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Panel on Manpower

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 28 May 2013**

Enforcement of labour legislation

Purpose

This paper gives an account of the past discussions by the Panel on Manpower ("the Panel") on the enforcement of labour legislation by the Labour Administration Branch of the Labour Department ("LD").

Background

2. The portfolios of the Labour Administration Branch of LD cover five programme areas, which include labour relations, employment services, employees' rights and benefits, policy support and development. The Labour Administration Branch of LD is responsible for enforcing the following labour legislation -

- (a) the Employment Ordinance (Cap. 57) ("EO") which covers a comprehensive range of employment protection and benefits for employees including wage protection, rest days, holidays with pay, paid annual leave, sickness allowance, maternity protection, severance payment, long service payment, employment protection, termination of employment contract and protection against anti-union discrimination. Employees who are owed wages, wages in lieu of notice and/or severance payments by insolvent employers may apply for ex-gratia payment from the Protection of Wages on Insolvency Fund ("PWIF") which is financed by an annual levy on business registration certificates;
- (b) the Employment of Children Regulations (Cap. 57 sub. leg. B) which govern the employment of children in all economic sectors;

- (c) the Employment of Young Persons (Industry) Regulations (Cap. 57 sub. leg. C) which govern the employment of young persons in the industrial sector;
- (d) Part IV of the Employees' Compensation Ordinance (Cap. 282) ("ECO") which provides for compulsory insurance in relation to compensation for work injuries;
- (e) Part IVB of the Immigration Ordinance (Cap. 115) which prohibits the employment of illegal immigrants in Hong Kong; and
- (f) the Minimum Wage Ordinance (Cap. 608) ("MWO") which provides for a minimum wage at an hourly wage for certain employees.

Inspections to the workplace and accommodation of imported workers are also conducted by the Labour Administration Branch of LD to ensure that workers entering Hong Kong for employment under the Supplementary Labour Scheme receive their statutory and contractual benefits.

Deliberations of the Panel

3. On the enforcement of labour legislation, members have been gravely concerned about implementation of SMW, the problem of false self-employment and abuse of PWIF.

Implementation of SMW

4. With regard to the implementation of SMW in May 2011, the Panel was briefed at its meeting on 11 April 2011 on the new arrangement for non-skilled workers engaged under government service contracts. Members were advised that for government service contracts straddling 1 May 2011 and engaging mainly non-skilled workers (such as cleaners and security guards), if the wages of workers were below the SMW requirement, the service contractors, as employers, were obliged to pay their workers additional remuneration to meet the shortfall as from 1 May 2011. In order to protect the employment of existing employees as well as to ensure the continued provision of public service, the Administration had decided to introduce the following special arrangements in tandem with the SMW implementation for government service contracts that relied heavily on the deployment of non-skilled workers -

- (a) for new contracts tendered on or after 1 May 2011, contractors would be mandated to pay their non-skilled workers at not less than SMW plus one paid rest day in every seven days¹; and
- (b) for existing contracts straddling 1 May 2011, the Government might provide, on an exceptional and one-off basis, top-up payment to service contractors to meet the increase in wage costs of non-skilled workers, arising solely and directly from meeting the SMW requirement with effect from 1 May 2011 until the expiry of the contracts concerned.

5. At its meeting on 15 December 2011, the Panel was advised that the aforesaid arrangements had been working smoothly. However, members expressed grave concern about the measures adopted by the Administration to ensure that the top-up payments would go to the workers who were the target beneficiaries of the special arrangements and asked whether further safeguards would be put in place by the Administration to prevent unscrupulous contractors from embezzling the top-up payments.

6. The Administration explained that for existing contracts straddling 1 May 2011, government service contractors might apply to procuring departments for top-up payment after their payment of monthly wages to non-skilled workers employed. Contractors were required to calculate the top-up payment down to a per-worker-per-contract level based on the actual wage and employment profiles of workers concerned. Top-up payment would only be released on a reimbursement basis after the procuring departments were satisfied that the top-up amount under application for the month had arisen solely and directly from meeting the SMW requirement, and that the contractors had paid their workers according to the wages stipulated in the standard employment contracts ("SECs") and made provident fund contributions in accordance with statutory requirements. The Administration considered that these measures could help prevent service contractors from embezzling the top-up payments.

7. Members were assured that there were established channels for workers to voice their grievances and seek assistance, and those who suspected their employment rights being infringed were encouraged to report to LD. When reports about cases of non-compliance with the statutory requirement were received, LD would investigate each of the cases and take out prosecution if there was sufficient evidence to establish an offence.

¹ A transitional arrangement had been introduced for higher-paid occupations to which the average market monthly wages published by the Census and Statistics Department in March 2011 would continue to apply until the rate of SMW plus one paid rest day in every period of seven days could catch up.

8. Noting that there were complaints about service contractors' reducing the working hours of workers without the latter's consent, the Administration advised that interested contractors should, in accordance with the requirements of government service contracts, specify in their tenders the terms and conditions of employment of non-skilled workers. Contractors who had succeeded in bidding for the relevant government contracts were required to state clearly in the employment contracts signed with their employees the period of employment, wage, maximum working hours for each day and leave arrangements, etc for the workers. Unilateral variation of terms stipulated in the written employment contracts by employers was not allowed.

