

For information on  
15 March 2012

## **Legislative Council Panel on Manpower**

### **Implementation of the Employment (Amendment) Ordinance 2010**

#### **Purpose**

The Employment (Amendment) Ordinance 2010 (Amendment Ordinance) has since 29 October 2010 made employers' wilful defaults of awards made by the Labour Tribunal (LT) or Minor Employment Claims Adjudication Board (MECAB) a criminal offence. This paper briefs Members on the implementation progress of the Amendment Ordinance.

#### **Background**

2. To combat employers' wilful defaults on payment of LT or MECAB awards, the Amendment Ordinance has introduced a new criminal offence under the Employment Ordinance (EO), whereby an employer who wilfully and without reasonable excuse fails to pay any sum awarded by LT or MECAB that comprises wages or entitlements underpinned by criminal sanctions under the EO within 14 days after it becomes due is liable to prosecution, and upon conviction, to a maximum fine of \$350,000 and imprisonment for three years. If the wilful default by a limited company is committed with the consent, connivance or neglect of the company director or responsible person, such person is also liable to prosecution.

3. In response to the request by the Bills Committee on the Employment (Amendment) Bill 2009 and in the light of the experience gained in enforcing the new offence, we now report to the Legislative Council Panel on Manpower on the implementation progress of the Amendment Ordinance.

#### **Overview of the implementation of the Amendment Ordinance**

4. To ensure the smooth and effective implementation of the Amendment Ordinance, the Labour Department (LD) has since late 2010 launched a series of educational and publicity activities to enhance public awareness of the new offence and has been taking stringent enforcement actions to deter breaches.

Educational and publicity work

5. To enhance public understanding of the Amendment Ordinance and to alert employers that defaulting payment of an LT or MECAB award has now become a criminal offence, LD has embarked on a wide range of educational and publicity activities since October 2010, which include distributing and displaying promotional publications, delivering talks and staging roving exhibitions, issuing press releases, and publicising the subject through LD's homepage, etc. We have organised large-scale briefings on the subject for employers, representatives of employers' associations and trade unions, human resources practitioners, management executives and members of the public. Moreover, relevant stakeholders have been briefed on this legislative amendment through various talks on the EO. Before the implementation of the Amendment Ordinance, copies of its concise guide have been widely disseminated via the branch offices of LD, LT, MECAB and the Public Enquiry Service Centres of the Home Affairs Department. The concise guide has also been distributed to over 1 100 employers' associations and trade unions, including associations of small-and-medium-sized enterprises to ensure that employers and employees of different trades and industries will become aware of the newly introduced offence. It is also made available in Chinese, English and multiple foreign languages for ease of reading by ethnic minorities and non-Chinese speaking persons.

6. In addition, LD has introduced a poster to promote the Amendment Ordinance, highlighting the message that defaulting employers may be liable to a fine and imprisonment. Other than arranging display through the channels of the Information Services Department, copies of the poster have been put up at the branch offices of the Labour Relations Division (LRD) of LD, LT and MECAB to alert employers on the serious legal consequences of wilful defaults of LT or MECAB awards.

7. As at the end of January 2012, LD staged eight roving exhibitions in different districts of the territory to ensure public awareness of the new offence at the community level. In tandem, we have issued feature articles to employers' associations from time to time and promoted the message through our network of 18 Human Resources Managers Clubs and the nine Tripartite Committees formed in various trades and industries.

8. In response to some Legislative Council Members' request, LD has published a leaflet to explain the "without reasonable excuse" clause in the Amendment Ordinance and provide employers with good people management recommendations so as to strengthen employers' understanding of the relevant provisions and prevent irresponsible employers from making up excuses for defaulting acts.

9. We believe the above-mentioned educational and publicity activities have aroused public awareness of the new offence, thereby helping to deter defaulting acts and protect employees' interests. In particular, these promotional drives caution irresponsible employers against the legal consequences of defying LT or MECAB awards. Such messages also enhance employees' understanding of the protection under the law.

Enforcement efforts

10. With the Amendment Ordinance coming into effect on 29 October 2010, in the 15-month period from November 2010 to January 2012, LD handled a total of 835 cases of defaulted LT or MECAB awards which fell within the ambit of the Amendment Ordinance, representing a notable decrease of 42% when compared with the 1 448 default cases handled during the preceding 15-month period from August 2009 to October 2010.

11. LD takes a serious view on defaults of LT or MECAB awards and has all along been sparing no efforts in bringing to justice employers and company responsible persons who defy the law. Where suspected LT or MECAB default cases are detected, LD will follow up and investigate the cases. We will take out prosecution where sufficient evidence has been obtained. As at the end of January 2012, among the default cases handled by LD, after discounting cases where the employers were unable to pay by their having gone bankrupt or been wound up, the companies had ceased operation, the employers or directors could not be located, or the claimants refused to be prosecution witnesses etc, we had taken out prosecution for 46 cases and consideration was being given to whether to take out prosecution for another 32 cases. There were 88 cases where investigation was underway. It is noteworthy that in the course of investigation, some employees withdrew their initial consent to be prosecution witnesses for various reasons including having successfully recovered the defaulted sums.

12. As at the end of January 2012, of the 46 cases with prosecution having been taken out, convictions had been secured in 19 cases involving 38 summonses; two cases received no conviction; and court action was still in progress for the remaining 25 cases.

