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Panel on Manpower

**Background brief prepared by the
Legislative Council Secretariat for the meeting on 17 May 2016**

Statutory paternity leave

Purpose

This paper sets out background information and gives a brief account of the past discussions by the Panel on Manpower ("the Panel") and the Bills Committee on Employment (Amendment) Bill 2014 on the provision of statutory paternity leave ("PL").

Background

2. The Employment (Amendment) Bill 2014 ("the Bill"), which sought to amend the Employment Ordinance (Cap. 57) ("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, was introduced into the Legislative Council ("LegCo") on 28 February 2014 and passed at the Council meeting of 18 December 2014. Following the coming into operation of the Employment (Amendment) Ordinance 2014 on 27 February 2015, a male employee with child born on or after 27 February 2015 is entitled to three days' PL to be taken consecutively or separately for each confinement of his spouse/partner if he fulfils the following requirements as stipulated in EO:

- (a) he is the father of a new-born child or a father-to-be;
- (b) he has been employed under a continuous contract¹; and

¹ Under EO, an employee who has been employed continuously by the same employer for four weeks or more and has been working for at least 18 hours each week is regarded as being employed under a continuous contract.

- (c) he has notified his employer in accordance with EO².

An eligible male employee may take PL at any time during the period from four weeks before the expected date of delivery of the child to 10 weeks beginning on the actual date of delivery of the child. He may also receive a daily rate of four-fifths of his average wages as PL pay. An employer who fails to grant PL or PL pay to an eligible employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

3. The Administration has undertaken to review the implementation of the enacted legislation one year after its coming into operation and report to the Labour Advisory Board ("LAB").

Past discussions by members

Duration of statutory PL

4. Most members considered that the three-day statutory PL was barely adequate for fathers to take care of their newborns and partners, particularly those who had undergone operations to give births and those who suffered from post-natal depression. Given that government employees had already been granted five-day full pay PL, these members urged the Administration to consider extending the duration of statutory PL to the same level as that of government employees. Some members also suggested that the duration of PL be increased to seven days to further promote family-friendly employment practice.

5. The Administration advised that prior to the introduction of the Bill, the Labour Department ("LD") had conducted a survey on PL in 2012 of which the findings revealed that the majority of the respondent companies offered on voluntary basis one to three days of PL, and the average duration was three days. Having regard to the practice of voluntary provision of PL in the private sector and the consensus reached by LAB, the Administration considered three-day statutory PL an appropriate starting point.

6. The Administration further advised that it was not appropriate to make a direct comparison between the duration of PL for government employees and that proposed in the Bill, as the former was provided by the Government in its

² The employee must notify his employer of: (a) his intention to take PL at least three months before the expected date of delivery of the child (exact date of leave not required at this stage); and (b) the date of his PL before taking the leave. If the employee fails to give the aforesaid three months' advance notice to the employer, he must notify the employer of his date of PL at least five days before that date.

capacity as an employer to its employees, having regard to such factors as affordability, its own manpower situation, etc; whereas the latter was a statutory requirement for all employers of varying sizes and was meant to be a minimum entitlement of PL for all employees. Employers were free to decide whether they would offer PL benefit above the statutory minimum entitlement upon its enactment, having considered their own circumstances.

Rate of PL pay

7. Some members considered it inappropriate to regard the nature of PL the same as maternity leave ("ML") and sick leave ("SL"), and pitch the rate of statutory PL pay at four-fifths of the employee's average daily wages as in the case of ML and SL. Given that the prevailing rates of ML pay and sickness allowances had been in force for a long time, these members called on the Administration to legislate for fully paid PL and in tandem review the rates of ML pay and sickness allowance.

8. According to the Administration, it was 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 considered that PL, similar to SL and ML, was incidental to certain employees for meeting their personal needs and should therefore be remunerated at the same rate as that for the latter types of leave. The Administration also drew members' attention to the stipulations in the relevant International Labour Conventions which stated 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 was either not paid at full rate or subject to a cap, or both.

9. The Administration stressed that the legislation only set out a statutory threshold. Some employers were already providing longer periods of PL to their employees on their own initiative. The Administration assured members that it would continue to encourage employers to offer their employees benefits favourable than statutory provision having regard to their own business operation and affordability.

