立法會
Legislative Council

LC Paper No. CB(2)344/14-15

Ref : CB2/BC/3/13

Paper for the House Committee meeting
on 5 December 2014

Report of the Bills Committee on Employment (Amendment) Bill 2014

Purpose

This paper reports on the deliberations of the Bills Committee on Employment (Amendment) Bill 2014 ("the Bill").

Background

2. The Chief Executive announced in his 2011-2012 Policy Address that the Government would take the lead in promoting child-bearing and family-friendly practices, beginning with a study into the provision of paid paternity leave ("PL") for civil servants, and conduct a study on legislating for PL in Hong Kong. On March 2012, the Administration announced that starting from 1 April 2012, all full-time Government male employees, including civil servants, non-civil service contract staff and political appointees, who have no less than 40 weeks' continuous service immediately before the expected or actual date of childbirth would be eligible for five working days of PL on each occasion of childbirth.

3. The Labour Department ("LD") conducted a study on legislating for PL in Hong Kong which included a survey on PL with member establishments of its 18 Human Resources Managers Clubs in 2012, and reported the findings of the study to the Labour Advisory Board ("LAB") and the Panel on Manpower in May and June 2012 respectively. According to the Administration, after a few rounds of discussion, LAB in November 2012 supported legislating for three days' PL with pay at four-fifths of the employees' daily wages. It was also LAB's view that where appropriate, other relevant requirements and details in respect of PL should be formulated on a par with the stipulations for maternity leave ("ML") under the Employment Ordinance (Cap. 57) ("EO").

Object of the Bill

4. The Bill seeks to amend EO to provide for a male employee's entitlement, in respect of the birth of a child of the employee, to PL of up to three days and PL pay at a daily rate of four-fifths of the employee's average daily wages, and to make related amendments.

5. The Bill will come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

The Bills Committee

6. At the House Committee meeting on 28 March 2014, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Mr Kenneth LEUNG, the Bills Committee held seven meetings with the Administration. The membership of the Bills Committee is in **Appendix I**. The Bills Committee has also received views from 16 deputations at one of its meetings. A list of deputations that have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Provision of PL

7. The majority of members and most deputations which expressed their views to the Bills Committee have expressed support for the provision of statutory PL and urged for its early implementation. Some other deputations, however, have expressed concern that many small and medium enterprises ("SMEs") are operating their business in a difficult environment. The catering industry in particular is in face of an acute manpower shortage problem. In the views of these deputations, while respecting the decision of LAB, employers should be encouraged to provide PL to their male employees on a voluntary basis having regard to their own circumstances. Some members including Mr Tommy CHEUNG and Mr CHUNG Kwok-pan share the concern expressed by these deputations. Mr Tommy CHEUNG has pointed out that the Liberal Party respected LAB's consensus regarding PL and has no objection to the Bill, but he would not support the Bill personally as the catering constituency to which he is returned is opposed to it.

8. Noting the concern of some SMEs about the impact of PL on their operation, members have enquired about the estimated cost implications of taking PL by the fathers of local babies born in Hong Kong in a year. The Administration has advised that there were about 46 500 fathers of local babies

born in Hong Kong in 2010 who were non-Government employees, representing 3% of the total number of male employees in Hong Kong. The labour cost of three-day PL taken by these male employees in a year is estimated to be about $140 million, which amounts to about 0.02% of the total wage costs. In the light of the above information, most members consider that the impact of granting of PL on the operating cost not material.

9. The Administration has further advised that it is the Government's policy to gradually improve employees' benefits in a way commensurate with the pace of Hong Kong's socio-economic development. All legislative proposals to improve employment benefits, including that on PL, have been deliberated and endorsed by LAB which is a tripartite consultative body equally represented by employers and employees to ensure that a reasonable balance is struck between the interests of employees and the affordability of employers. In formulating the PL proposal, consideration has been given to factors such as a father's legal rights and responsibilities to the child, viability and practicability for employers and employees to comply with the statutory PL scheme etc. The proposal is a starting point for PL. The Administration will review the implementation of the enacted legislation one year after its coming into operation and report to LAB.

Duration of PL and rate of PL pay

Proposed three-day statutory PL

10. Most members have pointed out that the proposed three-day statutory PL is barely adequate for fathers to take care of their newborns and partners, particularly those who have undergone operations to give births and those who suffer from postnatal depression. Given that Government employees have already been granted five-day full pay PL, some members have questioned the rationale for proposing only a three-day PL in the Bill. These members have urged the Administration to consider increasing the duration of statutory PL to the same level as that of Government employees. Some members have also suggested that the duration of PL be extended to seven days to further promote family-friendly employment practice.

