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勞工處 (總部)

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Legislative Council Secretariat  
(Attn: Mr Alvin CHUI Ho-yin  
Assistant Legal Adviser  
Legal Services Division)  
Legislative Council Complex  
1 Legislative Council Road  
Central  
Hong Kong

Dear Mr CHUI,

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

I refer to your letter of 13 July 2017 on the Employment (Amendment) (No. 2) Bill 2017 (the Bill). Our response to your questions is set out in the ensuing paragraphs.

Long Title of the Bill – Section 51(1) of the Employment Ordinance (Cap. 57)

Question 1

2. As stated in the long title, one of the purposes of the Bill is “to make certain existing offences applicable to persons associated with the holder of a licence to operate an employment agency and certain other persons”. Hence, clause 6 of the Bill amends section 57 of Cap. 57 to make it an offence for an associate (as defined in the new definition to be added to section 50(1)) of a licensee to overcharge job-seekers.

3. Another purpose of the Bill, as stated in the long title, is “to amend the grounds for refusing to issue or renew, or for revoking, [a licence to operate an employment agency (EA)]”. Hence, clause 5 of the Bill amends section 53 to add certain new grounds relating to the related persons (as defined in the new definition to be added to section 50(1)) and employees of the licensee. Related persons and employees are within the meaning of “associate”.

4. The proposed amendment to section 51(1) under clause 4 of the Bill, which clarifies that an associate of the licensee may operate, manage or assist in the management of the relevant EA, is therefore incidental to or connected with the above purposes expressly stated in the long title.

#### Long Title of the Bill – Offences

##### Question 2

5. The offences that are to be expanded to cover an associate of the licensee or a person purporting to act as a licensee or an associate are: (a) the offence under the proposed section 60(7) (contravention of the proposed section 57(1)(a)); and (b) the offence under the proposed section 60(8) (contravention of the proposed section 57(1)(b) or (c)).

#### Clause 4 of the Bill – Section 51(1) of Cap. 57: unlicensed associate

##### Question 3

6. According to the policy intent for the proposed amendment to section 51(1) as reflected in its drafting, an associate of a licensee is only allowed to operate, manage or assist in the management of the EA to which that licensee’s licence relates. In other words, the associate is not allowed to operate, manage or assist in the management of another EA (whether it is licensed or not) only because he/she is an associate of a licensee. An associate contravening that requirement is liable to the offence under the proposed section 60(6) and subject to a maximum fine of \$350,000 and imprisonment for three years. As such, an associate is only operating the EA on behalf / under the authorization of the licensee.

7. Our above approach is comparable to that of other licensing regimes. For example, under the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459), it is stipulated that any person who operates, keeps, manages or otherwise has control of a residential care home commits an offence unless a licence or certificate of exemption has been issued in respect of the residential care home<sup>1</sup>. In other words, a person, even though not being the holder of the licence, is allowed to operate, keep, manage or has control of a residential care home if a licence has been issued in respect of the residential care home. Another example is the Amusement Game Centres Ordinance (Cap. 435) under which any person can lawfully operate, keep, manage or otherwise control an amusement game centre provided that a valid licence has been issued for the operation of the centre<sup>2</sup>. The person concerned does not necessarily have to be holder of the licence.

Clause 4 of the Bill – Section 51(1) of Cap. 57: licence and certificate

Question 4

8. The proposed section 51(1) clearly indicates that the licence which a person holds must be the one that is valid for the time being, as law is always speaking. We thus consider it not necessary to add “for the time being in force”.

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<sup>1</sup> Section 6 of the Residential Care Homes (Elderly Persons) Ordinance stipulates that –

- (1) Any person who on any occasion operates, keeps, manages or otherwise has control of a residential care home in respect of which neither of the conditions indicated in subsection (2) has been satisfied commits an offence and is liable to a fine at level 6 and imprisonment for 2 years and to a fine of \$10,000 for each day during which the offence continues.
- (2) The conditions referred to in subsection (1) are -
  - (a) that a certificate of exemption has been issued under section 7(2) or renewed under section 7(5) in respect of the residential care home and is for the time being in force; or
  - (b) that a licence has been issued under section 8(2)(a) or renewed under section 9 in respect of the residential care home and is for the time being in force.

