



立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (3101 1018)

13 July 2017

Ms Queenie WONG  
Assistant Commissioner for Labour (Policy Support)  
Headquarters  
Labour Department  
16/F, Harbour Building  
38 Pier Road  
Central  
Hong Kong

Dear Ms WONG,

### **Employment (Amendment) (No. 2) Bill 2017**

I am scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill at the forthcoming Bills Committee meeting scheduled on 21 July 2017, I should be grateful if you would clarify the following matters.

#### **Legal Aspects**

##### The long title of the Bill

##### *Question 1*

Clause 4 proposes to amend section 51(1) of the Employment Ordinance (Cap. 57) to allow more persons (i.e. an associate of the licensee or the certificate of exemption ("Certificate") holder) to operate, manage or assist in the management of an employment agency ("EA"). This is also reflected in paragraph 4 of the Explanatory Memorandum of the Bill. However, it appears that such legislative intent is not expressly reflected in the long title of the Bill. Please clarify.

*Question 2*

According to paragraphs 2, 6 and 7 of the LegCo Brief (File Ref: LD CR/5/15/706) dated 14 June 2017, the Bill seeks to expand the scope of application of the offence of overcharging job-seekers ("overcharging offence"). However, as stated in the long title, the Bill seeks to, among others, "make certain existing offences applicable to persons associated with the holder of a licence to operate an employment agency and certain other persons".

Except the overcharging offence, we have not identified another existing offence having the scope expanded. Please clarify what are the other existing offences in Part XII of Cap. 57 with their scopes being sought to be expanded by the Bill.

Clause 4 – section 51(1) of Cap. 57 and Clause 9 – regulation 7 of the Employment Agency Regulations (Cap. 57A)

*Question 3*

Under the existing section 51(1), no person shall operate, manage or assist in the management of an EA unless that person is a holder of a licence or a Certificate, or that person is employed by a licensee or a Certificate holder. The effect of the proposed amendment to section 51(1) seems to be that an associate of a licensee or of a Certificate holder is also allowed to do so. However, an associate is not required to obtain a licence or a Certificate. Please clarify:

- (a) the legislative intent and the justification of allowing an unlicensed associate to operate, manage or assist in the management of an EA; and
- (b) whether the same approach of allowing an unlicensed person to operate, manage or assist in the management of a place which is subject to a licensing scheme has been adopted in any other licensing scheme under any ordinance in Hong Kong?

*Question 4*

The proposed section 51(1) does not expressly stipulate whether the licence or the Certificate should be in force at all material times. Please consider if it is necessary to state clearly in the proposed section 51(1) that the licence or the Certificate is "for the time being in force".

In this regard, it is noted that "for the time being in force" is expressly provided in certain pieces of legislation such as:

- (a) section 6 (concerning restriction on operating residential care homes) of the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459); and
- (b) section 4 (concerning offence of operating residential care homes for persons with disabilities without licence) of the Residential Care Homes (Persons with Disabilities) Ordinance (Cap. 613).

Please consider if a similar approach should be adopted for section 51(1).

#### *Question 5*

Clause 9 proposes to amend regulation 7 of Cap. 57A to the effect that in the case of a company as a licensee, the company shall notify the Commissioner for Labour ("Commissioner") in writing of the name of an individual who is an associate of the company and appointed by the company to operate, manage or assist in the management of an EA ("written notification"). Please clarify:

- (a) whether an associate of a corporate licensee, who has not been named in the written notification under regulation 7 ("unnamed associate"), can still lawfully operate, manage or assist in the management of an EA under section 51 of Cap. 57;
- (b) if the answer to (a) is affirmative, whether regulation 7 imposes a separate and distinct obligation on a corporate licensee. Even though the unnamed associate can still lawfully manage an EA, the corporate licensee would still be in contravention of regulation 7 and punishable to a fine at level 3 under regulation 17(3); and
- (c) if the answer to (a) is negative, whether, for the sake of clarity and certainty, it should be expressly provided so in section 51?