11. The Administration has advised that according to a survey on PL conducted by LD with member establishments of its 18 Human Resources Managers Clubs in 2012, the duration of PL provided by the respondent organisations on a voluntary basis ranged from one day to 14 days, with an average duration of three days, and over 81% offered one to three days of PL. Having regard to the prevailing practice of voluntary provision of PL in the private sector and the consensus reached by LAB, the Administration considers the proposed three-day PL an appropriate starting point for statutory PL.

12. The Administration has further advised that it would not be appropriate to make a direct comparison between the duration of PL for Government employees and that proposed in the Bill, as the former is provided by the Government in its capacity as an employer to its employees, having regard to such factors as affordability, its own manpower situation etc; whereas the latter is a statutory requirement for all employers of varying sizes and is meant to be a minimum entitlement of PL for all employees. Employers in the private sector are free to decide whether they will offer PL benefit above the statutory minimum entitlement upon its enactment, having considered their own circumstances.

Rate of PL pay

13. Members note that the rate of PL pay, as stipulated under the proposed new section 15H, is pitched at four-fifths of the employer's average daily wages as in the case of ML. Some members have expressed the view that it is inappropriate to regard the nature of PL the same as ML and sick leave, and pitch the rate of PL pay at four-fifths of the employee's average daily wages as in the case of ML. These members consider that employees taking PL should be granted full pay.

14. According to the Administration, it is LAB's view that, where appropriate, the relevant requirements and details of statutory PL should be aligned with those applicable to ML under EO. The Administration has explained that employees may take sick leave and ML based on their own physical conditions with pay at a rate pitched at four-fifths of their normal pay. Such leaves are distinct from the statutory leaves (e.g. statutory holiday and annual leave) for all employees which attract full pay. The Administration considers that PL, similar to sick leave and ML, 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. The Administration has further drawn members' attention to the stipulations in the relevant International Labour Conventions which state that ML pay should be pitched at not less than two-thirds of the employee's previous earnings. In many other places around the world, PL pay is either not paid at full rate or subject to a cap, or both.

Members' proposed amendments

15. Some members including Mr LEE Cheuk-yan and Dr Helena WONG have maintained the view that as the proposed PL aims to facilitate working fathers in taking care of a newborn, the duration of statutory PL should be increased and employees should be granted full-pay PL. Dr Helena WONG has indicated her intention to propose Committee stage amendments ("CSAs") to the Bill such that an eligible employee should be granted seven-day PL on full pay.

16. Some other members including Mr Tommy CHEUNG and Mr Martin LIAO do not support Dr Helena WONG's proposed amendments, which deviate from the consensus of LAB on PL. Dr CHIANG Lai-wan has advised that the Democratic Alliance for the Betterment and Progress of Hong Kong respect LAB's consensus regarding PL and accept the proposed duration of three days' PL so as to facilitate the early implementation of the legislation on PL.

17. The Administration has reiterated that the current proposal of making three days' PL with pay set at four-fifths of the employee's average daily wages a statutory benefit for male employees under EO, together with an agreement to review its implementation one year after its coming into operation, is a broad consensus reached by LAB after rounds of serious deliberations, detailed discussions and rigorous lobbying. As the interests of the representatives of employers and employees at LAB on the subject of legislating for PL are divergent, the broad consensus reached at LAB regarding the legislative proposal on PL represents a pragmatic and conciliatory stance acceptable to the two sides. It is on this basis that the Government has decided to introduce the Bill to implement the consensus reached at LAB by legislation.

18. The Administration has further drawn members' attention to the fact that LAB represents a long-established mechanism which aims, and has served, to resolve the divergent views of employers and employees over the years. According to the established practice, if, in the process of scrutiny of a labour bill, Members wish to move amendments to the relevant bill which represents any important deviation from the consensus of LAB, the Government is duty-bound to revert to LAB for consultation before continuing with the legislative process. In the view of the Administration, the number of PL days and the rate of PL pay are, among others, the core components of the consensus reached at LAB.

19. Some members have noted that the number of PL days and PL pay rate are set out in the long title of the Bill, and raised the concern whether the detailed and specific description of the proposed PL entitlement in the long title of the Bill would restrict individual Members' right to propose amendments relating to the duration and pay rate of PL. The legal adviser to the Bills Committee has also sought clarification about whether the long title of the Bill as presently drafted is in compliance with Rule 50(3) of the Rules of Procedure. The Administration has considered that the description in the long title that "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" provides the necessary details that can help to provide a clear picture of the main object of the Bill and the long title in its present form is in compliance with Rule 50(3) of the Rules of Procedure.

