Bills Committee on the Employment (Amendment) Bill 2014

The Government's response to the issues raised by the Bills Committee at its meeting held on 8 July 2014 and the draft Committee Stage Amendments proposed by Members

This paper sets out the Government's response to -

(i) the issues raised by the Bills Committee on the Employment (Amendment) Bill 2014 ("the Bill") concerning the drafting of the Bill at its meeting held on 8 July 2014; and

(ii) the draft Committee Stage Amendments (CSAs) proposed respectively by Dr Hon Helena WONG Pik-wan (LC Paper No. CB(2)2002/13-14(02)) and Hon LEE Cheuk-yan (LC Paper No. CB(2)2020/13-14(02)).

Issues raised by the Bills Committee at its meeting held on 8 July 2014 concerning the drafting of the Bill

(a) Definition of "child"

2. Some Members asked the Government to reconsider spelling out in the definition of "child" in section 2(1) of the Employment Ordinance (Cap. 57) (EO) the use of "嬰兒" as a Chinese equivalent of "child" in the new Part IIIA. The Government considers that while the references to "child" in the Bill are in order and unlikely to give rise to any problem of interpretation, for the sake of clarity, a technical amendment will be made by adding a definition of "child (嬰兒)" in the new Part IIIA for the purposes of that Part. Please refer to the new section 15CA in the Annex on the CSAs to be moved.

(b) The Chinese text of the new section 15D(3)(b)

3. Some Members asked the Government to reconsider incorporating the Chinese equivalent of "inclusive of" in the Chinese text

of the new section 15D(3)(b) by following the pattern of a similar provision in EO regarding maternity leave.

4. Having re-examined the new section 15D(3)(b), we will make a textual amendment to the English and Chinese texts of that section to improve clarity. Please refer to the Annex for details.

(c) The Chinese text of the new sections 15F(1) and 15I(2)

5. Having taken note of some Members' views on the Chinese text of the new section 15F(1), the Government will recast the provision to place the emphasis on the entitlement to paternity leave (PL). We will also make a textual amendment to the new section 15I(2) to rectify an error in the Chinese text. Please refer to the proposed amendments to the said sections in the Annex for details.

(d) The terms "average daily wages" and "daily average of the wages"

6. Some Members asked the Government to confirm whether the terms "average daily wages" and "daily average of the wages" had the same meaning under EO and clarify whether the term "average daily wages" would be used in future amendments to EO.

7. As pointed out in our reply to the Legal Service Division on 8 May 2014 (LC Paper No. CB(2)1480/13-14(05)), the term "average daily wages" means the "daily average of the wages earned by the employee", and is to be reckoned in the same way as the latter term. The two terms have the same meaning. The term "average daily wages" is used in the new Part IIIA because of its simplicity and conciseness. In proposing amendments to EO in future, the term "average daily wages" will be used in similar contexts.

(e) Description of the long title of the Bill

8. Some Members requested the Government to reconsider amending the description of the long title of the Bill to a more general one. The Government is of the view that the long title, as now drafted, has accurately and succinctly reflected the purpose and content of the Bill.

There is no need to amend its description.

CSAs proposed by Members

(a) Draft CSAs proposed by Dr Hon Helena WONG Pik-wan

9. The CSAs proposed by Dr Hon Helena Wong seek to extend the duration of statutory PL to seven days, increase the rate of PL pay to full pay and remove the 2-day advance notice requirement for taking PL.

10. As the Government explained to the Bills Committee in previous meetings, the proposal to make 3 days' PL with the pay set at four-fifths of the employee's average daily wages a statutory benefit for male employees under EO is a broad consensus reached by the Labour Advisory Board (LAB) after serious deliberations and detailed discussions involving LAB Members as well as the major employers' associations and employee unions which they represent. It is important to note that the cost of PL benefits in the non-government sector is to be shouldered by employers of varying sizes. A reasonable balance must therefore be struck between the interests of employees and the affordability of employers, particularly the small and medium-sized enterprises. According to a survey conducted by LD with member establishments of its 18 Human Resources Managers Clubs in 2012, the majority of the respondent organisations providing PL on a voluntary basis provided PL of 3 days or less[1]. Having regard to the duration of PL now voluntarily provided by employers in the private sector and the consensus reached by LAB, we consider the proposed 3-day PL an appropriate starting point for statutory PL.

11. Under the existing EO, employees may take sick leave and maternity leave on account of their own physical conditions with pay at a rate pitched at four-fifths of their normal pay. Such leaves are distinct from the statutory leave (e.g. statutory holiday and annual leave) for all

[1] According to the survey, the respondent organisations provided an average of 3 days of PL on a voluntary basis. Among those respondent organisations offering PL, about 43.5% provided 3 days of PL and over 81% offered 1 to 3 days of PL.

employees which attract full pay. We consider that PL, similar to sick leave and maternity leave, is incidental to certain employees for meeting their personal needs and should be remunerated at the same rate as that for the latter types of leave.

12. As pointed out in paragraph 10 above, the Bill introduced by the Government was drafted on the basis of the broad consensus reached at LAB after careful and detailed deliberations. It represents a pragmatic and important step forward and is built on the spirit of mutual understanding and compromise. The LAB at its meeting in September 2014 reaffirmed support for its earlier consensus and urged the Government to work with the Legislative Council to take forward the original proposal as early as possible. The Government will undertake a review of the implementation of the law on PL one year after its coming into operation.

