

Employment (Amendment) Bill 2014

Contents

Clause	Page
Part 1	
Preliminary	
1.	Short title and commencement C83
Part 2	
Amendments to Employment Ordinance	
2.	Employment Ordinance amended C85
3.	Section 2 amended (interpretation) C85
4.	Section 7 amended (termination of contract by payment in lieu of notice) C87
5.	Section 11A amended (interpretation) C87
6.	Part IIIA added C87
Part IIIA	
Paternity Leave	
15D.	Entitlement to paternity leave C87
15E.	Notification requirements relating to paternity leave C89
15F.	Paternity leave not affected by other leave entitlements C91
15G.	Entitlement to paternity leave pay C93

Clause	Page
15H. Rate of paternity leave pay.....	C93
15I. Documentary requirements relating to paternity leave pay: birth in Hong Kong	C99
15J. Documentary requirements relating to paternity leave pay: birth outside Hong Kong.....	C101
15K. Payment of paternity leave pay	C103
15L. Offence	C105
7. Section 32O amended (award of terminal payments)	C107
8. Section 32 amended (restriction on deductions from wages)	C107
9. Section 33 amended (sickness allowance).....	C107
10. Section 35 amended (rate of sickness allowance).....	C109
11. Section 41 amended (rate of holiday pay).....	C109
12. Section 41AA amended (annual leave).....	C109
13. Section 41C amended (rate of annual leave pay)	C109
14. Section 43 amended (payment of holiday pay, etc. in event of bankruptcy, etc.).....	C111
15. Section 43N amended (interpretation of Part IXB).....	C111
16. Section 49A amended (requirement to keep wage and employment records).....	C113

Part 3

Amendment to Minimum Wage Ordinance

17. Minimum Wage Ordinance amended.....	C115
18. Section 6 amended (wages)	C115

A BILL

To

Amend the Employment Ordinance to provide for a male employee's entitlement, in respect of the birth of a child of the employee, to paternity leave of up to 3 days and paternity leave pay at a daily rate of four-fifths of the employee's average daily wages; and to make related and other minor amendments.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Employment (Amendment) Ordinance 2014.
 - (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.
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Part 2

Amendments to Employment Ordinance

2. Employment Ordinance amended

The Employment Ordinance (Cap. 57) is amended as set out in sections 3 to 16.

3. Section 2 amended (interpretation)

(1) Section 2(1)—

Add in alphabetical order

“*paternity leave* (侍产假) means the paternity leave provided for in Part IIIA;

paternity leave pay (侍产假薪酬) means pay payable in respect of paternity leave;”.

(2) After section 2(2)(b)—

Add

“(ba) any paternity leave pay under Part IIIA;”.

(3) After section 2(2A)(b)—

Add

“(ba) in relation to any paternity leave pay under Part IIIA—

(i) if paternity leave is taken in a period of consecutive days, the date on which that period begins; or

(ii) in any other case, the date on which paternity leave is taken;”.

4. Section 7 amended (termination of contract by payment in lieu of notice)

(1) Section 7(1)(a), after “maternity leave,”—

Add

“a day of paternity leave,”.

(2) Section 7(1B)(a)(i), after “maternity leave,”—

Add

“paternity leave,”.

5. Section 11A amended (interpretation)

(1) Section 11A(2)(a), after “maternity leave,”—

Add

“a day of paternity leave,”.

(2) Section 11A(4)(a)(i), after “maternity leave,”—

Add

“paternity leave,”.

6. Part IIIA added

After Part III—

Add

“Part IIIA

Paternity Leave

15D. Entitlement to paternity leave

(1) A male employee is entitled to paternity leave in respect of the birth of a child if—

(a) he is the child’s father;

- (b) he has been employed under a continuous contract immediately before taking leave; and
 - (c) he has complied with all the requirements in section 15E.
- (2) For subsection (1), the employee—
- (a) subject to section 15F, is entitled to take leave during the period specified in subsection (3) on the date or dates notified to the employer under section 15E(1); and
 - (b) is entitled to take leave for not more than 3 days, whether consecutive or not, for each confinement.
- (3) For subsection (2)(a), the period—
- (a) begins 4 weeks before the expected date of the delivery of the child; and
 - (b) ends 10 weeks from and inclusive of the actual date of the delivery of the child.
- (4) For subsection (2)(b), multiple births in one pregnancy are taken to be one confinement.
- (5) Subsection (1)—
- (a) applies to a child born on or after the date on which the Employment (Amendment) Ordinance 2014 (of 2014) comes into operation; and
 - (b) does not apply to a miscarriage.