20. Dr Helena WONG has provided for the consideration of the Bills Committee a set of CSAs which seeks to amend the proposed new section 15D and new section 15H(2) to the effect that the statutory PL should be seven days and the daily rate of PL pay is a sum equivalent to the daily average wages earned by the employee concerned respectively. Dr WONG has further suggested that the Bills Committee should adopt her proposed CSAs. The Bills Committee has agreed with a majority vote of six to three that the Chairman will move the above CSAs on behalf of the Bills Committee. The Administration has reiterated the need to consult LAB on CSAs proposed by Members which deviate from the consensus of LAB. Members have urged the Administration to kick start the consultation with LAB as early as possible in order not to delay the coming into operation of the Bill, although they generally do not consider it necessary for the Administration to do so.

21. The Administration has subsequently advised that LAB has been consulted (in September 2014) and has taken note of the relevant deliberations of the Bills Committee. According to the Administration, LAB has 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 Administration has reiterated its stance that the Bill has struck a reasonable balance between the interests of employees and the affordability of employers, particularly SMEs and that it will undertake a review of the implementation of the legislation on PL one year after its coming into operation.

Whether employers would be allowed to grant less than three days' PL

22. Some members have expressed concern whether the expressions "up to 3 days" and "not more than 3 days" which appear in the long title of the Bill and the proposed new section 15D(2)(b) respectively in relation to the entitlement of a male employee to PL would have the implication that employers would be allowed to grant less than three days' PL to their employees.

23. The Administration has explained that under the proposed PL scheme, a male employee who is the father of a newborn or a father-to-be is entitled to PL only if he has been employed under a continuous contract[1] for a period of not less than 40 weeks immediately before taking such leave and has given advance notice to his employer in accordance with the proposed new section 15E[2]. The Bill further proposes that PL, which is to be taken during the period from four

[1] Under 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.

[2] Under the proposed new section 15(E)(1)(a), an employee who intends to take PL must notify the employer of his intention at least 3 months before the expected date of the delivery of the child and of each intended date of PL, at least 2 days before that date. Under the proposed new section 15E(1)(b), if the employee does not notify the employer in accordance with section 15E(1)(a)(i), he must notify the employer of each intended date of PL at least 5 days before that date.

weeks before the expected date of delivery of the employee's child to 10 weeks from and inclusive of the actual date of delivery, may be taken consecutively or on discrete days. In the case of an employee taking up employment shortly before the sixth week after his child is born, he may be able to establish a continuous contract just before the expiry of the 10-week post-natal period. Depending on the actual date of his taking up employment, the employee may still be able to take one or two days of PL before the 10-week post-natal period expires. In other words, the description of "up to 3 days" in the long title and the description of "not more than 3 days" in the proposed new section 15D(2)(b) is necessary to reflect the possibility of an employee taking one or two days of PL in the event that he is not entitled to take all three days of PL owing to his short length of service.

24. In the light of the Administration's explanation, some members have pointed out that the Administration should consider issuing guidelines on PL with illustrative examples setting out the mode in which PL entitled by an employee can be taken. To put it beyond doubt that the employer must grant three-day PL to an eligible employee, Mr LEE Cheuk-yan has informed the Bills Committee that he will consider moving CSAs to the long title of the Bill and the proposed new section 15D(2)(b) to delete the words "up to " and "not more than" respectively. The Administration has reiterated its view that the use of the expressions "up to 3 days" and "not more than 3 days" in the Bill would not have the effect of allowing employers to grant PL of a shorter duration to employees who are entitled to three days' PL and have duly given advance notice in accordance with the relevant provisions.

Meaning and calculation of "wages"

25. Members note that under EO, commission is reckoned as wages and thus should be included in the calculation of PL pay. The legal adviser to the Bills Committee has sought clarification from the Administration on the reasons for the use of the expression "average daily wages" in the Bill instead of the expression "daily average of the wages" which is used in other provisions of EO. The Administration has explained that in the proposed new section 15H, the expression "average daily wages", in relation to an employee, 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 expression "average daily wages" has been widely used in the Government's statistics and publications on wages and labour earnings. The provisions in the proposed new section 15H have clearly spelt out how the average daily wages of an employee is to be reckoned to ensure that there is no possibility for any misinterpretation about the meaning of the expression. On this basis, the Administration proposes to adopt the term "average daily wages" in the calculation of PL pay.

26. For the purpose of consistency in the use of expressions in EO, some members have suggested the Administration to consider amending all other EO provisions to align with the term "average daily wages" proposed in the Bill. The Administration has advised that the term "average daily wages" is used in the proposed new section 15H in relation to the calculation of PL pay while "daily average of the wages" is currently used in some other parts of EO in respect of other statutory entitlements. While the term "average daily wages" is used in the Bill for the sake of its clarity and simplicity, there is no possibility for any misconception that the calculation of the "daily average of the wages" earned by an employee in respect of other relevant statutory entitlements under EO would follow a different methodology just because it does not adopt the expression "average daily wages". The Administration therefore has no intention to include the proposed amendments in the current legislative exercise. Nonetheless, in proposing amendments to EO in future, the term "average daily wages" will be used in similar contexts.