13. As regards the 2-day advance notice requirement for taking PL, it should be noted that while an employee is required to notify the employer of his intention to take PL at least three months before the expected date of delivery of the child, he is not required to inform the employer the actual date on which he is going to take PL at the time of notifying the employer. The 2-day advance notice requirement aims at facilitating employers, especially the small and medium-sized enterprises, in making the necessary manpower arrangements during the employee's leave. The Government therefore does not accept removing the 2-day advance notice requirement.

(b) Draft CSAs proposed by Hon LEE Cheuk-yan

14. The CSAs proposed by Hon LEE Cheuk-yan seek to afford employment protection to employees who are taking/intend to take PL in a way similar to maternity protection afforded to pregnant employees under EO. According to the proposed CSAs, it will be an offence for an employer to dismiss an employee who has notified his employer of his intention to take PL before he has taken his PL in full (except for cases of summary dismissal owing to the employee's serious misconduct etc.[2]).

[2] Under section 9(1) of EO, an employer may terminate a contract of employment without notice or payment in lieu –

If the employer unlawfully dismisses the employee, apart from being liable to prosecution, the employer will also be required to pay the employee wages in lieu of notice, a further sum equivalent to 7 days' wages, and 3 days' PL pay if, but for the dismissal, he is or would have been entitled to such pay. The employee may also claim remedies which include reinstatement/re-engagement or payment of terminal payments and/or compensation in the same way as may an employee who is unlawfully and unreasonably dismissed under EO.

15. As the Government explained to the Bills Committee in previous meetings, a prospective father is not in an analogous position as a pregnant woman who may be hindered by her physical conditions from performing certain work during her pregnancy and her need to take leave for medical examinations in relation to her pregnancy. Besides, owing to the need to recover from infirmity shortly after giving birth and to provide full-time primary care for the child during the early period of its life, it would be more difficult for a pregnant woman or a woman having given birth to seek and start a new employment before she has fully recovered from the physical act of child-bearing. The existing employment protection for a pregnant employee is in essence a form of maternity protection to safeguard her against dismissal due to her pregnancy or confinement but not for her taking maternity leave alone.

16. Unlike a pregnant employee, the male employee's own physical condition would in general not differ from any other employees notwithstanding the pregnancy or confinement of his spouse/partner. Without the physical constraints of a pregnant woman or a woman who has given birth, a male employee would also not experience the same difficulties in finding alternative employment faced by the woman. As such, the prospective father or father of a newborn child would not have any special circumstances that would set him so much apart from any

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(a) if an employee, in relation to his employment-
  (i) wilfully disobeys a lawful and reasonable order;
  (ii) misconducts himself, such conduct being inconsistent with the due and faithful discharge of his duties;
  (iii) is guilty of fraud or dishonesty; or
  (iv) is habitually neglectful in his duties; or
(b) on any other ground on which he would be entitled to terminate the contract without notice at common law.

other employees as to warrant the same protection against dismissal as that afforded to a pregnant employee.

17. The Government considers that the prohibition of an employer from dismissing the concerned employee as proposed by Hon LEE is out of proportion to the provision of PL. According to Hon LEE's draft CSAs, an employer will be prohibited from dismissing the employee during the several months spanning from the notification of his intention to take PL, which in normal circumstances is to be given at least three months before the expected date of delivery of the child, up to the expiry of the last day on which PL may be taken, which is 10 weeks after the actual date of delivery of the child. If an employee chooses to notify his employer of his intention to take PL as early as when the child's mother is known to have become pregnant[3], say, one month after pregnancy, this could imply a period of protection from dismissal lasting as long as 11 months. As very little information is required of an employee in relation to the notification of his intention to take PL[4], the imposition of a criminal offence on an employer for dismissing an employee on the flimsy evidence grounded merely on his notification is disproportionate to the standard of proof required in criminal proceedings. There will be immense implementation problems in affording employment protection to a male employee who merely claims to be expecting a child, especially in respect of those births outside marriage cases.

Conclusion

18. The Government therefore opposes the draft CSAs proposed by Hon WONG and Hon LEE.

Labour and Welfare Bureau
October 2014

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[3] The Bill does not impose a restriction on how early a male employee may give notice of the pregnancy of his partner/wife to his employer.

[4] Under the new section 15E(2), if the employer so requests, an employee who has notified the employer of his intention to take PL must also provide his employer with a written statement signed by him stating the child's mother's name, the expected date of delivery of the child or (if available) actual date of delivery, and that he is the child's father.

Annex

Employment (Amendment) Bill 2014

Committee Stage

Amendments to be moved by the Secretary for Labour and Welfare

Clause	Amendment Proposed
6	By adding— "**15CA. Interpretation of Part IIIA** In this Part— ***child*** (嬰兒) means a new-born child.".
6	In the proposed section 15D(3)(b), by deleting "from and inclusive of" and substituting "beginning on".
6	In the Chinese text, by deleting the proposed section 15F(1) and substituting— "(1) 侍產假是僱員在根據本條例有權享有的休息日、假日及年假以外，另有權享有的假期。".
6	In the proposed section 15I(2), in the Chinese text, by deleting "出生登記" and substituting "生死登記".