒ Since (2) is not less than (1), the minimum wage requirement is met.

### Example 20 :

#### Assuming

- the following employment terms according to the contract of employment :
  - remuneration : \$250 per day, wage period is a calendar month, with no-pay rest days on Sundays
  - working hours :  
Monday to Saturday – 9:00 a.m. to 5:00 p.m. including 1-hour paid lunch break

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9 Assumptions : There are 30 days (including 4 Saturdays and 4 Sundays) in this month and the total number of hours worked is 170 hours (22 days from Monday to Friday × 7 hours per day + 4 Saturdays × 4 hours per day).

10 Assumptions : Rest day pay is the payment made to the employee for time that is not hours worked. Rest day pay for 4 Sundays is :  $\$6,500 \div 30 \text{ days} \times 4 \text{ days} = \$867$ .

11 Assumptions : Payment for lunch break is the payment made to the employee for time that is not hours worked. With the same hourly wages for working hours and lunch break in the 22 days from Monday to Friday, payment for lunch break is :  $\$6,500 \div 30 \text{ days} \div 8 \text{ hours} \times 1 \text{ hour} \times 22 \text{ days} = \$596$ .

- total number of hours worked in this month : 216 hours<sup>12</sup>
- SMW rate : \$28

#### Calculation

- (1) Minimum wage for this month : **\$6,048** (216 hours × \$28)
- (2) Wages payable to the employee in respect of this month :  
**\$6,750** (27 days × \$250 per day)

⇒ Since (2) is not less than (1), the minimum wage requirement is met.

#### Example 21 :

#### Assuming

- the following employment terms according to the contract of employment :
  - remuneration : piece-rated at \$100 per piece, with no-pay meal break; wage period is a calendar month; total remuneration for this month is \$5,500 (\$100 × 55 pieces)
- total number of hours worked in this month : 200.5 hours
- SMW rate : \$28

#### Calculation

- (1) Minimum wage for this month : **\$5,614** (200.5 hours × \$28)
- (2) Wages payable to the employee in respect of this month : **\$5,500**

⇒ Since (2) is less than (1), the employer has to pay additional remuneration of \$114.

(minimum wage of \$5,614 – wages payable of \$5,500 = additional remuneration of \$114)

#### **(2) Deductions from wages**

- Deductions from the wages of an employee made under the specified provisions of the Employment Ordinance in respect of any wage period **must be counted** as part of the wages payable in respect of that wage period. These specified provisions refer to section 25(3)

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12 Assumptions : There are 31 days (including 4 Sundays) in this month and the total number of hours worked is 216 hours (27 days from Monday to Saturday × 8 hours per day). In this example, as meal break is regarded as working hours of the employee in accordance with the contract of employment or agreement with the employer, it is included in computing minimum wage.

and section 32(2)(b), (c), (d), (e), (f), (g), (h) and (i) of the Employment Ordinance. For these provisions, please refer to the text of the Employment Ordinance and the Concise Guide to the Employment Ordinance. There are some examples of application below.

#### Example 22 :

A beauty shop assistant has damaged the goods of the employer by neglect or default. The employer deducts \$100, equivalent to the value of the damage, from the wages of this employee in respect of January in accordance with the Employment Ordinance.

⇒ In determining whether the wages of this employee meet the minimum wage requirement, this deducted amount of \$100 is counted as wages payable in respect of January.

#### Example 23 :

The employer of a fast food shop has made a loan to an employee. With the employee's written consent, the employer deducts \$200 from the wages of this employee in respect of February for the recovery of the loan in accordance with the Employment Ordinance.

⇒ In determining whether the wages of this employee meet the minimum wage requirement, this deducted amount of \$200 is counted as wages payable in respect of February.

#### Example 24 :

The employer of a laundry shop deducts \$300 from an employee's wages in respect of March to make contributions to the Mandatory Provident Fund on behalf of the employee (i.e. employee's contributions for Mandatory Provident Fund).

⇒ In determining whether the wages of this employee meet the minimum wage requirement, this deducted amount of \$300 is counted as wages payable in respect of March.

#### Example 25 :

The employer of a wholesale company deducts \$400 from an employee's wages in respect of April for the recovery of an over-payment of wages made to the employee in the wage period of March in accordance with the Employment Ordinance.

⇒ In determining whether the wages of this employee meet the minimum wage requirement, this amount of \$400 is counted as

wages payable in respect of April, not as wages payable in respect of March.