Eligibility for PL entitlement

Childbirths outside of marriage and outside Hong Kong

27. Members note that the Bill applies to childbirths outside of marriage and outside Hong Kong. The issue of whether PL should be accorded to legally married males only has been studied by the Bills Committee. In the view of the Administration, entitlement to PL and PL pay stems from a birth incident involving the mother and the child rather than the male employee. The obligation 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. As the birth of a child is essential to an employer's legal obligation to provide PL and PL pay, birth within marriage is not a prerequisite for entitlement to the proposed statutory PL and PL pay. The employee concerned, however, must be the legal father whose name is entered as the father of the child on the birth certificate, irrespective of whether the father of a child was married to the mother of the child.

28. The Administration has also pointed out that it has consulted the Department of Justice ("DoJ") on the consistency of the Bill with the Hong Kong Bill of Rights and various discrimination-related ordinances, and DoJ has advised that failing to grant PL for childbirths outside marriage may constitute discrimination on grounds of marital status and family status under the Sex Discrimination Ordinance (Cap. 480) ("SDO") and the Family Status Discrimination Ordinance (Cap. 527) ("FSDO").

29. As for the entitlement to PL in respect of a father whose child is not born in Hong Kong, the Administration has advised that the employee concerned may have the same need for PL. Given the increasing prevalence of

cross-boundary marriage and courtship, should statutory PL be confined to childbirths in Hong Kong only, employees with Mainland partners and children born on the Mainland would not be entitled to the PL benefits. The Administration has further advised that according to LD's survey with the 18 Human Resources Managers Clubs in 2012, the vast majority of the organisations currently providing PL on a voluntary basis accept certification issued by authorities in places outside Hong Kong as documentary proof for granting PL. The Administration therefore proposes not to impose any restriction on the birthplace of the newborn.

30. Some members including Mr Tommy CHEUNG and Mr CHUNG Kwok-pan have queried the arrangement of granting PL benefits to an employee whose spouse/partner has given birth in a place outside Hong Kong, given that it may take almost the entire three-day PL for travelling. In the event that the employee concerned has not left Hong Kong in any of the three days of PL to take care of the mother and the newborn outside Hong Kong, it would have defeated the purpose of providing PL. The Administration has advised that it is up to the employer and the employee to make arrangements on whether more leave would be granted to meet individual needs. Nonetheless, the Bill does not impose any restrictions on how PL is to be used as this would not be practicable and is likely to give rise to endless arguments and labour disputes.

Multiple births

31. Members have sought clarification about the duration of PL in respect of multiple births. The Administration has advised that a male employee who meets the specified requirements will be entitled to three days' PL for each incident of birth of his child; multiple births in one pregnancy are taken to be one confinement.

Miscarriage and stillbirth cases

32. Noting that the statutory PL is not applicable to a miscarriage, but to a stillbirth, members have questioned the rationale for the disparity. Most members take a strong view that the Administration should consider extending the entitlement of statutory PL to miscarriage cases.

33. The Administration has advised that in the case of a miscarriage which is defined under EO as the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy, a female employee is entitled to sick leave for any day on which she is absent from work by reason of such miscarriage, rather than ML. On the other hand, an employee who is certified to have given birth to a dead child is eligible for ML. Mirroring the same arrangements applicable to ML, it is proposed in the Bill that statutory PL should not apply to a miscarriage, but to a stillbirth if the

pregnancy period exceeds 28 weeks. Given that PL is provided for a father to help looking after the newborn and the mother at around the time of delivery, there is no sufficient justification for PL to be granted with respect to cases of miscarriage where no delivery of a child has occurred. In such cases, a female employee is also not entitled to ML.

Same-sex partner of the mother

34. Some members have expressed concern about whether the proposal of providing PL to male employees only, with the effect of excluding the same-sex partner of a mother from the benefits proposed to be afforded by the Bill, would give rise to an issue of discrimination on the ground of sexual orientation. The Administration has explained that the female partner of a woman who has given birth to a baby cannot be recognised as the "father" of the baby under Hong Kong law and cannot be named as the baby's father on the birth certificate issued by the Hong Kong authorities. As such, the female partner of a pregnant woman does not have, under current Hong Kong law, 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. The Administration has no intention to extend the statutory PL scheme to the female partner of a child's mother.

