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Bills Committee on Employment (Amendment) (No.2) Bill 2017

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information on the Administration's proposal to strengthen the regulation of employment agencies ("EAs") and summarizes the past discussions by the Panel on Manpower ("the Panel") on the related issues.

Background

2. EAs in Hong Kong, including EAs placing foreign domestic helpers ("FDHs") (thereafter referred to as "FDH EAs"), are regulated by Part XII of the Employment Ordinance (Cap. 57) ("EO") and the Employment Agency Regulations (Cap. 57A) ("EAR"). Under the existing regulatory regime, all EAs must obtain a licence from the Labour Department ("LD") for undertaking job placement business. EAs are only allowed to receive from job-seekers, including FDHs, the prescribed commission specified in the Second Schedule of EAR, which is no more than 10% of the latter's first month's salary for successful job placement service. The Employment Agencies Administration ("EAA") of LD is responsible for regulating the operation of EAs, including FDH EAs, through licensing, both regular and surprise inspections, complaints investigation and prosecution to ensure that they are operating in compliance with the law.

3. According to the Administration, up to end-January 2017, there were 2 988 licensed EAs in Hong Kong, amongst which 1 397 were FDH EAs. While there is no legal requirement in Hong Kong that FDHs must be recruited through the intermediary service of an EA, EAs are the most common channel through which employers in Hong Kong recruit FDHs.

4. In April 2016, LD conducted a two-month public consultation exercise on the draft Code of Practice for EAs ("the Code"). After considering the views received during the consultation and refining the Code, LD promulgated the Code on 13 January 2017. The Code highlights the salient legislative requirements that EA operators must follow and sets out the minimum standards expected of EA licensees by the Commissioner for Labour ("C for L"), some of which are particularly relevant to FDH EAs.

The Employment (Amendment) (No.2) Bill 2017

5. The Bill mainly seeks to amend EO to expand the scope of the existing offence of overcharging job-seekers; raise the maximum penalties for the offences of unlicensed operation of EAs and overcharging job-seekers; provide for new grounds for refusing to issue, renew or for revoking a licence to operate an EA; and empower C for L to issue the Code, and to provide for incidental and connected matters.

Deliberations of the Panel

6. The Panel discussed regulation of EAs and the proposal to issue the Code at a number of meetings in 2016 and 2017. The Panel was briefed on the implementation of the Code and the legislative proposals to strengthen the regulation of EAs at its meeting on 21 February 2017. The major views and concerns of members are summarized in the ensuing paragraphs.

Malpractices of employment agencies

7. Some members expressed grave concern about EAs' overcharging commission and various fees and charges from job-seekers, especially FDHs. These members pointed out that many FDHs, particularly those from Indonesia, had incurred huge debts in order to meet the high intermediary fees and training fees charged by EAs in their home countries prior to working in Hong Kong. Upon arrival in Hong Kong, these FDHs had to make monthly repayment for the huge debts through the local EAs. Some FDHs' passports were allegedly withheld by EAs so as to force them to make loan repayment.

8. The Administration advised that charging of commission exceeding the prescribed amount and money-lending activities were regulated under EAR and the Money Lenders Ordinance (Cap. 163) respectively. FDHs could file claims with LD, so that LD would conduct investigation upon receipt of the overcharging or malpractices complaints. An EA or any other person withholding a FDH's passport without the latter's consent would have

committed an offence under the Theft Ordinance (Cap. 210). Whenever such malpractice was detected by officers of EAA during their inspections to EAs, they would take appropriate enforcement action and refer the case to the Police for follow-up. These legislative requirements that EAs had to follow were listed in Chapter 3 of the Code.

9. Some members asked whether the Administration would verify the accreditation status of the intermediaries in FDH-sending countries so as to facilitate the taking of enforcement actions. Some members considered that arrangement could be made for FDHs to receive job training in Hong Kong so as to alleviate their burden arising from the high level of fees for attending the relevant training in their home countries.

10. The Administration explained that while there was no legal requirement in Hong Kong that FDHs must be recruited through the intermediary service of an EA, such requirements were imposed by many of the FDH-sending countries and these requirements varied from country to country. For instance, the Philippine Government did not allow direct hiring of first-time FDHs, while the Indonesian Government only allowed hiring FDHs through accredited EAs. The Administration pointed out that it was the national laws and practices of individual FDH-sending countries that FDHs be required to undergo relevant training in their home countries. The Hong Kong Government did not have any jurisdiction on the operation of overseas intermediaries and training institutes. The Administration also drew members' attention to the fact that while the existing legislation did not require accreditation by other governments as a prerequisite for obtaining an EA licence in Hong Kong, all EAs, regardless of whether they were accredited by the relevant FDH-sending governments, were subject to the regulation of EO and EAR.

11. Members were further advised that the Government had through its regular contacts with the relevant Consulates General ("CGs") in Hong Kong, brought the concern about "bonded labour" to the latter's attention and urged them to draw the problem to the attention of their respective governments so as to tackle the issue at source for protecting the interests of both employers and FDHs. LD had since 2014 intensified collaboration with CGs of major FDH-sending countries in Hong Kong by participating in briefings for newly-arrived FDHs and cultural events organized by these CGs from time to time to promote among FDHs the important information on employment rights and ways to seek redress from various channels.