Notification and documentary requirements

10. Some members questioned the need for an employee who intended to take PL to notify his employer at least three months before the expected date of delivery. Some other members, however, pointed out that employers, in particular small and medium-sized enterprises, would have operational difficulties in releasing their employees for PL upon short notice.

11. The Administration advised that the three-month notice period was requested by 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. The notification requirement aimed to strike a balance between the interests of both employees and employers.

12. Members were advised that for the entitlement of PL pay, a male employee must provide his employer with the birth certificate of his newborn child, on which his name is entered as the child's father. In response to members' enquiry about the legal consequences to an employee who failed to provide the required documents in relation to taking PL, the Administration advised that it was up to the employer to decide whether to grant PL benefits to an employee who failed to provide the required documents owing to various reasons. However, it was a criminal offence if the employee made or provided false document.

13. Some members expressed concern that it might sometimes be difficult for the employer to verify documents regarding childbirth issued by the authorities of other places, in particular when those documents were available in languages other than Chinese and English. They asked how disputes or doubts over documentary proof of birth outside Hong Kong could be tackled.

14. The Administration advised that only if the authorities of the place where the child was born did not issue birth certificates, the employee might provide other documents issued by the authorities that could reasonably be taken as proof that the employee was 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 could be reached, to be adjudicated by the Labour Tribunal or Minor Employment Claims Adjudication Board as appropriate.

Legality of payment in lieu of PL

15. Members was concerned whether it was in breach of the law for an employer to pay wages in lieu of granting statutory PL to an employee if the employer had or had not obtained the agreement of the employee concerned. Some members considered that flexibility should be allowed for an employer to pay wages in lieu of granting PL with the employee concerned. Concern was also raised about whether employees were allowed to take unpaid additional PL.

16. The Administration advised that even if there was an agreement between the employer and the employee about making payment in lieu of PL, the employer still committed an offence if he/she denied an employee the benefit of taking PL. However, if owing to personal reasons, an employee had chosen not to exercise his right to take PL, he was not obliged to notify his employer of his intention to take PL. As regards unpaid PL, the Administration advised that it did not rule out the possibility that unpaid PL could be considered in future.

Eligibility for PL entitlement

17. Noting that the statutory PL was not applicable to a miscarriage, but to a stillbirth, members questioned the rationale for the disparity. Most members took the view that the Administration should consider extending the entitlement of statutory PL to miscarriage cases.

18. The Administration explained that under EO, where a female employee suffered from a miscarriage, instead of ML, she would be entitled to SL for any day on which she was absent from work by reason of such miscarriage. On the other hand, an employee who was certified to have given birth to a dead child was eligible for ML. Mirroring the same arrangements applicable to ML, it was considered that statutory PL should not apply to a miscarriage, but to a stillbirth. Given that PL was provided for a father to help look after the newborn and the mother at around the time of delivery, there was no sufficient justification for PL to be granted with respect to cases of miscarriage where no delivery of a child had occurred. In such cases, a female employee was also not entitled to ML.

19. Some members queried the arrangement of granting PL benefits to an employee whose spouse/partner had given birth in a place outside Hong Kong, given that it might take almost the entire three-day PL for travelling. In the event that the employee concerned had 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 advised that it was up to the employer and the employee to make arrangements on whether more leave would be granted to meet individual needs.

Latest development

20. The Administration will brief the Panel on the implementation and review of statutory PL at the meeting on 17 May 2016.

Relevant papers

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

Appendix

Relevant papers on statutory paternity leave

Committee	Date of meeting	Paper
Legislative Council	29.10.2008	Official Record of Proceedings (Question 15)
Legislative Council	21.4.2010	Official Record of Proceedings (Question 16)
Legislative Council	2.3.2011	Official Record of Proceedings (Question 9)
Panel on Manpower	20.6.2012	Agenda Minutes
Legislative Council	17.10.2012	Official Record of Proceedings (Question 6)
Panel on Manpower	25.1.2013	Agenda Minutes
Bills Committee on Employment (Amendment) Bill 2014	--	Report
Legislative Council	20.4.2016	Official Record of Proceedings (Question 17)