35. At the request of the Bills Committee, the Administration has sought the views of the Equal Opportunities Commission ("EOC") which advises that exclusion of the female same-sex partner of a child's mother from PL would not contravene any discrimination legislation currently in force. Members have, however, noted the EOC's view that 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. It would advance equality in general if similar leave could be given to the same-sex partner of the mother. Issues on employment benefits for workers in same-sex relationship would be relevant in the discussion as to whether there should be legislation on sexual orientation discrimination.

<u>Notification requirement</u>

36. Under the proposed new section 15E, a male employee who intends to take PL in respect of the birth of a child must notify his employer of his intention -

(a) at least three months before the expected date of delivery of the child; and at least two days before the day on which PL is to be taken; or

(b) at least five days before the day on which PL is to be taken if the

employee fails to notify the employer three months before the expected date of delivery of the child.

37. Some members have questioned the need for an employee who intends to take PL to notify his employer at least three months before the expected date of delivery. These members have further expressed concern whether it is reasonable to require an employee to notify the employer two days before the actual day of his taking PL as the employee may need to take leave immediately when he learns that the newborn is about to be delivered, the time of which is unpredictable in most cases. Some other members, however, have pointed out that employers, SMEs in particular, would have operational difficulties in releasing their employees for PL upon short notice.

38. The Administration has advised that the three-month notice period is proposed upon a request of LAB's employer representatives for the purpose of enabling the employer to have early knowledge of the employee's intention to take PL, thus facilitating manpower deployment by the employer where necessary during the employee's PL. Notwithstanding this, the Bill does not prohibit an employer from waiving the notification requirement for taking PL if circumstances warrant and it is operationally feasible to do so. The proposed notification requirement aims to strike a balance between the interests of both employees and employers.

39. Some members including Ms Cyd HO and Dr Helena WONG have maintained the view that the two-day advance notice requirement for taking PL as presently drafted in the Bill is unreasonable. To dispense with such requirement, Dr Helena WONG has provided for consideration of the Bills Committee her proposed CSAs to delete the proposed new section 15E(1)(a)(ii). Dr WONG has further suggested that the Bills Committee should adopt her proposed CSAs. The Bills Committee has agreed by a majority vote of six to three that the Chairman will move the CSAs on behalf of the Bills Committee.

40. The Administration has reiterated 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 that stage. The two-day advance notice requirement aims at facilitating employers, especially SMEs, in making the necessary manpower arrangements when the employee actually takes leave. The Administration therefore does not accept removing the two day advance notice requirement.

41. The Administration has subsequently advised the Bills Committee that having further consulted LAB at the latter's meeting on 1 December 2014, it has decided to move CSAs to the proposed new section 15E(1) for the purpose of substituting the two-day advance notice requirement with the requirement to

notify the employer of the intended date of PL before proceeding on leave. The Administration has emphasised that it cannot accept the CSAs to be moved by the Bills Committee, as the CSAs will have the effect of removing entirely the need for an employee to inform the date(s) of his taking PL before doing so. This can adversely affect labour relation at the workplace and manpower deployment for SMEs. According to the Administration's CSAs, an employee will be required to notify the employer of his intended date of PL before proceeding on leave, and there will be no restriction on how advance such notice should be given to the employer by the employee. The Administration has pointed out that its proposed CSAs aim to balance the needs of employers and employees.

Documentary requirement

42. For the entitlement to PL pay, a male employee must provide his employer with documentary proof in respect of the birth of the child in Hong Kong as required under the proposed new section 15I, i.e. the birth certificate of his newborn child issued by the Births Registry of the Immigration Department under the Births and Deaths Registration Ordinance (Cap. 174), on which his name is entered as the child's father. For childbirths outside Hong Kong, under the proposed new section 15J, the employee must provide a birth certificate issued by the authorities of the place where the child is born, on which his name is entered as the child's father. The Bills Committee also notes that as an employee may take PL before the proof of father-child relationship or delivery of the child is available, if the employer so requests, the employee must provide his employer with a written statement signed by him stating the name of the child's mother, the expected date of delivery of the child or actual date of delivery, if available, and that he is the child's father.

43. Members have asked about the legal consequences to an employee who fails to provide the required documents in relation to taking PL. The Administration has advised that an employee is entitled to take three days' PL if he is the child's father, has been employed under a continuous contract immediately before taking leave, and meets the specified notification requirements under the proposed new section 15E. The employee concerned is entitled to PL pay only after he has provided his employer with documentary proof as required under the proposed new section 15I or new section 15J as appropriate. The Administration has stressed that while it would be up to the employer to decide whether to grant PL benefits to an employee who fails to provide the required documents owing to various reasons, it would be a criminal offence if the employee makes or provides false document.