9. Noting that there was no requirement for provision of paid meal breaks under the special arrangements, members considered it unfair to workers engaged under government service contracts. According to the Administration, neither MWO nor EO prescribed that meal breaks or rest days should be paid or not. These matters had to be agreed between employers and employees. The SEC used by government service contractors did not prescribe the provision of paid meal breaks. At the time of signing SEC, contractors and their workers could negotiate and agree on the terms of employment, such as working hours or arrangements and any payment for meal breaks, having regard to the nature of work, characteristics of the industries and operational needs of the company.

False self-employment

10. Members had all along expressed grave concern over the growing number of employees being labelled by their employers as "self-employed" despite the fact that they satisfied all characteristics of an employee for the purpose of an employment contract. There was a worry that with the commencement of MWO on 1 May 2011, the problem of false self-employment might become more serious since employers might circumvent the requirement of paying employees SMW by forcing the latter to become self-employed persons. Members were thus strongly of the view that the Administration should introduce new legislation and impose heavier penalty in order to deter unscrupulous employers from deliberately evading their statutory responsibilities under the pretext of self-employment.

11. Members were advised that the suggestion of clearly distinguishing an employment relationship from that of "self-employment" through legislation had been fully deliberated by both the Labour Advisory Board ("LAB") and the Panel in 2009, and LAB had re-visited the issue in May 2011. Notwithstanding the good intention behind the suggestion, the Administration was of the view that to define self-employment by drawing an exhaustive list of criteria might fail to account for the possible specific features in individual

occupational groups and sectors and in turn inadvertently hinder the development of entrepreneurship and the freedom of contract. With reference to past court cases involving self-employment disputes, the Administration pointed out that there was no single conclusive test to distinguish whether a person was an employee or a self-employed person. Hence, the Administration considered that the more effective ways to tackle the problem of false self-employment were through education on the differences, merits and drawbacks as well as the legal rights and obligations of the two contractual relationships of employment and self-employment.

12. There was a view that Labour Inspectors should conduct proactive inspections and mount targeted enforcement campaigns against establishments in industries which were more prone to have false self-employment disputes, such as transportation and personal services industries. The Administration advised that Labour Inspectors conducted workplace inspections rigorously to check employers' compliance with the law and educate employees on their statutory rights and protection. Between October 2009 and May 2011, Labour Inspectors, apart from routine workplace inspections, conducted special enforcement inspections of establishments in these industries. A total of 452 establishments were inspected and five cases of suspected false self-employment in breach of EO or ECO were detected.

13. On the question as to whether difficulties were encountered in taking out prosecution against the suspected employers, the Administration advised that in many cases, the relevant parties claimed that they entered into self-employment contracts by mutual consent. Notwithstanding this, Labour Inspectors conducting workplace inspections would advise employers of the risks involved should they wish to enter into contracts to engage someone as a self-employed person. They were also duly advised that they would still be required to fulfill their responsibilities under relevant legislation if in essence there existed an employer-employee relationship. Notably, the employers concerned would be required to pay back statutory benefits retroactively to employees who were falsely labelled as "self-employed", they might also have to bear the legal consequences for having committed offences under relevant labour laws.

Abuse of PWIF

14. There was an enquiry about the cooperation among various government departments in the fight against PWIF abuses. Members were advised that the Administration had stepped up enforcement and prosecution actions against abuse of PWIF. In parallel with the establishment of a special investigation team in May 2003, the Government had set up an inter-departmental task force in November 2002 comprising representatives from the Commercial Crime

Bureau ("CCB") of the Hong Kong Police Force, the Official Receiver's Office ("ORO"), the Legal Aid Department ("LAD") and LD to strengthen the collaboration among the departments concerned in pursuing and investigating possible abuse of PWIF. If offences such as illegal transfer of assets, fraud or conspiracy to defraud were suspected to have been committed, LD would refer the case, where appropriate, to CCB or ORO for investigation. The Administration further advised that LD had engaged former police officers as contract investigation officers to reinforce its capacity in intelligence gathering and evidence collection. As endeavours to strengthen the cooperation with LAD, LD had, since 2009, established linkage to the on-line computer system of LAD so as to follow up more closely the progress of presenting bankruptcy/winding up petitions of individual cases, whereby relevant information could be provided more readily to applicants in their enquiries.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
21 May 2013

**Relevant papers on the enforcement of labour legislation by the
Labour Department**

| Committee | Date of meeting | Paper |
|-------------------|-------------------------|--|
| Panel on Manpower | 20.1.2011 (Item III) | <u>Agenda</u> <u>Minutes</u> |
| | 12.7.2011 (Item II) | <u>Agenda</u> <u>Minutes</u> |
| | 15.12.2011 (Item V) | <u>Agenda</u> <u>Minutes</u> |
| Council meeting | 19.12.2012 | [Question 5] Asked by: Hon LEUNG Yiu-chung <u>Taking out employees'</u> <u>compensation insurance</u> <u>policies</u> |

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