15E. Notification requirements relating to paternity leave

- (1) For section 15D(1)(c), an employee who intends to take paternity leave in respect of the birth of a child must—
- (a) notify the employer—

- (i) of his intention at least 3 months before the expected date of the delivery of the child; and
 - (ii) of each intended date of his leave at least 2 days before that date; or
 - (b) (if he does not notify the employer in accordance with paragraph (a)(i)) notify the employer of each intended date of his leave at least 5 days before that date.
- (2) If the employer so requires, the employee must also give the employer a written statement signed by the employee—
- (a) stating that the employee is the child's father; and
 - (b) stating—
 - (i) the name of the child's mother; and
 - (ii) the expected date of the delivery, or (if the child has been born) the actual date of the delivery, of the child.

15F. Paternity leave not affected by other leave entitlements

- (1) Paternity leave is in addition to rest days, holidays and annual leave to which an employee is entitled under this Ordinance.
- (2) If—
- (a) an employee has, in compliance with the requirement in section 15E(1), notified the employer that he intends to take paternity leave on a particular day; and
 - (b) that day falls on a rest day or holiday or falls within a period of annual leave,
- he is entitled to take the leave on the day immediately after the rest day, holiday or period of annual leave.

- (3) Despite subsection (2), the employee is entitled to take the leave on another day he chooses if he has notified the employer of his choice at least 2 days before that other day.
- (4) The employee is entitled to take leave on the day mentioned in subsection (2) even if that day falls on a day after the 10-week period mentioned in section 15D(3)(b).
- (5) However, subsection (3) does not entitle the employee to take leave on a day that falls on a day outside the period specified in section 15D(3).

15G. Entitlement to paternity leave pay

An employee is entitled to pay at the rate specified in section 15H in respect of each day on which he has taken paternity leave if—

- (a) he has been employed under a continuous contract for a period of not less than 40 weeks immediately before that day; and
- (b) he has complied with all the requirements in section 15I or 15J.

15H. Rate of paternity leave pay

(1) In this section—

specified date (指明日期), in relation to paternity leave taken by an employee, means—

- (a) if the leave is taken in a period of consecutive days, the date on which that period begins; or
- (b) in any other case, the date on which the leave is taken;

wages (工資), in subsections (2), (3) and (4), includes a sum of money paid by an employer in respect of any of the following days—

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- (a) a day of paternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;
 - (b) a day of leave taken by the employee with the agreement of the employer;
 - (c) a normal working day on which the employee is not provided with work by the employer;
 - (d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282).
- (2) The daily rate of paternity leave pay is four-fifths of the employee's average daily wages during—
- (a) the period of 12 months immediately before the specified date; or
 - (b) if the employee has been employed by the employer for a period shorter than 12 months immediately before the specified date, the shorter period.
- (3) The average daily wages are to be calculated without regard to—
- (a) any period (*excluded period*) during the 12-month period or shorter period for which the employee was not paid wages or full wages because of—
 - (i) any paternity leave, rest day, sickness day, holiday or annual leave taken by the employee;
 - (ii) any leave taken by the employee with the agreement of the employer;
 - (iii) the employee's not being provided with work by the employer on a normal working day; or

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- (iv) the employee's absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282); and
 - (b) any wages paid to the employee for the excluded period.
- (4) To avoid doubt, if the amount of the wages paid to an employee in respect of a day covered by the definition of *wages* in subsection (1) is only a fraction of the amount earned by the employee on a normal working day, the employee's average daily wages are to be calculated without regard to the wages and the day.
- (5) Despite subsection (2), if for any reason it is impracticable to calculate an employee's average daily wages in the manner provided in that subsection, the amount may be calculated by reference to—
- (a) the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the specified date; or
 - (b) if there is no such person, the wages earned by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the specified date.
- (6) If, under the employee's contract of employment or any other agreement or for any other reason, the employer pays a sum of money to the employee in respect of a day on which the employee takes paternity leave, the paternity leave pay payable to the employee in respect of the day under this Part is to be reduced by the sum.

15I. Documentary requirements relating to paternity leave pay: birth in Hong Kong

- (1) For section 15G(b), an employee who takes paternity leave in respect of the birth of a child in Hong Kong must provide the employer with the birth certificate of the child—
 - (a) that is issued under the Births and Deaths Registration Ordinance (Cap. 174); and
 - (b) on which the employee's name is entered as the child's father.
- (2) Despite subsection (1), if the child is born dead, or if the child dies after birth and no birth certificate has been issued in respect of the child under the Births and Deaths Registration Ordinance (Cap. 174), the employee must provide the employer with—
 - (a) a medical certificate described in subsection (3); and
 - (b) (if the employer so requires) a written statement signed by the employee, stating that—
 - (i) he is the father of the child delivered by the woman named in the medical certificate; and
 - (ii) the child is born dead or dies after birth (whichever is appropriate).
- (3) For subsection (2)(a), the medical certificate—
 - (a) must certify the delivery of the child; and
 - (b) must be issued by—
 - (i) a registered medical practitioner; or
 - (ii) despite section 16 of the Midwives Registration Ordinance (Cap. 162), a midwife registered under section 8, or deemed to be registered under section 25, of that Ordinance.