Implementation and effectiveness of the Code

12. While considering that the issuance of the Code would facilitate EAs' compliance and for ease of reference by FDHs and their employers, some

members expressed concern about the binding effect of the Code, in particular whether it could adequately address issues relating to money-lending activities of intermediaries and the unscrupulous operation of EAs. To enhance the deterrence effect against unscrupulous operation of EAs, some members called on the Administration to, in addition to the issuance of the Code, consider publishing the names of these EAs on LD's website and introducing a demerit points system for regulating EAs. Some other members, however, took the view that the Code should equally safeguard the interest of employers who suffered from the problem of job hopping of FDHs. There was a view that a probation period should be introduced for newly-recruited FDHs, so as to better protect the interests of both employers and employees.

13. The Administration advised that the Code defined the roles and obligations of an EA during its dealings with job-seekers and employers so that each party would know clearly what to expect from EAs. It applied to all licensed FDH EAs, irrespective of whether or not they were accredited EAs by the FDH-sending governments. It would also illustrate best practices for EAs and provide some sample forms for EAs, for example, sample service agreements and sample resume of FDH job-seekers. The Administration further advised that in relation to the implementation of the Code, LD would issue warning letters to EAs for rectification of irregularities detected, including but not limited to failing to meet the statutory requirements and/or standards set out in the Code. When making decision of issuing, revoking, or refusing to issue or renew EA licences, C for L would consider, amongst other relevant factors, whether a person was fit and proper to operate an EA in accordance with section 53(1)(c)(v) of EO based on the relevant track record (for example whether EAs had persistently failed to meet the requirements and/or standards set out in the Code, as well as records of failure to rectify upon warning of LD, etc.) of EAs and/or their capability of meeting such requirements/standards. As regards the suggestion of introducing a probation period for employment of FDHs, the Administration would need to examine the suggestion carefully to safeguard against adverse unintended consequences. In effect, the Administration would take into account whether EAs were involved in cases of FDHs' premature termination of contracts when considering their applications for licence renewal.

14. Some members pointed out that prospective employers of FDHs relied heavily on the information provided by EAs in deciding whether to employ the FDH concerned. They enquired about how the Code could help ensure EAs' provision of accurate information. In addition, these members considered that a complaint mechanism for handling disputes of FDH-related matters should be established.

15. The Administration advised that a "Sample Form for Profile of Foreign Domestic Helper" was provided in the Code. In drawing up the service agreement with employers, EAs had to provide a copy of the resume of the selected FDH to the prospective employer. EAs should also exercise due diligence in checking the accuracy of the information in the resume of the job-seekers as far as practicable (e.g. the accuracy and/or validity of the qualification and work experience set out therein). It was believed that such information would facilitate employers to make an informed decision when selecting FDHs and the service agreement/resume could serve as supporting documents for legal proceedings as necessary.

16. Some members considered that Chapter 4 of the Code i.e. standards which C for L expected from EAs should be included in the Bill, having regard to the difficulty in requiring EAs to observe the Code if it was not legally binding. The Administration explained that introducing the Code was an administrative measure. EAs were expected to comply with the Code during their operations, and as a result EAs' professional level and service quality should be enhanced. C for L could exercise his power under the relevant provisions of EO, if he was satisfied on reasonable grounds that the licensee concerned was not a fit and proper person to operate an EA, to refuse to issue or to renew, or even to revoke the EA's licence. The Code set out C for L's expectation over EAs. C for L would duly take into account EA's compliance with the Code in considering, among others, whether a particular EA was a fit and proper person to operate EA business. The Administration had proposed in the legislative amendments to specify C for L's power to promulgate the Code so as to provide a legal basis for the Code.

17. Members were also concerned about whether the Administration would consider conducting a review of the Code after its implementation for a period of time. The Administration advised that it would closely monitor the implementation of the Code and consider conducting a review, say 18 months after its implementation.

Proposal to impose heavier penalties on EAs

18. Members noted that the Administration also proposed to impose heavier penalties on EAs overcharging job-seekers or operating without a licence, and to extend the criminal liability of overcharging to responsible person(s) in addition to the licensee, to combat any exploitation of job-seekers by EAs which were not allowed under the laws. Specifically, the maximum penalty for EAs' operation without a licence would be increased from \$50,000 to \$350,000 and three years of imprisonment, with a view to attaining a more potent deterrent effect.

19. Members welcomed the legislative proposals to further strengthen the regulation of EAs and considered that the proposed increase in the penalty on EAs charging job-seekers excessive fees was appropriate.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
20 July 2017

**Relevant papers on the regulation of employment agencies
placing foreign domestic helpers**

Committee	Date of meeting	Paper
Panel on Manpower	19.4.2016 (Item V)	Agenda Minutes
Panel on Manpower	24.5.2016 (Item I)	Agenda Minutes
Panel on Manpower	23.1.2017	LC Paper No. CB(2)652/16-17(03)
Panel on Manpower	21.2.2017 (Item IV)	Agenda Minutes

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