

Bills Committee on the Employment (Amendment) Bill 2014

The Government's response to issues as requested by the Bills Committee at its meeting on 15 April 2014

This paper responds to three issues as requested by the Bills Committee on the Employment (Amendment) Bill 2014 (“the Bill”) at its first meeting held on 15 April 2014.

Legality of payment in lieu of paternity leave (PL)

2. Members enquired whether it was in breach of the law for an employer to pay wages in lieu of granting statutory PL to an employee in the respective scenarios where the employer has or has not obtained the agreement of the employee concerned.

3. It is the policy intention of the Bill that a male employee who is the father of a newborn or a father-to-be should be entitled to take PL if he is employed under a continuous contract¹ and has duly given advance notice to his employer in accordance with the proposed new section 15E. He should also be entitled to PL pay if he has been employed under a continuous contract for a period of not less than 40 weeks immediately before the day on which he takes PL and has complied with the documentary requirements in the proposed new section 15I or section 15J. It is, therefore, spelt out in the proposed new section 15L(1) that an employer must (a) grant an employee PL to which the employee is entitled and (b) pay him PL pay as required if he meets the PL payment criteria. The proposed new section 15L(2) further stipulates that an employer who without reasonable excuse contravenes the aforesaid provisions commits an offence and is liable on conviction to a fine at level 5 which is currently set at \$50,000.

4. The Bill renders non-granting of PL to an eligible employee unlawful. This is regardless of whether payment in lieu of PL is made

¹ Under the Employment Ordinance (Cap. 57), an employee who has been employed continuously by the same employer for 4 weeks or more and has been working for at least 18 hours each week is regarded as being employed under a continuous contract.

or not. If the employee meets the criteria referred to in paragraph 3 above and has given the required advance notice to his employer in accordance with the relevant provisions, the employer contravenes the proposed new section 15L if he/she fails to grant PL to the employee though payment in lieu of PL is made to the employee. Even if there is an agreement between the employer and the employee about making payment in lieu of PL, the employer still commits an offence if he/she denies an employee the benefit of taking PL.

Survey on PL

5. At the request of the Bills Committee, a report of the survey on PL conducted by the Labour Department (LD) with member establishments of its 18 Human Resources Managers Clubs in 2012 is provided at **Annex 1**.

Exclusion of female employees from PL

6. A Member suggested that the Government should ask the Equal Opportunities Commission (EOC) whether the proposal in the Bill of excluding female employees from PL, with the effect of excluding the female same-sex partner of a mother from the benefits of the Bill, would give rise to an issue of discrimination.

7. LD made a written enquiry to EOC accordingly on 25 April 2014 and EOC replied on 5 May 2014. The relevant correspondences are at **Annexes 2 and 3** respectively.

Labour and Welfare Bureau
May 2014

**Report of survey conducted by the Labour Department in 2012 on
the provision of paternity leave by member establishments of its
18 Human Resources Managers Clubs**

Background

The Labour Department (LD) has all along been dedicated to encouraging employers to, having regard to their own circumstances, adopt family-friendly employment practices including paternity leave (PL) which befit their operational conditions to help employees address their family needs. To collect information about the prevalence and practices of respondent establishments on the provision of PL, LD conducted a survey among member organisations of its 18 Human Resources Managers Clubs² (HRMCs) in June 2012. The 18 HRMCs drew its members from 16 industries/sectors, including banking, building services, catering, community and social services, construction, education, electronics, garment, hotel and tourism, information technology, logistics, manufacturing, retail, other services, trading as well as small and medium enterprises.

2. The survey was conducted through questionnaires sent to 1 580 member organisations. A total of 576 completed questionnaires were received, which corresponded to a response rate of 36.5%.

Findings of the survey

3. Among the 576 respondent organisations, 223 (38.7%) indicated that they provided PL to their employees. Findings on the profile of the respondent organisations, as well as their practices on the provision of PL, are provided in paragraphs 4 - 9 below.

² LD encourages enterprises to implement good people management practices having regard to their own circumstances through the establishment of 18 HRMCs composed of personnel responsible for staff matters like business owners, administrators or human resources professionals. They promote people-oriented good people management practices and effective labour-management communication through regular experience-sharing and briefing sessions.

A. Profile of respondent organisations offering PL

Size of organisations providing PL

4. An analysis by the size of respondent organisations showed that in general, organisations with larger employment size were more inclined to provide PL. The percentages of respondent organisations of various employment sizes providing PL were as follows:

- 20 or less employees : 20.0%;
- 21 to 50 employees : 25.6%;
- 51 to 100 employees : 30.0%;
- 101 to 500 employees : 44.9%;
- 501 to 1 000 employees : 42.6%;
- more than 1 000 employees : 53.8%.