44. Some members including Mr Tommy CHEUNG and Mr CHUNG Kwok-pan have expressed concern that it may sometimes be difficult for the employer to verify documents regarding childbirth issued by the authorities of

other places, in particular when those documents are available in languages other than Chinese and English. They have asked how disputes or doubts over documentary proof of birth outside Hong Kong can be tackled.

45. The Administration has advised that only if the authorities of the place where the child is born do not issue birth certificates, the employee may provide other documents issued by the authorities that can reasonably be taken as proof that the employee is the child's father. Any disputes over documents required for PL entitlement would be dealt with in the same way as disputes concerning statutory entitlements under EO, i.e. by the conciliation service rendered by LD, or if no settlement can be reached, to be adjudicated by the Labour Tribunal or Minor Employment Claims Adjudication Board as appropriate.

46. Mr Tommy CHEUNG and Mr CHUNG Kwok-pan, however, have reiterated that the documentary requirements for childbirths outside Hong Kong will give rise to disputes over PL entitlement. To facilitate understanding of the documentary requirements relating to PL pay, the Administration has acceded to members' request to issue guidelines in this respect.

Legality of payment in lieu of PL

47. Some members consider that flexibility should be allowed for an employer to pay wages in lieu of granting PL with the employee concerned. Members have enquired whether it is in breach of the law for an employer to pay wages in lieu of granting statutory PL to an employee if the employer has or has not obtained the agreement of the employee concerned.

48. The Administration has explained that it is 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. The Bill renders non-granting of PL to an eligible employee unlawful. This is regardless of whether payment in lieu of PL is made or not. If the employee meets the eligibility criteria 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. However, if owing to personal reasons, an employee has chosen not to exercise his right to take PL, the law will not oblige him to notify his employer that he is going to have a child and/or to take such leave.

Whether PL forms part of the notice period in contract termination

49. Noting that under section 6 of EO, ML and annual leave are not counted as part of the notice period in contract termination, members have enquired whether PL would form part of the notice period in the event of termination of contract of employment by notice.

50. The Administration has explained that under EO, the length of notice to terminate a continuous contract of employment can be as short as seven days. If annual leave and ML are allowed to be included in the length of notice required to terminate a contract of employment, it would be possible that the termination can take effect immediately after ML or annual leave expires, thus defeating the purpose of requiring the giving of prior notice for termination of a contract of employment as stipulated in section 6 of EO. In the view of the Administration, to balance the interests of employers and employees, there is a need to forbid the use of ML or annual leave in lieu of the notice period required for termination of contract. The Administration has further advised that having regard to the proposed three-day statutory PL, which is shorter than the minimum seven-day advance notice for the termination of a continuous contract of employment under EO, the chance that the length of notice for termination of a contract of employment can be entirely offset by the employee's taking of PL is on the low side. As such, the Administration does not consider it necessary to impose a restriction on the taking of PL during the notice period for termination of a contract of employment.

51. Some members have expressed concern that if there is no prohibition on the inclusion of PL in the length of notice required to terminate a contract of employment, an employee who is dismissed by way of notice after having notified his employer of the dates on which he intends to take PL would lose out if the employer includes his PL as part of the notice period, hence shortening the actual notice period which the employer is required to give. To tackle the problem, it is suggested that in the event of a termination of contract where notice instead of payment in lieu is given, the three days' PL should not be allowed to be included in the notice period, be the termination initiated by the employer or the employee.

52. The Administration has pointed out that denying the inclusion of PL in the length of notice required to terminate a contract would not always work to the advantage of the employee. An employee who tenders resignation may wish to take PL during the notice period and have PL included as part of the notice period. The Administration has further pointed out that under the existing EO, there is no restriction on the inclusion of holidays in the notice period required to terminate an employment contract.

Employment protection against dismissal

53. Members have observed that unlike the situation in female employees taking ML who are protected from dismissal under EO (except for summary dismissal due to the employee's serious misconduct), there is no similar provision in the Bill to prohibit the employer from dismissing a male employee for reason of taking PL. Members have asked whether the same protection from dismissal afforded to female employees taking ML should also be afforded under the Bill to male employees taking PL.

54. The Administration has explained that PL is different from ML in that the situation where a female employee 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 would not apply to a male employee taking PL. 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 female employee is in essence a form of maternity protection with the aim of safeguarding her against dismissal owing to her pregnancy or confinement but not for her taking ML. Moreover, the duration of ML is 10 weeks while the duration of PL is three days, it is not proportionate for the same protection from dismissal afforded to female employees taking ML to also be afforded to male employees taking PL. The Administration has pointed out that apart from the EO provisions, employers also have to comply with the requirements under FSDO under which the dismissal of a male employee for reason of taking PL is likely to contravene FSDO.