<sup>2</sup> Section 4 of the Amusement Game Centres Ordinance stipulates that –

- (1) Any person who on any occasion —
  - (a) operates, keeps, manages or otherwise has control of, an amusement game centre in regard to the operation of which a licence is not in force; or
  - (b) in any capacity assists, either directly or indirectly, in the operation, keeping, management or other control of an amusement game centre in regard to the operation of which a licence is not in force,commits an offence.

Clause 9 of the Bill – Regulation 7 of the Employment Agency Regulations (Cap. 57A)

Question 5

9. Pursuant to the existing regulation 7, a corporate licensee is required to appoint a person (hereinafter referred to as “nominated operator”) to operate, manage or assist in the management of the EA. A licensee who contravenes regulation 7 is liable to a fine at level 3 under regulation 17(3). The nominated operator must be an associate of the company because, under the proposed section 51(1) of Cap. 57, apart from the holder of a licence or certificate of exemption, only an associate is allowed to operate, manage or assist in the management of an EA. We thus consider the proposed amendment to regulation 7 a technical one that does not make any material difference to existing practice nor impose a separate and distinct obligation on a corporate licensee.

10. As regards other associates who are not the nominated operators, they can still operate, manage or assist in the management of the EA under the proposed section 51(1).

Clause 5 of the Bill – Section 53(1)(d) and (e) of Cap. 57

Question 6

11. Section 53(1) sets out the factors that the Commissioner for Labour (C for L) may take into account in considering whether to refuse to issue or renew a licence or revoke a licence of an EA, including whether the licensee or intending licensee is an undischarged bankrupt (section 53(1)(c)(i)) or has knowingly furnished false or misleading information to C for L in connection with the application for the issue or renewal of the licence (section 53(1)(c)(iii)). The reasons for taking into account these two factors are that the financial condition of the licensee or intending licensee may affect the operation of an EA, and that a dishonest person should not be considered a suitable person for holding a licence for an EA.

12. In the case of a related person or an individual employed by the licensee or intending licensee (i.e. the proposed section 53(1)(d) and (e)), as the licensee is the one who is ultimately accountable for the operation of the EA, we consider that whether such persons (i.e. the related person or individual employed) are undischarged bankrupts would not necessarily affect the operation of the EA and hence it would be out-of-proportion if C for L refuses to issue or renew a licence or revoke a licence solely on the basis that such persons are undischarged bankrupts.

13. As regards the furnishing of false information, since it is the responsibility of the licensee to furnish information to C for L in connection with the licensee's application for the issue or renewal of a licence, we consider this consideration not relevant in the case of a related person or an individual employed by the licensee or intending licensee.

#### Question 7

14. Under section 53(1)(c)(ii), if a licensee has, within the preceding five years, been convicted of an offence against the person of a child, young person or woman or of an offence involving membership of a triad society, fraud, dishonesty or extortion, C for L may consider to refuse to issue or renew a licence or revoke a licence.

15. Nevertheless, a person who has committed the aforementioned offences may exercise control over an EA as a related person (e.g. performing management function) of a licensee, and the related person could, for example, be the licensee's family member. In such a case, the person could in effect exercise control over an EA by hiding behind the scene. To plug the loophole, we therefore propose under the new section 53(1)(d)(i) that C for L may refuse to issue or renew a licence or revoke a licence in the case where a related person has been convicted of an offence mentioned in the preceding paragraph.

16. In the case of an individual employee, it is considered less likely for such a person to exercise control over the operation of an EA. With due consideration to the proportionality (e.g. whether it is fair to the licensee for the licensee's application to be refused on the ground that the licensee's employee has committed an offence of dishonesty before), we therefore do not include this factor of consideration under the proposed section 53(1)(e).