### **(3) Advance or over-payment of wages**

- An advance or over-payment of wages made to an employee in any wage period must **not** be counted as part of the wages payable in respect of that wage period.

#### **Example 26 :**

In May, the employer of a grocery store has made an advance payment of wages of \$500 to an employee from his wages payable in respect of June. The employer subsequently deducts such amount from the employee's wages payable in respect of June in accordance with the Employment Ordinance.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, this amount of \$500 is counted as wages payable in respect of June, not as wages payable in respect of May.

### **(4) Payment of arrears of wages in respect of an earlier wage period**

- A payment of arrears of wages in respect of an earlier wage period made to an employee in any wage period must **not** be counted as part of the wages payable in respect of the wage period in which it is paid.

#### **Example 27 :**

An employer has defaulted payment of wages of \$600 in respect of July to a clerk, and pays such arrears of wages in the wage period of August.<sup>13</sup>

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, this amount of \$600 is counted as wages payable in respect of July, not as wages payable in respect of August.

### **(5) Counting of commission**

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13 According to the Employment Ordinance, an employer who wilfully and without reasonable excuse fails to pay wages to an employee when it becomes due is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for three years.

- According to the Employment Ordinance, the definition of wages includes commission (except commission which is of a gratuitous nature or which is payable only at the discretion of the employer). Hence, other than commission which is gratuitous or payable only at the discretion of the employer, commission is wages and must be paid in accordance with the provisions of the Employment Ordinance. Depending on their actual circumstances, employers and employees may agree on how commission is calculated and payable in their employment contracts.
- In determining whether the wages of an employee meet the minimum wage requirement, commission payable under the contract of employment is counted as wages payable in respect of the wage period as specified in the employment contract (no matter the employer has paid it or not when it has been due <sup>13</sup>) (Example 28). If commission is payable in respect of a number of wage periods according to the contract of employment, in determining whether the wages of an employee meet the minimum wage requirement, commission is counted as wages payable in respect of the corresponding wage period as provided in the contract of employment (Example 29).
- In addition, given the unique nature of commission, the Minimum Wage Ordinance sets out the following provision for employers and employees to apply in the counting of commission as wages payable :

For the purpose of computing minimum wage, any commission paid

- with the prior agreement of the employee
- at any time after the first 7 days of a wage period but before the end of the 7<sup>th</sup> day immediately after that wage period

**must be counted** as part of the wages payable in respect of that wage period irrespective of when the work is done or the commission is otherwise payable under the contract of employment.

Hence, in determining whether the wages of an employee meet the minimum wage requirement, if there is prior agreement of the employee, commission can be counted as part of the wages payable in respect of a wage period according to the timing when the commission is paid (Example 30, Example 31). Without the prior agreement of the employee, the above provision is not applicable. In applying the provision, employers have to comply with the provisions on wage payment and deductions under the Employment Ordinance.

Please refer to the Concise Guide to the Employment Ordinance for details.

#### Example 28 :

A shop assistant is entitled to a basic salary plus commission **according to the contract of employment**. His wage period is each calendar month.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, wages payable in respect of each month include the basic salary and commission, no matter whether the employer has paid it or not.<sup>13</sup>

#### Example 29 :

A sales staff is entitled to a basic salary plus commission **according to the contract of employment**. His wage period is each calendar month. According to the contract of employment, commission is payable in respect of a number of wage periods.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, wages payable in respect of each month include the basic salary as well as the commission payable in respect of the corresponding month, no matter whether the employer has paid it or not.<sup>13</sup>

#### Example 30 :

An employer pays a product sales staff commission of \$1,000 (which is originally payable in respect of the wage period of March) on 31 January with the **prior agreement** of the salesman.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, this commission of \$1,000 is counted as wages payable in respect of January<sup>14</sup>, not as wages payable in respect of March.

#### Example 31 :

An employer pays a real estate agent commission of \$2,000 and \$3,000 on 8 April and 7 June respectively with the **prior agreement** of the real estate agent. The commission is originally payable in respect of the

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<sup>14</sup> Being paid in the period from 8 January to 7 February, the commission is counted as wages payable in respect of January.

wage period of July.