Breakdown by industry of organisations providing PL

5. An analysis by the trade/industry to which individual respondent organisations belonged showed that among 16 industries/sectors, provision of PL was more popular in the banking industry, with 68.1% of the respondent organisations from that industry indicating that they provided PL to their male employees. The electronics (60%) and retail industries (55.6%) ranked second and third respectively. The survey also showed that relatively fewer organisations in the education (15.7%) and catering (16.7%) industries as well as SMEs (17.1%) provided PL to their employees.

B. Practices on the provision of PL

Duration of PL

6. Regarding the duration of PL, 81.6% of the 223 respondent organisations offering PL provided one to three days' PL. The most common duration of PL offered was three days, with 43.5% respondent organisations indicating such a duration of PL offered. There were 9%

organisations providing one day, 29.1% providing two days, 2.7% providing four days and 12.6% providing five days of PL. The longest duration of PL was 14 days, which was provided by 0.9% of organisations offering PL.

Payment for PL

7. Regarding the payment during PL, 220 respondent organisations offering PL (98.7%) provided full pay to their employees. Two respondent organisations (0.9%) offered 80% of the employee's wages as PL pay. One respondent organisation (0.4%) which provided 14 days of PL did not offer any pay for PL.

Documentary proof

8. For the 223 respondent organisations offering PL, 89.2% required documentary proof for taking PL, of which 88.9% were willing to accept documents issued outside Hong Kong. The most common types of documentary proof required were birth certificate (81.9%), marriage certificate (30.7%) and proof of delivery (26.6%) etc.

C. Respondent organisations not offering PL

Other supportive measures

9. For the 353 respondent organisations which did not offer PL at the time of the survey, 85.3% indicated that other supportive measures were in place to assist their male employees to accompany and take care of their spouses/partners and their newborns before/after delivery. Such measures included flexible arrangement of annual leave (91.4%), no pay leave (41.9%), paid casual leave (12%) and arrangement of flexible working hours (10%).

XXXXXXXXXX


LABOUR DEPARTMENT (Headquarters)

勞工處（總處）

Your reference 來函編號：

Our reference 本處檔案編號：(56) in LD HQ/711/245/5 Pt.8

Tel. No. 電話號碼：2852 4099

Fax No. 傳真號碼：2854 4166

25 April 2014

Mr Joseph LI
 Director (Operations)
 Equal Opportunities Commission
 19/F., City Plaza Three
 14 Taikoo Wan Road
 Taikoo Shing
 Hong Kong

Dear Mr LI,

Employment (Amendment) Bill 2014

At the request of the Bills Committee on the Employment (Amendment) Bill 2014 (“Bill”) of the Legislative Council (“LegCo”), I write to seek the views of the Equal Opportunities Commission (EOC) on an issue raised by a Member of the said Committee at the meeting held on 15 April 2014.

Background

2. To facilitate working fathers in taking care of the newborn and the mother around the time of childbirth, the Administration has, based on the consensus of the Labour Advisory Board (LAB)¹ and the endorsement of the Panel on Manpower of LegCo, formulated a bill to make three days’ paid paternity leave (PL) a statutory benefit for working fathers under the Employment Ordinance (Cap. 57) (EO). The Bill was introduced into LegCo

¹ LAB, chaired by the Commissioner for Labour, comprises six members representing employers and another six representing employees. Noting that both PL and maternity leave emanated from the same cause, and that the nature of PL was similar to that of maternity leave, LAB agreed that, where appropriate, the relevant requirements and details of PL should be aligned with those applicable to maternity leave under the EO for the purpose of reasonableness and consistency with the existing law.

on 26 March 2014 and is now under the scrutiny of the aforesaid Bills Committee. A copy of the Legislative Council Brief on the Bill is enclosed for your reference.

Key features of the proposal

3. The proposal aims at granting paid PL to working fathers. Under the proposal, a male employee who is the father of a newborn or a father-to-be will be entitled to PL if he is employed under a continuous contract² and has given advance notice to his employer in accordance with the relevant stipulations as set out in the Bill. He will also be entitled to PL pay if he meets the requirement on the length of service and has submitted the required documentary proof on the father-child relationship to his employer (please see paragraphs 4 and 5 below for details).

4. The community is broadly of the view that PL should be accorded to “husbands”, i.e. legally married males, only. Yet the Administration considers that failing to grant PL for childbirths outside of marriage might be in breach of the Sex Discrimination Ordinance (Cap. 480) and the Family Status Discrimination Ordinance (Cap. 527) respectively in terms of the possible discrimination on grounds of marital status and family status. Having regard to the provisions in the anti-discrimination legislation, the best interests of the newborn, and the need to strike a reasonable balance between the interests of employers and employees, the Administration proposes to grant PL to a “father” without imposing a requirement that a male employee has to be legally married with the mother of the newborn child for entitlement to PL.

