



Labour Department (Headquarters)

勞工處 (總部)

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Tel. number 電話號碼 : 2852 3633
Fax number 傳真機號碼 : 3101 1018

By Email and Fax (2509 9055)

4 October 2017

Ms Joanne MAK
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Ms MAK,

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

I refer to your letter of 27 July 2017. The Government's response to the issues requested by Members of the Bills Committee on the Employment (Amendment) (No.2) Bill 2017 at its meeting on 21 July 2017 is provided at Annex.

Yours sincerely,

(Ms Queenie WONG)
for Commissioner for Labour

c.c. Department of Justice
(Attn: Mr Henry CHAN, Senior Government Counsel)

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

**The Government's Response to Issues as Requested by the Bills Committee
at its Meeting on 21 July 2017**

This paper responds to four issues as requested by Members of the Bills Committee on Employment (Amendment) (No. 2) Bill 2017 (the Bill) at its first meeting held on 21 July 2017.

(A) Modus operandi of employment agency

2. A Member enquired whether the job-placement services provided at virtual platforms (e.g. through websites or mobile applications) would be subject to same regulation for employment agencies (EAs) under Part XII of the Employment Ordinance (Cap. 57) (EO).

3. Section 50(1) of EO defines an EA as “a person who operates a business the purpose of which is –

- (a) to obtain employment for another person; or
- (b) to supply the labour of another person, to an employer,

whether or not the person who operates the business will derive any pecuniary or other material advantage from either the employer or such other person”. Accordingly, any business performing any of the aforementioned functions of an EA in Hong Kong, irrespective of its modus operandi (e.g. whether it is provided online virtually or at a physical business address) and the kinds of jobs involved, including casual worker jobs, and so long as the job-seeker and the prospective employer placed by the EA would have employer-employee relationship, would fall within the definition of EA under Part XII of EO and be subject to the regulation under that Part. However, by virtue of section 50(3)(f) of EO, Part XII does not apply to an EA which is carried on by a contractor/sub-contractor who employs any person on work for another person, i.e. deploying the contractor/sub-contractor's own staff on work for its business partners.

4. Pursuant to section 50(2), Part XII of EO applies to any EA “which is carried on in Hong Kong, whether the employment is to take place within or outside Hong Kong”. As long as the business of the EA is carried on in Hong Kong, the EA will be subject to the regulation of Part XII of EO.

(B) Meaning of “similar officer of the company” in the definition of “related person” under proposed section 50(1)

5. The Bill seeks to add the definition of “related person” to section 50(1). Under the proposed definition, a related person, in relation to a company, means a director, manager, secretary or other similar officer of the company. A Member requested the Government to clarify the meaning of “other similar officer of the company”.

6. By “other similar officer of the company”, we refer to officers of the company who exercise similar power as that of a director, manager or secretary of an EA, though these officers may not carry the same official title(s). The intention is to close the loophole by netting in those who are in effect in charge of an EA but, in order to evade legal responsibilities, hide behind the scene by not bearing the official title(s) of a director, manager or secretary.

(C) Legislative intent of including conviction of offence against the person of a child, young person or woman as a ground for refusing to issue or renew or revoking a licence

7. The existing section 53(1)(c)(ii) and the proposed section 53(1)(d)(i) provide a ground for the Commissioner for Labour (C for L) to refuse to issue or renew a licence, or revoke a licence, if the licensee, the person intending to be the licensee or a related person of the licensee has been convicted of certain offences, including an offence against the person of a child, young person or woman or an offence involving membership of a triad society, fraud, dishonesty or extortion, within the preceding five years. A Member enquired why only “woman”, instead of both “man” and “woman”, is included in these provisions and whether there would be any issue of discrimination.

8. As the existing section 53(1)(c)(ii) and the proposed section 53(1)(d)(i) apply equally to all persons subject to the regulation of Part XII of EO without distinction and irrespective of their sex, there is no unlawful discrimination on the ground of sex against such persons under Article 25 of the Basic Law¹ or

¹ Article 25 of the Basic Law provides that “All Hong Kong residents shall be equal before the law”.

Article 22 of the Hong Kong Bill of Rights². Moreover, the relevant provisions seek to regulate the business of EAs and not to restrict the employment opportunities of job-seekers on the basis of their sex. Hence, there is also no unlawful discrimination against job-seekers on the ground of their sex.

9. The existing section 53(1)(c)(ii) and the proposed section 53(1)(d)(i) seek to protect clients of EAs, particularly foreign domestic helpers (FDHs) who are mostly women, as well as children, young persons and women who are generally regarded as more vulnerable to abuse and exploitation, and thus require more care and protection. We consider that a person convicted of any of the offences mentioned in paragraph 7 should not be entrusted with the task of looking after the interests of FDHs (mostly female) as job-seekers as well as children, young persons and women in providing job-placement services. Moreover, these provisions also screen out persons who are convicted of an offence involving membership of a triad society, fraud, dishonesty or extortion within the preceding five years. Looking at the provisions holistically, the overall objective is to ensure that a licensee of an EA has a high standard of integrity and morality to protect job-seekers and relatively vulnerable groups from exploitation or abuse.

(D) Code of Practice for EAs

10. A Member expressed concern about how the Labour Department (LD) would enforce the Code of Practice for EAs (the Code) promulgated in January 2017 and enquired whether there are any sanctions on EA operators for non-compliance of the Code.

11. The Code was promulgated as an administrative measure to promote the professionalism and service quality of EAs. Chapter 3 of the Code recaps the salient legislative requirements relevant to the operation of EAs, while Chapter 4 sets out the minimum operation and management standards which C for L expects of EA licensees. Apart from complying with the statutory requirements (particularly those set out in Chapter 3) at all times, whether an EA licensee or an applicant can meet the standards set out in Chapter 4 is also an important factor which C for L will take into account when considering if a person is a fit and proper person to operate an EA in the course of deciding whether to issue or renew, or to revoke the EA's licence.

² Article 22 of the Hong Kong Bill of Rights provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

12. In relation to the implementation of the Code, LD has drawn up an internal enforcement guidelines for frontline officers to follow. Generally speaking and without prejudice to C for L's power in considering all relevant facts in enforcing the Code, if the EA has contravened those requirements of the Code that are less severe / more technical in nature (e.g. failing to distribute the information packs to employers/job-seekers, failing to ask the employer/job-seeker to sign the acknowledgement receipt, etc.), LD will issue warnings to the EA concerned upon the first instance and request rectification. However, if the EA has contravened those requirements which are more severe in nature (e.g. being involved in job-seekers' financial arrangements such as arranging FDHs to take up loans for repaying agency fees, failing to draw up service agreements, etc.), or if the EA concerned has persistently failed to meet the requirements and/or standards set out in the Code, or it has a track record of failing to rectify upon warning of LD, etc., C for L may question whether the EA licensee is not a fit and proper person to operate an EA and thus may consider whether he should revoke or refuse to renew the EA licence under section 53(1) of EO. Since the promulgation of the Code, 12 written warnings have been issued, and an EA's licence has been revoked for keeping passports of FDHs without consent.

13. Under the Bill, the proposed section 62A(1) will provide a clear legal basis for C for L to issue codes of practice for the operation, management or control of EAs. The proposed provisions under section 53(1)(c)(iva), (d)(iii) and (e)(ii) make it clear that non-compliance with a code of practice by the licensee and/or associate(s) will be a ground upon which C for L may refuse to issue or renew, or revoke an EA licence.

Labour and Welfare Bureau
Labour Department
October 2017