- (4) The documents required under this section must be provided to the employer—
 - (a) within 12 months after the first day on which the employee takes the paternity leave; or
 - (b) if the employee has ceased to be employed by the employer, within the period mentioned in paragraph (a) or within 6 months after the cessation (whichever period expires first).

15J. Documentary requirements relating to paternity leave pay: birth outside Hong Kong

- (1) For section 15G(b), an employee who takes paternity leave in respect of the birth of a child in a place outside Hong Kong must provide the employer with—
 - (a) the birth certificate of the child—
 - (i) that is issued by the authorities of the place (*authorities*); and
 - (ii) on which the employee's name is entered as the child's father; or
 - (b) (if the authorities do not issue birth certificates) any other document issued by the authorities that could reasonably be taken as proof that the employee is the child's father.
- (2) Despite subsection (1), if the child is born dead or dies after birth, and neither the birth certificate nor document mentioned in that subsection is available, the employee must provide the employer with—
 - (a) a medical certificate or any other document issued by the authorities that could reasonably be taken as proof of the delivery of the child; and
 - (b) (if the employer so requires) a written statement signed by the employee, stating that—

- (i) he is the father of the child delivered by the woman named in the medical certificate or document; and
 - (ii) the child is born dead or dies after birth (whichever is appropriate).
- (3) The documents required under this section must be provided to the employer—
 - (a) within 12 months after the first day on which the employee takes the paternity leave; or
 - (b) if the employee has ceased to be employed by the employer, within the period mentioned in paragraph (a) or within 6 months after the cessation (whichever period expires first).

15K. Payment of paternity leave pay

- (1) In this section—

requisite document (所需文件), in relation to an employee who has taken paternity leave on a day, means the document required under section 15I or 15J for his entitlement to paternity leave pay in respect of the day.
- (2) If an employee has taken paternity leave on a day (**leave day**) and provided the employer with the requisite document on or before the leave day, the employer must pay him the paternity leave pay in respect of the leave day—
 - (a) not later than the day on which he is next paid his wages after the leave day; or
 - (b) if he has ceased to be employed by the employer, not later than 7 days after the cessation.
- (3) If the employee provides the employer with the requisite document after the leave day, the employer must pay him the paternity leave pay in respect of the leave day—

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- (a) not later than the day on which he is next paid his wages after the document is provided; or
 - (b) if he has ceased to be employed by the employer, not later than 7 days after the document is provided.
- (4) Where the employer has paid the employee the paternity leave pay in respect of the leave day before the requisite document is provided, the employer may deduct from his wages an amount equivalent to the paternity leave pay if—
- (a) he fails to provide the employer with the requisite document within 3 months after the first day on which the paternity leave is taken; or
 - (b) he has ceased to be employed by the employer and fails to provide the employer with the requisite document before the cessation.
- (5) If after the deduction the employee provides the employer with the requisite document in accordance with section 15I(4) or 15J(3), the employer must pay him the paternity leave pay in respect of the leave day again—
- (a) not later than the day on which he is next paid his wages after the document is provided; or
 - (b) if he has ceased to be employed by the employer, not later than 7 days after the document is provided.

15L. Offence

- (1) An employer must—
- (a) grant an employee paternity leave to which the employee is entitled; and

(b) pay an employee paternity leave pay to which the employee is entitled in accordance with section 15K.

(2) An employer who without reasonable excuse contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5.”.

7. Section 32O amended (award of terminal payments)

After section 32O(3)(d)—

Add

“(da) any paternity leave pay payable under Part IIIA;”.

8. Section 32 amended (restriction on deductions from wages)

After section 32(2)(g)—

Add

“(ga) deductions permitted by section 15K(4);”.

9. Section 33 amended (sickness allowance)

(1) Section 33(4BAAA)(a), after “maternity leave,”—

Add

“a day of paternity leave,”.

(2) Section 33(4BAAB)(a)(i), after “maternity leave,”—

Add

“paternity leave,”.

(3) Section 33(6)(a), Chinese text—

Repeal

“《醫院、療養院及留產院登記條例》”

Substitute

“《醫院、護養院及留產院註冊條例》”。

10. Section 35 amended (rate of sickness allowance)

(1) Section 35(1)(a), after “maternity leave,”—

Add

“a day of paternity leave,”.