5. It should be noted that entitlement to PL and PL pay stems from a birth incident involving the mother and the child rather than the employee. Yet the liability to grant PL and PL pay only arises in the course of an employment relationship between the employer and employee, to which neither the child nor the mother of the child is a party. Therefore there is a need for the employee claiming such entitlement to produce document(s) in support of the alleged father-child relationship. As the birth of a child is central to an employer’s legal liability to provide PL and PL pay, and birth within marriage is not a prerequisite for entitlement to the proposed statutory PL and PL pay, the birth certificate is an easy-to-obtain documentary proof and a practical tool that can reasonably establish the father-and-child relationship between the employee and

² According to the EO, an employee who has been employed continuously by the same employer for 4 weeks or more and has been working for at least 18 hours each week is regarded as being employed under a continuous contract.

the child borne by the woman. In light of the above, we propose that, for the purpose of the Bill, whilst the child's father or father-to-be is entitled to unpaid PL, he is entitled to PL pay only if he can provide further documentary proof in the form of a birth certificate of the child on which his name is entered as the "father" of the child.

Same-sex partner of the mother

6. At present, the female partner of a woman who has given birth to a baby cannot be recognised as the "father"³ of the baby as a matter of Hong Kong law and cannot be named as the baby's father in the birth certificate issued by the Hong Kong authorities. As the female partner of a pregnant woman cannot be the father of the child, she does not have, under current Hong Kong law, the legal rights and responsibilities of a father towards the child. So long as the current state of the law is that the female partner of a woman who has given birth to a child does not have legal recognition as the father of the child and thus cannot assume the legal rights and responsibilities of a father towards the child, extending PL benefits to the female partner would be at odds with the family law of Hong Kong. After careful deliberation, the Administration has no intention to extend the statutory PL scheme to the female partner of a child's mother.

Advice sought

7. At the aforesaid meeting of the Bills Committee, a LegCo Member requested the Administration to seek the views of EOC on whether excluding female employees from the proposed statutory PL scheme, thereby excluding the female same-sex partner of a mother from the benefits of the Bill, would give rise to an issue of discrimination on the ground of sexual orientation. In this connection, to the extent that the issue involved falls within the purview of

³ Under current Hong Kong law, "father" refers to the male sex/a man. Section 5 of the Parent and Child Ordinance (Cap. 429) specifically provides for the presumptions of paternity which reads -

- "(1) **A man (emphasis added)** shall be presumed to be the father of a child-
- (a) if he was married to the mother of the child at any time and if there arises by virtue of that marriage a presumption of law that the child is the legitimate child of that man; or
 - (b) where no man is presumed to be the father under paragraph (a), and subject to section 10(3), if he has been registered as the father of the child by an entry made after the commencement of this section in any register of births kept by the Registrar of Births and Deaths under any Ordinance.

..."

EOC, we should be grateful for your advice on the above having regard to the background and rationale of the proposed statutory PL scheme.

8. As we are requested to provide our reply to the Bills Committee by 7 May 2014, we should be most grateful if the EOC would kindly let us have its views as soon as is practicable. Thank you for your attention.

Yours sincerely,



(Charles Hui)

for Commissioner for Labour



平等機會委員會

EQUAL OPPORTUNITIES COMMISSION

OUR REF.: EOC/GOV/05
 YOUR REF.: (56) in LD HQ/711/245/5 Pt. 8
 TEL NO.: 2106 2178
 FAX NO.: 2824 3892

香港太古城太古灣道14號太古城中心三座19樓

19/F., Cityplaza Three, 14 Taikoo Wan Road
 Taikoo Shing, Hong Kong
 網址 Website : <http://www.eoc.org.hk>

5 May 2014

By Fax: 2854 4166 and By Post

Commissioner for Labour
 Labour Department (Headquarters)
 Harbour Building
 38 Pier Road
 Central, Hong Kong
Attention: Mr. Charles Hui

Dear Sir,

Employment (Amendment) Bill 2014

Thank you for your letter dated 25 April 2014. The Commission is pleased with the introduction of paternity leave under the Employment Ordinance.

As you pointed out, a female same-sex partner of a child's mother is not recognized as having the rights and responsibilities of a parent. Same-sex marriage or partnership are not legally recognized. There is no legislation on sexual orientation discrimination. In these circumstances, exclusion of the female same-sex partner from paternity leave would not contravene any discrimination legislation at the present time. But in terms of general equality, the same-sex partner may be regarded as being in a similar position to a father who has to take care of the newborn and the mother around the time of childbirth. On this view, it would advance equality in general if similar leave could be given to the same-sex partner.

There has been much discussion in the community as to whether there should be legislation on sexual orientation discrimination. The Commission takes the view that introduction of such legislation should be seriously explored. Issues on employment benefits for workers in same-sex relationships would be relevant in any effort to develop sexual orientation legislation.

Yours faithfully

Herman Poon

Chief Legal Counsel

Equal Opportunities Commission