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**Legislative Council**

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**Panel on Manpower**

**Background brief prepared by the Legislative Council Secretariat  
for the meeting on 16 December 2014**

**Special arrangement for employees with disabilities under  
the Statutory Minimum Wage regime**

**Purpose**

This paper provides background information and summarizes the past discussions by the Bills Committee on Minimum Wage Bill, the Subcommittee on Minimum Wage (Criteria for Approved Assessors) Notice and Minimum Wage (Assessment Methods) Notice as well as the Panel on Manpower on issues relating to the special arrangement for employees with disabilities under the Statutory Minimum Wage ("SMW") regime since the Fourth Legislative Council ("LegCo").

**Background**

2. Schedule 2 to the Minimum Wage Ordinance (Cap. 608) ("MWO") provides a special arrangement whereby persons with disabilities and whose productivity may be impaired by their disabilities may choose to have their productivity assessed in performing their work in the actual workplace during a trial period of employment not exceeding four weeks so as to help determine whether they should be remunerated at not lower than the SMW level or at a rate commensurate with their productivity (hereinafter referred to as "the special arrangement"). A person with disabilities is defined in MWO as a person who holds a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation.

3. The productivity assessment must be made by an approved assessor. Under sections 1 and 6 of Schedule 2 to MWO, the Commissioner for Labour may, by notice published in the Gazette, specify the kinds of persons who are eligible to become approved assessors, the requisite lengths of experience such

persons must have in the provision of vocational rehabilitation or other services in relation to the employment of persons with a disability ("relevant services"), and the methods of assessment. On 7 January 2011, the Administration published in the Gazette the Minimum Wage (Criteria for Approved Assessors) Notice and the Minimum Wage (Assessment Methods) Notice for the purposes of the definition of an approved assessor in Schedule 2 to MWO, and the methods for assessing the degree of productivity of an employee with disabilities in performing the work required under his contract of employment respectively. A subcommittee was formed to study the two Notices, which came into operation on the day on which Schedule 2 to MWO came into operation, i.e. 1 May 2011.

## **Members' deliberations**

### Need for the special arrangement

4. Some members queried the need for the special arrangement for assessing the degree of productivity of employees with disabilities. They were concerned that such a special arrangement might have the effect of exempting employees with disabilities from the SMW regime. Concern was raised as to whether the stakeholders and the Equal Opportunities Commission ("EOC") were supportive of the special arrangement. There was another view that employees with severe disabilities should be exempted from the SMW regime.

5. The Administration explained that MWO was applicable to able-bodied employees and employees with disabilities alike. Nevertheless, recognizing the possible employment difficulties encountered by some persons with disabilities upon the implementation of SMW, a special arrangement was provided for those whose productivity was impaired by their disabilities so as to minimize any possible adverse impact of introducing SMW on their employment opportunities. To forestall abuse, the right to invoke such an assessment was vested in an employee with disabilities but not his employer. The Administration stressed that the special arrangement, which was meant to strike a reasonable balance between providing wage protection for employees with disabilities and safeguarding their employment opportunities, had been formulated after elaborate discussions involving various stakeholders, including persons with disabilities, parents groups, rehabilitation organizations, EOC and employer representatives.

6. Members were concerned whether the special arrangement for persons with disabilities was in conformity with the Disability Discrimination Ordinance (Cap. 487) ("DDO") and Article 39 of the Basic Law. The Administration advised that the special arrangement was not incompatible with DDO, which had no constitutional or overriding status over MWO. It did not oblige an

employer to employ a person who was unable to carry out the inherent requirements of the particular employment due to his disabilities. A person who was able to carry out the inherent requirements of a particular employment should be protected by SMW, irrespective of whether he was a person with disabilities or not. The special arrangement sought to ensure that, while safeguarding like treatment of persons with disabilities and able-bodied, the employment opportunities of employees with disabilities would not be affected by the introduction of SMW.

#### Trial period of employment and wage protection

7. Some members expressed concern about the purpose of the trial period of employment and the protection provided to employees with disabilities during such period. Noting that during the trial period of employment, wages would be set at no less than 50% of SMW which lasted for not more than four weeks with no retrospective claims, some members held the view that the employee concerned should be paid retrospectively the wage difference during the trial period of employment if the degree of productivity of an employee with disabilities was assessed to be more than 50% of SMW. Some members considered that a wage floor should be established such that those employees with disabilities whose degree of productivity had been assessed must be remunerated no less than 50% of SMW, irrespective of the outcome of productivity assessment. There was a further view that a wage subsidy should be provided to employees with disabilities whose productivity was assessed to be less than 100%.

8. The Administration advised that the purpose of the trial period of employment was to provide an opportunity for an assessment to be conducted on the degree of productivity impairment, if any, arising from the disability of an employee. The percentage of SMW during the trial period of employment, the length of the trial period and whether there were retrospective claims on the wage difference after assessment were all inter-related. After consultation with the rehabilitation organizations and relevant stakeholders, the Administration considered that the arrangement in setting the wages to be no less than 50% of SMW during the trial period of employment which lasted for not more than four weeks (save for cases in exceptional circumstances) with no retrospective claims would strike an appropriate balance between providing wage protection for employees with disabilities and safeguarding their employment opportunities. An across-the-board mandatory wage level at 50% of SMW would affect the employment opportunities and in turn the social integration of persons with disabilities, especially those with severe disabilities. As regards provision of wage subsidy, the Administration advised that it had no plan to implement the suggestion since it was not the policy intent of MWO. In its reply to a written question raised at the Council meeting of 26 March 2014 concerning the employment of persons with disabilities, the Administration

reiterated its stance as the suggestion would involve major policy consideration with far-reaching implication on public finance.