#### Clause 5 –section 53(1)(d) and (e)

#### *Question 6*

Under section 53(1)(c)(i) and (iii), in considering whether to refuse to issue or renew a licence or revoke a licence of an EA, whether a licensee is an undischarged bankrupt and has knowingly furnished to the Commissioner

any false or misleading information in connection with his application for the issue or renewal of the licence ("furnishing false information") are factors that the Commissioner may take into consideration. However, these two factors are not stated in the proposed section 53(1)(d) and (e) concerning the conducts of a related person of a licensee and an individual employed by a licensee respectively.

Please clarify whether the factors of undischarged bankrupt and furnishing false information should also be included in the proposed section 53(1)(d) and (e). If the answer is negative, please explain the reason(s) for the difference.

#### *Question 7*

It is further noted that whether certain offences have been committed by a licensee or a related person of the licensee is also a factor that the Commissioner may take into consideration under section 53(1)(c) and the proposed section 53(1)(d). However, such factor is not included in the proposed section 53(1)(e). Please clarify whether such factor should also be included in the proposed section 53(1)(e). If the answer is negative, please explain the reason(s) for the difference.

#### Clause 6 – section 57

The effect of the proposed amendment to section 57 is that an associate (including related persons and employees) of a licensee or any person purporting to act as such a licensee or associate is prohibited from directly or indirectly receiving from an job-seeker any reward, payment, or other advantage other than the prescribed commission.

#### *Question 8*

Please clarify, in the context of a related person (such as a company director), if he/she is not involved in the daily operation of an EA, under what circumstances the related person would commit the overcharging offence.

In this regard, it is noted that the circumstances under which a director or a partner will be liable for an offence committed by a body corporate are expressly provided in section 20 of the Trade Descriptions Ordinance (Cap. 362) which reads as follows:

"If an offence under this Ordinance is committed by a body corporate or by a person as a member of an unincorporated body, and it is proved that the offence has been committed with the consent or connivance or is

attributable to the neglect of a person specified in subsection (2), that person also commits the offence and is liable to be proceeded against and punished accordingly."

Please consider whether a similar approach should be adopted for section 57.

*Question 9*

Please clarify the liability of an employee under the following circumstances:

- (a) would an employee who is assigned the task of issuing invoices or receipts with the amount higher than the prescribed commission to job-seekers be regarded as indirectly receiving excessive commission from job-seekers and committed an offence?; and
- (b) would an employee who is assigned the task of receiving excessive commission from job-seekers but without any authority to influence the decision of his employer be regarded as directly committed the overcharging offence?

If the answers to (a) and (b) are affirmative, please consider if it is necessary to provide a defence for those employees who only carry out their duties in the course of their employment and are not in a position to influence the decision of their employers.

In this respect, it is noted that there is a similar defence in section 15A(5) of the Human Reproductive Technology (Amendment) Ordinance 2016 (Ord. No. 20 of 2016) which reads as follows:

"It is a defence for a person charged with an offence for contravening subsection (1) to show that -

- (a) the conduct was engaged in by the person –
  - (i) in the course of the person's employment; and
  - (ii) in accordance with instructions given by the person's employer in the course of that employment; and
- (b) at the time the conduct was engaged in, the person was not in a position to make or influence a decision regarding the conduct."

Please consider whether a similar approach should be adopted for section 57.

## Drafting aspects

### Clause 10 – regulation 10(2) of Cap. 57A

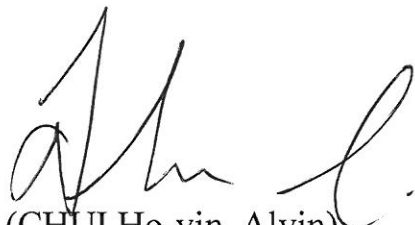
#### *Question 10*

It is proposed that "a licensee" in regulation 10(2) should be amended to "an employment agency". Regulation 10(2) should be read with section 57. However, section 57 is proposed to be amended from "a licensee shall" to "A licensee, or an associate of a licensee, in respect of an employment agency, or a person purporting to act as such a licensee or associate, must" instead of to "an employment agency". Please clarify:

- (a) the reason to amend regulation 10(2) from "a licensee" to "an employment agency"; and
- (b) for the purpose of consistency, whether regulation 10(2) should be amended in accordance with that of section 57.

I look forward to receiving your reply in both languages as soon as possible.

Yours sincerely,



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