- ⇒ In determining whether the wages of this employee meet the minimum wage requirement, the commission of \$2,000 is counted as wages payable in respect of April<sup>15</sup> and the commission of \$3,000 is counted as wages payable in respect of May<sup>16</sup>, both not being counted as wages payable in respect of July.

#### **D. Transitional provisions**

- If the commencement date of SMW (i.e. 1 May 2011) falls within the wage period of an employee, any hours worked before the commencement date and wages payable for such hours should not be taken into account in calculating minimum wage. Specifically, only hours worked on or after 1 May 2011 and wages payable for such hours are relevant for the calculation of minimum wage.

#### **E. No contracting out**

- Any provision of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Minimum Wage Ordinance shall be void. Any agreement made between an employer and an employee cannot reduce the latter's entitlement to SMW.
- Same as the Employment Ordinance, a contract of employment is an agreement on the employment conditions made between an employer and an employee. The agreement can be made orally or in writing and it includes both express and implied terms.

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15 Being paid in the period from 8 April to 7 May, the commission is counted as wages payable in respect of April.

16 Being paid in the period from 8 May to 7 June, the commission is counted as wages payable in respect of May.

## **5 Employer to keep records of total number of hours worked by employee (where applicable)**

- The wage and employment records kept by an employer under the Employment Ordinance should include the total number of hours (including any part of an hour)<sup>17</sup> worked by the employee in a wage period if :
  - SMW applies to the employee (Please refer to [3. Application of statutory minimum wage](#) above); **and**
  - wages payable in respect of that wage period (Please refer to [4. Employee's entitlement to minimum wage](#) (the section on [C. Wages payable to employee in respect of wage period](#)) above) are **less than \$11,500 per month**<sup>18</sup>.

Therefore, when wages payable in respect of a wage period are at **\$11,500 or above per month**, the wage and employment records kept by an employer according to the Employment Ordinance are not required to include the total number of hours worked by the employee in that wage period.

- If the wage period of an employee is not a calendar month, the monetary cap of \$11,500 per month on keeping records of the total number of hours worked is calculated on a proportional basis ([Example 32](#), [Example 33](#)).
- Neither the Employment Ordinance nor the Minimum Wage Ordinance specifies the form of recording the total number of hours worked. Officers of the Labour Department may inspect the wage and employment records and require the total number of hours worked and the following particulars in the wage and employment records (which are currently set out in the Employment Ordinance) to be produced in a single document :
  - name and identity card number of the employee
  - wage period
  - wages paid in respect of each wage period

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17 This does not include hours worked before the commencement date of SMW (i.e. 1 May 2011).

18 The Government has tabled the subsidiary legislation on this monetary cap at the Legislative Council for approval.

- periods of annual leave, sick leave, maternity leave and holidays entitled and taken, together with details of payments made in respect of such periods
- While the employer is not required to keep the records of the total number of hours worked by the employee when wages payable in respect of a wage period are at \$11,500 or above per month, it is pertinent to note that the employee is still entitled to be paid wages in respect of that wage period of not less than the minimum wage.

### Example 32 :

The wage period of a delivery worker is half-monthly, lasting from the 1<sup>st</sup> day to the 15<sup>th</sup> day and from the 16<sup>th</sup> day to the last day of a month. Taking the two wage periods in August as an example, the monetary cap applicable to this employee for the records of the total number of hours worked is calculated proportionally as follows –

#### (a) Wage period from 1 to 15 August :

**\$11,500** × 15 days ÷ 31 days (i.e. the ratio that the period 1 to 15 August bears to August) = \$5,564.52

⇒ If wages payable in respect of the above wage period is at \$5,564.52 or above, the wage and employment records are not required to include the total number of hours worked in that wage period.

#### (b) Wage period from 16 to 31 August :

**\$11,500** × 16 days ÷ 31 days (i.e. the ratio that the period 16 to 31 August bears to August) = \$5,935.48

⇒ If wages payable in respect of the above wage period is at \$5,935.48 or above, the wage and employment records are not required to include the total number of hours worked in that wage period.

### Example 33 :

The wage period of a cleaning worker runs from the 16<sup>th</sup> day of each month to the 15<sup>th</sup> day of the following month. Taking the wage period of 16 August to 15 September as an example, the monetary cap applicable to this employee for the records of the total number of hours worked is calculated proportionally as follows –

**\$11,500** × 16 days ÷ 31 days (i.e. the ratio that the period 16 to 31 August bears to August) + **\$11,500** × 15 days ÷ 30 days (i.e. the ratio that the period 1 to 15 September bears to September) = \$11,685.48

⇒ If wages payable in respect of the above wage period is at \$11,685.48

or above, the wage and employment records are not required to include the total number of hours worked in that wage period.