13. Among the 19 convicted cases, one employer was sentenced to a community service order of 200 hours for defaulting the awarded sum. In another case, a company director was convicted for consent, connivance or neglect that led to the company's default of the awarded sum. He was sentenced to community service of 100 hours. In addition, in late February 2012, a limited company and its director were together sentenced to a fine of

\$300,000 for offences under the Amendment Ordinance upon the company being convicted for late payment of the awarded sum and its director for consent, connivance or neglect that caused the default. This is the highest fine for the offences recorded so far. The imposition of heavy fines and community service orders reflects the great importance that the courts attach to such offences.

14. Among the 19 cases convicted as at the end of January 2012, 12 involved non-payment of awards and of these there were 10 cases in which the court made orders under section 65 of the EO for the employers or directors to clear the outstanding sums. The remaining 7 cases involved late payment of awards. Such judgments have sent strong messages to employers as well as directors or responsible persons of limited companies that they must ensure that payment of the awards issued by LT or MECAB are duly complied with.

15. Where there is sufficient evidence indicating wilful and unreasonable default of LT or MECAB awards, LD will continue to resort to the Amendment Ordinance to take out prosecution against such law-defying employers.

*Assistance to employees and sanction against defaulting employers*

16. To provide assistance to employees aggrieved by LT or MECAB defaults to recover the outstanding sums as soon as possible, LD has put in place a user-friendly and efficient arrangement to provide necessary information and appropriate assistance to affected employees. A designated officer in each of LD's LRD branch office is assigned with the dedicated role of providing these employees with detailed information and guidance on various modes of executing their LT or MECAB awards, assisting them in applying for ex gratia payment from the Protection of Wages on Insolvency Fund, and making appropriate referrals to other government departments, such as the Legal Aid Department or the Social Welfare Department, etc for legal or financial assistance as required. The designated officer also follows up with the concerned employees to continuously provide assistance where necessary. Many of the employees assisted by LD find this service useful in helping them obtain comprehensive information about enforcement of LT or MECAB awards and referring them to relevant departments as appropriate in one go. On top of this arrangement, LD will also immediately suspend the provision of free recruitment service to those employers who are known to have defaulted LT or MECAB awards until the payment is settled.

## **Time and procedures required for investigation and prosecution**

17. Criminal prosecution requires a high standard of proof to the extent that a suspected offence must be proved beyond reasonable doubt. As always, stringent requirements of establishing a criminal prosecution case are to be satisfied by LD when taking enforcement action. On this premise, LD always strives to complete investigation and prosecution of suspected offences cases expeditiously and properly. In the course of investigating suspected contraventions of the Amendment Ordinance, LD will invite employees to give witness statements, actively conduct workplace inspections to collect relevant information, and arrange interviews with employers for obtaining details of the suspected offences. Prosecution will be taken out where sufficient evidence is available.

18. Under section 43S(2) of the Amendment Ordinance, investigation officers are required to hear a person against whom the allegation is made or give the person an opportunity of being heard. Like similar offences under the EO, this requirement gives a suspected offender an early opportunity to inform LD of his explanation and any special circumstances that would likely mitigate or remove his culpability. Early knowledge of possible mitigating and exculpatory matters is to the benefit of both the employees and the employers involved, as it could help expedite LD's investigation and decision-making on whether it is appropriate to take out prosecution.

19. From enforcement experience, hearings under section 43S(2) are normally conducted within two weeks upon an employer who is suspected to have committed an offence has been notified. As the conduct of hearings is integral to the collection and verification of evidence for assessing the sufficiency of evidence and deciding whether to prosecute, the requirement for hearings under section 43S(2) has in no way hampered the effectiveness of enforcing the Amendment Ordinance.

20. While the length of time for employees and other relevant parties to provide statements and information varies from case to case and is outside the full control of LD, operational experience suggests that investigation into relatively straightforward cases under the Amendment Ordinance can be completed in one to two months' time following employees' provision of witness statements. For cases involving a larger number of employees/defendants or more complicated facts, a longer investigation time may be needed.

21. Before instituting prosecution, LD has to assess the evidence collected from the witnesses (including the relevant employees and other related persons), conduct research, and make reference to the relevant court cases and previous legal advice from the Department of Justice (DoJ). When necessary, LD will require the witnesses to supply further evidence or information and seek further legal advice from DoJ. However, the length of time for the employees and other relevant parties to provide statements and information varies from case to case and is often beyond the control of LD. In addition, there are many factors affecting the time taken for prosecution of the relevant offences. Such include the complexity of the cases; the number of defendants and witnesses; consistency of the evidence provided by the witnesses; or whether the defendants admit the offences and so on. Nevertheless, once there is sufficient evidence, the authorised officers will without delay issue written consent of the Commissioner for Labour (CL) to commence prosecution. In relatively straightforward cases, it takes about four to six weeks' time after investigation to assess the sufficiency of evidence and make recommendation on the giving of CL's consent for prosecution. For complicated cases where further evidence or legal advice is required, a longer assessment time for seeking further evidence or legal advice may be required. Under all circumstances, LD strives to complete investigation and prosecution of suspected offences under the Amendment Ordinance expeditiously and properly.

### **Way forward**

22. The new offence introduced by the Amendment Ordinance sends a clear message to irresponsible employers that they must not defy the law by wilful defaults of awards. Coupled with the launching of extensive education and publicity and the taking of stern enforcement actions, the new offence has been achieving certain deterrent effect as demonstrated by the notable drop in the number of default cases where LD's assistance was sought after the implementation of the Amendment Ordinance. In future, LD will continue to strengthen public understanding of the Amendment Ordinance through different promotional channels, assist employees to recover the defaulted sums, and keep up its efforts in taking stringent and expeditious enforcement action to deter employers from defaulting LT or MECAB awards wilfully.