55. Notwithstanding the Administration's explanation, some members including Mr LEE Cheuk-yan and Mr TANG Ka-piu have raised the concern whether the differential treatment in employment protection against dismissal under the Bill in respect of male employees taking PL would contravene the discrimination related legislation. In response to the Bills Committee's enquiry, EOC has advised that in the light of LAB's view that the details of PL should be aligned with ML for reasonableness and consistency, EOC considers that there should be protection from dismissal for taking PL in the same way as there is protection for taking ML.

56. The Administration has explained that in coming to a consensus on legislating for PL, LAB agreed that, *where appropriate*, the relevant requirements and details of PL should be aligned with those applicable to ML under EO for the purpose of reasonableness and consistency with the existing law. Furthermore, unlike maternity cases, the father-child relationship can hardly be established before the birth of the child and the issue of the relevant birth certificate. There would be immense implementation problems for

employers in affording additional employment protection to a male employee who merely claims to be or become a father of a child, especially in cases concerning births outside of marriage. The Administration considers that it would not be appropriate and proportionate to extend the employment protection similar to that for pregnancy and confinement to employees taking or intending to take PL.

57. Members note that Mr LEE Cheuk-yan has indicated his intention to propose CSAs to the Bill which 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 his CSAs, it would 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.

58. The Administration considers that the prohibition of an employer from dismissing the concerned employee as proposed by Mr LEE Cheuk-yan is out of proportion to the provision of PL. In the view of the Administration, according to Mr LEE's proposed 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, say, one month after pregnancy, this could imply a period of protection from dismissal lasting as long as 11 months. The Administration has pointed out that as very little information is required of an employee in relation to the notification of his intention to take PL, 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.

Consequential amendments

59. Members note that the Bill also seeks to make a number of amendments to EO, as stipulated under clauses 3, 4, 5, 7, 8, 9(1) and (2) and 10 to 18, and to the Minimum Wage Ordinance (Cap. 608) consequential to the introduction of the statutory PL and PL pay mechanism. The Bills Committee has raised no objection to these proposed consequential amendments.

Committee stage amendments

CSAs proposed by the Administration

60. Members note that the Chinese equivalent of the definition of "child" in section 2(1) of EO is "兒童". Having regard to the nature of PL, some members have asked whether it is necessary to use "嬰兒" as a Chinese equivalent of the definition of "child" for the purpose of the Bill. Taking into account members' view, the Administration has advised 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 purpose of that Part. The Bills Committee also notes that the Administration has proposed to make a few other textual amendments to the Bill. The Bills Committee has raised no objection to these CSAs.

61. As elaborated in paragraph 41 above, the Administration will move CSAs in respect of the proposed new section 15E(1). The full set of CSAs to be moved by the Administration is in **Appendix III**.

CSAs proposed by the Bills Committee

62. The CSAs to be moved by Mr Kenneth LEUNG, Chairman of the Bills Committee, on behalf of the Bills Committee as elaborated in paragraphs 20 and 39 above are in **Appendix IV**.

CSAs proposed by individual Member

63. The Bills Committee takes note that Mr LEE Cheuk-yan has indicated his intention to move CSAs to the Bill as detailed in paragraphs 24 and 57 above. The CSAs proposed by Mr LEE Cheuk-yan are in **Appendix V**.

Resumption of Second Reading debate

64. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill.

Advice sought

65. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
4 December 2014

Appendix I

Bills Committee on Employment (Amendment) Bill 2014

Membership list

Chairman	Hon Kenneth LEUNG
Members	Hon LEE Cheuk-yan Hon Emily LAU Wai-hing, JP Hon Tommy CHEUNG Yu-yan, SBS, JP Hon WONG Kwok-hing, BBS, MH Hon Jeffrey LAM Kin-fung, GBS, JP Hon Cyd HO Sau-lan, JP Hon WONG Kwok-kin, SBS Hon Paul TSE Wai-chun, JP Hon Alan LEONG Kah-kit, SC Hon CHAN Chi-chuen Dr Hon Kenneth CHAN Ka-lok Hon CHAN Yuen-han, SBS, JP Hon KWOK Wai-keung Hon SIN Chung-kai, SBS, JP Dr Hon Helena WONG Pik-wan Dr Hon Elizabeth QUAT, JP Hon Martin LIAO Cheung-kong, SBS, JP Hon POON Siu-ping, BBS, MH Hon TANG Ka-piu, JP Dr Hon CHIANG Lai-wan, JP Hon CHUNG Kwok-pan (Total : 22 members)
Clerk	Miss Betty MA
Legal adviser	Ms Clara TAM
Date	2 July 2014

Appendix II

Bills Committee on Employment (Amendment) Bill 2014

List of organisations which have given oral representation to the Bills Committee