*Points to note :*

- According to the Employment Ordinance, every employer must at all times keep a record setting out the wages and employment history of each employee covering the period of his employment during the preceding 12 months, including the total number of hours worked (where applicable). The wage records must be kept at the employer's place of business or at the place where the employee is employed, and they should also be kept for a period of another six months after the employee ceases to be employed. An employer who fails to keep the wage and employment records is liable to prosecution and, upon conviction, to a fine of \$10,000. For information on the provisions of the Employment Ordinance, please refer to the Concise Guide to the Employment Ordinance.
- If employers and employees can keep proper records in relation to attendance, hours worked, wages etc, this can safeguard their respective rights and benefits and help avoid unnecessary disputes.

## **Appendix 1 Statutory minimum wage exempting student interns and work experience students during exempt student employment**

- SMW does not apply to student interns as well as work experience students during a period of exempt student employment.

### **A. Student Interns**

A student intern is -

- a student undergoing a period of work arranged or endorsed by a local education institution specified in Schedule 1 to the Minimum Wage Ordinance, and the work is a compulsory or elective component of the requirements of a full-time accredited programme being provided by the institution to the student; or
- a student resident in Hong Kong and undergoing a period of work arranged or endorsed by an institution, and the work is a compulsory or elective component of the requirements of a full-time education programme for a non-local academic qualification at degree or higher level being provided by the institution to the student.

### **B. Work experience students during a period of exempt student employment**

A work experience student is -

- a student who is enrolled in a full-time accredited programme provided by a local education institution specified in Schedule 1 to the Minimum Wage Ordinance; or
- a student who is resident in Hong Kong and enrolled in a full-time education programme for a non-local academic qualification at degree or higher level

and is under the age of 26 years at the beginning of employment. The work experience student may agree with the employer to have a continuous period of up to 59 days<sup>19</sup> as exempt student employment if :

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<sup>19</sup> This does not include any employment period before the commencement date of SMW (i.e. 1 May 2011).

- (a) the student has not commenced another exempt student employment period within the same calendar year<sup>19</sup> (whether under the employment of the same employer or not) ([Example 34](#)); **and**
- (b) the student has made a statutory declaration verifying the fact in (a) above and provided the declaration (or copy) to the employer.

**Example 34 :**

A work experience student is employed from 1 July 2012 and agrees with the employer on a period of exempt student employment up to 28 August 2012 (i.e. not exceeding a continuous period of 59 days).

⇒ This work experience student cannot have another exempt student employment period in 2012, regardless of whether the employment is with the same employer or not.

**Local education institutions specified in Schedule 1 to the Minimum Wage Ordinance**

- The Hong Kong Institute of Education
- University of Hong Kong
- The Hong Kong Polytechnic University
- The Chinese University of Hong Kong
- Hong Kong Baptist University
- City University of Hong Kong
- The Hong Kong Academy for Performing Arts
- The Hong Kong University of Science and Technology
- The Open University of Hong Kong
- Lingnan University
- Approved post secondary colleges registered under the Post Secondary Colleges Ordinance (Cap. 320)
- Bodies established under the Vocational Training Council Ordinance (Cap. 1130)
- Schools registered or provisionally registered under the Education Ordinance (Cap. 279) (**Note:** The programme should be at post secondary level, i.e. associate degree, higher diploma, professional diploma or equivalent or higher level)

*Points to note :*

- The Labour Department will publish guidelines on the details of the exemption for student interns, work experience students and employers under the SMW regime.
- Since internships undertaken by work experience students are not necessarily curriculum-related or arranged/endorsed by their institutions, the Minimum Wage Ordinance sets out the above restrictions on age, duration of exempt student employment and that the student may commence a period of exempt student employment at most once in a calendar year. These restrictions do not apply to student interns whose internships must be arranged/endorsed by their institutions and form a compulsory/elective component of their programmes.
- SMW applies if a work experience student does not agree with the employer to have a period of exempt student employment.

## **Appendix 2 Enquiries**

[The finalised Reference Guidelines will list out our enquiry hotline, homepage address of the Labour Department and address of branch offices]