(2) Section 35(2A)(a)(i), after “maternity leave,”—

Add

“paternity leave,”.

11. Section 41 amended (rate of holiday pay)

(1) Section 41(1)(a), after “maternity leave,”—

Add

“a day of paternity leave,”.

(2) Section 41(3)(a)(i), after “maternity leave,”—

Add

“paternity leave,”.

12. Section 41AA amended (annual leave)

Section 41AA(10)—

Repeal

“holidays and maternity leave”

Substitute

“holidays, maternity leave and paternity leave”.

13. Section 41C amended (rate of annual leave pay)

(1) Section 41C(1)(a), after “maternity leave,”—

Add

“a day of paternity leave,”.

- (2) Section 41C(3)(a)(i), after “maternity leave,”—

Add

“paternity leave,”.

14. Section 43 amended (payment of holiday pay, etc. in event of bankruptcy, etc.)

Section 43—

Repeal

“maternity leave pay”

Substitute

“maternity leave pay, paternity leave pay”.

15. Section 43N amended (interpretation of Part IXB)

- (1) Section 43N(1), definition of *specified entitlement*, after paragraph (c)—

Add

“(ca) any paternity leave pay payable under Part IIIA;”.

- (2) Section 43N(1), definition of *specified entitlement*, paragraph (i), after “maternity leave,”—

Add

“paternity leave,”.

- (3) Section 43N(1), definition of *specified entitlement*, paragraph (i), after “(c),”—

Add

“(ca),”.

- (4) Section 43N(1), definition of *specified entitlement*, paragraph (j)(i), after “(c),”—

Add

“(ca),”.

16. Section 49A amended (requirement to keep wage and employment records)

Section 49A(3)(f)—

Repeal

“maternity leave”

Substitute

“maternity leave, paternity leave”.

Part 3

Amendment to Minimum Wage Ordinance

17. Minimum Wage Ordinance amended

The Minimum Wage Ordinance (Cap. 608) is amended as set out in section 18.

18. Section 6 amended (wages)

Section 6(1), after “(g),”—

Add

“(ga),”.

Explanatory Memorandum

The main object of this Bill is to amend the Employment Ordinance (Cap. 57) (*Ordinance*) to introduce a statutory paternity leave and paternity leave pay mechanism. Under the mechanism, if a male employee who is a father-to-be or father of a new-born child (*employee*) fulfils the specified conditions, he is entitled to paternity leave of up to 3 days and paternity leave pay at a daily rate of four-fifths of his average daily wages.

Part 1 (Preliminary)

2. Clause 1 sets out the short title and provides for commencement.

Part 2 (Amendments to Ordinance)

3. Clause 6 adds a new Part IIIA to the Ordinance—
 - (a) the new section 15D provides that, subject to specified conditions, an employee is entitled to paternity leave in respect of the birth of a child of the employee under the Ordinance, and sets out the period during which he may take leave and the total number of days he may take leave for each confinement;
 - (b) the new section 15E sets out the notification requirements that an employee must comply with before he is entitled to paternity leave;
 - (c) the new section 15F provides that paternity leave is in addition to rest days, holidays and annual leave to which an employee is entitled under the Ordinance;
 - (d) the new section 15G provides that, subject to specified conditions, an employee is entitled to paternity leave pay in respect of each day on which he has taken paternity leave under the Ordinance;

- (e) the new section 15H sets out how an employee's daily rate of paternity leave pay is calculated;
 - (f) the new section 15I sets out the documentary requirements that an employee who takes paternity leave in respect of a child born in Hong Kong must comply with before he is entitled to paternity leave pay;
 - (g) the new section 15J sets out the documentary requirements that an employee who takes paternity leave in respect of a child born in a place outside Hong Kong must comply with before he is entitled to paternity leave pay;
 - (h) the new section 15K sets out the time limit for the payment of paternity leave pay, and provides that, under specified circumstances, an employer who has paid an employee paternity leave pay in advance may deduct from the employee's wages an amount equivalent to the pay; and
 - (i) the new section 15L imposes criminal liability on an employer who, without reasonable excuse, fails to grant or pay an employee paternity leave or paternity leave pay to which the employee is entitled under the Ordinance.
4. Clauses 3, 4, 5, 7, 8, 9(1) and (2) and 10 to 16 contain amendments to the Ordinance consequential to the introduction of the statutory paternity leave and paternity leave pay mechanism.
5. Clause 9(3) amends the Chinese text of the Ordinance to rectify an error in the Chinese reference to the short title of the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap. 165).

Part 3 (Amendment to Minimum Wage Ordinance)

6. Clause 18 contains an amendment to the Minimum Wage Ordinance (Cap. 608) consequential to the introduction of the statutory paternity leave and paternity leave pay mechanism.