### Approved assessors

9. Some members were concerned that approved assessors were required to obtain a recommendation from a recognized organization, which applied to a vocational rehabilitation practitioner but not a registered occupational therapist, registered physiotherapist or registered social worker, if they had completed satisfactorily the relevant training for the purpose of making productivity assessments for persons with disabilities. These members were of the view that the requirement should be abolished.

10. The Administration advised that in the course of consultation with the stakeholders, there were views that the quality of approved assessors was key to the smooth and effective implementation of the assessment mechanism. The requirement of a valid registration or practicing certificate did not cover the category of vocational rehabilitation practitioners who might come from a wide variety of background. The requirement for obtaining a recommendation from a recognized organization was to ensure the quality of productivity assessments to be conducted under the special arrangement.

11. Some members were concerned whether there would be a sufficient number of approved assessors to carry out the assessments for employees with disabilities. The Administration explained that all approved assessors should possess the requisite experience in providing relevant services, and satisfactorily complete the training arranged by the Labour Department ("LD"). Some members were concerned whether there would be any channel for lodging complaints against approved assessors. The Administration advised that complaints against the assessment mechanism might be lodged with LD. Where appropriate, complaints could also be lodged with the professional bodies concerned.

### Whether an appeal mechanism should be provided

12. Some members were of the view that an avenue should be provided for a review of an assessment in the event of disputes about the assessment results, deteriorated health of an employee with disabilities, or improved productivity of an employee with disabilities who had become familiarized with his work.

13. The Administration advised that stakeholders had divergent views on whether employees with disabilities who had their degree of productivity assessed should have a review in the form of a second assessment. The Administration took the view that if there was a review arrangement, it could discourage some employers from employing persons with disabilities and put a

strain on the labour relations between employers and employees with disabilities, leading to, say, disputes on whether employees with disabilities were forced by their employers to undertake a review assessment to facilitate a pay cut. Some rehabilitation organizations pointed out that the productivity of some employees with disabilities might deteriorate owing to the changing state of their disabilities and a review might not necessarily be to their advantage. The Administration further advised that since Hong Kong had no experience in the implementation of SMW, particularly the assessment mechanism for employees with disabilities under the SMW regime, it would review the special arrangement for persons with disabilities, including whether there was a need for an appeal mechanism, in the light of operational experience within two years of the implementation of SMW.

#### Impact of the implementation of SMW on employment of persons with disabilities

14. Members were concerned about the impact of the implementation of SMW on employment of persons with disabilities. Drawing reference to a survey report released by the Hong Kong Society for Rehabilitation in June 2013, members noted with concern that the unemployment rate of the 1 020 adult respondents with disabilities and chronic diseases was 51.5%, whilst the median monthly personal income of the working respondents and the median monthly household income of the respondents were \$7,900 and \$11,000 respectively. Members were also given to understand that quite a number of persons with disabilities considered that the productivity assessment mechanism under the special arrangement was ineffective in protecting employees with disabilities. Information was sought on the employment of persons with disabilities after the implementation of SMW.

15. According to the Administration, information from the relevant organizations revealed that newly employed persons with disabilities were mostly remunerated at or above the SMW rate and thus needed not undergo productivity assessment. For serving employees with disabilities who opted for the transitional arrangement under MWO before 1 May 2011, they might invoke the assessment at any time as long as they were employed by their existing employers to perform the work concerned. As regards the number of employees with disabilities who had not undergone any assessment of productivity and opted to retain their original wage rate after the implementation of SMW, employees with disabilities concerned were not required under MWO to notify LD of their election for the transitional arrangement. In respect of the number of persons with disabilities undergoing the assessment since the implementation of SMW, members were given to understand that individual employees with disabilities had completed more than one productivity assessment. As at the end of 2013, 349 cases of productivity assessment had been completed under MWO. Of these cases, the assessment results of the

majority (about 97%) showed productivity of not less than 50%.

### **Relevant papers**

16. A list of the relevant papers on the LegCo website is in the **Appendix**.

Council Business Division 2  
Legislative Council Secretariat  
10 December 2014

**Relevant papers on  
Special arrangement for employees with disabilities  
under the Statutory Minimum Wage regime**

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Bills Committee on Minimum Wage Bill	---	<u>Report</u>
Subcommittee on Minimum Wage (Criteria for Approved Assessors) Notice and Minimum Wage (Assessment Methods) Notice	---	<u>Report</u>
Panel on Manpower	20.11.2012 (Item IV)	<u>Agenda</u> <u>Minutes</u>
Panel on Manpower		<u>LC Paper No. CB(2)644/12-13(01)</u>
Panel on Manpower	28.5.2013 (Item III)	<u>Agenda</u> <u>Minutes</u>
Legislative Council	26.3.2014	<u>Official Record of Proceedings</u> <u>(Question 7)</u>