#### Clause 6 of the Bill – Section 57 of Cap. 57

#### Question 8

17. In our experience in handling prosecution cases involving overcharging, the related persons of an EA, such as individual directors of a company, may sometimes have a decisive say over the amount of commission charged. In some cases, they may even instruct their staff to deposit the commission charged to the bank account of the company or the director, although they may not necessarily participate in the daily operation of the EA. Our field experience also reveals that the licensee may conveniently evade responsibility by claiming that he/she was not involved in the daily operation of

the EA and thus was not in the know of the overcharging acts, and prosecution could not be instigated under such circumstances. To effectively protect job-seekers from being overcharged, we consider, depending on individual case merits, if there is sufficient evidence to show that the related person is directly involved in overcharging commission, it should not be necessary to further prove their involvement in daily operation of the concerned EA.

18. Under an approach similar to that of section 20 of the Trade Descriptions Ordinance (Cap. 362) proposed in your question (hereinafter referred to as “proposed approach”), the prosecution is required to prove that the offence has been committed by the body corporate, i.e. the corporate licensee in the context of Part XII of Cap. 57 on regulating EAs, in the first place before considering the criminal liability of the director. Thus, the proposed approach would not be able to close the loophole mentioned in the preceding paragraph. Further, the proposed approach requires the prosecution to prove consent, connivance or neglect of the director involved. Most of the job-seekers being overcharged are foreign domestic helpers, who are usually not familiar with the laws and legislation in Hong Kong, and most of the time they are only received by the frontline staff of an EA. It would be unlikely that the victim would know or be able to provide information on whether the overcharging was committed with the consent or connivance or was attributable to the neglect of the director. Given the above, we do not adopt the proposed approach for section 57.

#### Question 9

19. At present, only a holder of an EA licence could be held liable to the overcharging offence under the existing section 57(a), but not other persons involved in the operation of the EA who charge job-seekers excessive fees. For example, if the licensee is a limited company, even if there is sufficient evidence showing that its directors or staff members have overcharged job-seekers, the Labour Department (LD) could only prosecute the limited company. If a job-seeker was overcharged by a person involved in the operation of the EA who is not the licensee, the licensee may argue that the fee was not actually received by the licensee, and LD may not be able to prosecute owing to the limitations of the existing provision. We therefore propose to expand the scope of the offence of overcharging to cover the associates of a licensee, or a person purporting to act as a licensee or associate, under the proposed section 57(1)(a).

20. Concerning the two scenarios mentioned in Question 9, LD would conduct detailed investigation before considering whether to proceed with prosecution. In considering whether to prosecute a person involved in overcharging, LD would carefully consider all relevant facts of each case, such

as ascertaining whether such person is the end receiver of the overcharged commission. Such person may rely upon the common law defence by showing that he/she had an honest and reasonable belief in a state of facts which, if they existed, would make his/her act innocent. LD would also strictly follow established prosecution procedures, including consulting the Department of Justice, when considering whether to proceed with prosecution of a case. Given such, we consider that the proposed formulation of section 57(1) would afford sufficient protection to an innocent employee.

Clause 10 of the Bill – Regulation 10(2) of Cap. 57A

Question 10

21. The proposed amendment to regulation 10(2) is a technical one to align with the wording adopted in section 62(g) and (h) of Cap. 57 and Part II of the Second Schedule to Cap. 57A, which refer to commission/fee received by “an employment agency”. As the policy intent is to stipulate that an EA as a whole must not overcharge job-seekers, regardless of whether the commission is received by a licensee, an associate or a person purporting to act as the licensee or associate, we have proposed to adopt “an employment agency” in regulation 10(2).

22. Since a person who contravenes the proposed section 57(1) would commit the offence(s) stipulated in the proposed section 60(7) and/or (8), the Bill has set out clearly those persons who will be caught by the proposed section 57(1), i.e. “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”, so that such persons would be aware of their legal responsibilities.

Yours sincerely,



( Ms Queenie WONG )  
for Commissioner for Labour

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