1. Labour Party
2. Civic Party
3. Public Omnibus Operators Association
4. Democratic Alliance for the Betterment and Progress of Hong Kong
5. Democratic Party
6. Service Industry General Union
7. I. T. People Association of Hong Kong
8. The Hong Kong Federation of Trade Unions Women Affairs Committee
9. Right of People's Livelihood & Legal Association, Hong Kong
10. Hong Kong Taxi Owners' Association Limited
11. Hong Kong Air Cargo Terminals Employees Union
12. Hong Kong Catering Industry Association
13. Association of Restaurant Managers
14. Hong Kong & Kowloon Vermicelli & Noodle Manufacturing Industry Merchants' General Association
15. The Federation of Hong Kong and Kowloon Labour Unions
16. Institution of Dining Art

List of organisations which have provided written views to the Bills Committee

1. The Society for Truth and Light
2. Deacons
3. The Chinese General Chamber of Commerce
4. Hong Kong Confederation of Trade Unions
5. New World First Ferry Services Limited
6. Family Value Foundation of Hong Kong

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	By deleting the proposed section 15E(1)(a)(ii) and substituting— "(ii) of the intended date of his leave before taking the leave; or"
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".

Appendix IV

Bills Committee on Employment (Amendment) Bill 2014

Committee Stage

Amendments to be moved by Hon Kenneth LEUNG

Clause	Amendment Proposed
Long title	By deleting "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 substituting "paternity leave of 7 days and paternity leave pay at a daily rate of the employee's average daily wages".
6	In the proposed section 15D(2)(b), by deleting "not more than 3 days" and substituting "7 days".
6	In the proposed section 15E(1)— (a) by deleting paragraph (a) and substituting— "(a) notify the employer of his intention at least 3 months before the expected date of the delivery of the child; or"; (b) in paragraph (b), by deleting "(i)".
6	In the proposed section 15H(2), by deleting "four-fifths of".

E(A)Bill2014CSAs_e01

Employment (Amendment) Bill 2014

Committee Stage

Amendments to be moved by the Hon LEE Cheuk-yan (1st draft)

Clause	Amendment proposed
Long title	By deleting "of up to 3 days".
6.	In the proposed section 15D(2)(b), by deleting "not more than".
6	By adding after the proposed section 15L—

"**15M. Prohibition against termination of employment**

(1) In this section—

period of taking paternity leave (放取侍產假期間), in relation to an employee who has notified his employee in accordance with section 15E, means the period from the date of the notice—

(a) to the date on which his paternity leave expires; or

(b) in the case of miscarriage, the date of miscarriage.

wages (工資), in subsections 5(b), (6) and (7), includes a sum of money paid by an employer in respect of any of the following days—

(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) Subject to subsection (3), after an employee has notified his employer in accordance with section 15E, the employer shall not terminate his continuous contract of employment otherwise than in accordance with section 9 during the period of taking paternity leave.

(3) An employer who terminates the continuous contract of employment of his employee during the period of taking paternity leave shall be taken for the purposes of subsection (2) to terminate the contract otherwise than in accordance with section 9—

(a) unless the contrary is proved; or

(b) subject to subsection (4), unless the employer proves that—

(i) he purported to terminate the contract in accordance with that section; and

(ii) at the time of such termination, he reasonably believed that he had a ground to do so.

(4) Subsection (3)(b) shall not apply in the case of civil proceedings.

(5) An employer who contravenes subsection (2) shall be liable to pay to the dismissed employee —

(a) the sum which would have been payable if the contract had been terminated by the employer under section 7;

(b) a further sum equivalent to 7 times the employee's average daily wages during —

(i) the period of 12 months immediately before the date of

termination of the contract of employment; or

(ii) if the employee has been employed by the employer for a period shorter than 12 months immediately before the date of termination of the contract of employment, the shorter period; and

(c) where the employee is or would have been entitled to paternity leave pay, paternity leave pay for 3 days.

(6) 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

(iv) the employee's absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employee's Compensation Ordinance (Cap. 282); and

(b) any wages paid to the employee for the excluded period.

(7) 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.

(8) Despite subsection (5)(b), 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 date of termination of the contract of employment; 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 the date of termination of the contract of employment.

(9) Any employer who contravenes subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine at level 6.

New By adding after clause 6—

"6A. Section 32A amended (employee's entitlement to employment protection)

Section 32A(1)(c)(i), after "15(1)"—

Add

", 15M(2)".

6B. Section 32M amended (remedies for employment protection)

Section 32M(2)(a), after "15(1)"—

Add

", 15M(2)".".

New By adding after clause 7—

"7A. Section 32P amended (award of compensation)

Section 32P(1)(b), after "15(1)"—

Add

", 15M(2)".".