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By Email and Fax (2509 9055)

15 November 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 16 October 2017. The Government's overall response to the views and issues requested by Members of the Bills Committee on the Employment (Amendment) (No.2) Bill 2017 at its meeting on 13 October 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)

Annex

Bills Committee on Employment (Amendment) (No. 2) Bill 2017
The Government's Overall Response to Views and Issues Requested by the Bills Committee at its Meeting on 13 October 2017

This paper provides an overall response to the views and issues requested by Members of the Bills Committee on the Employment (Amendment) (No.2) Bill 2017 (the Bill) at the meeting held on 13 October 2017.

(A) Foreign domestic helpers (FDHs) being arranged by Hong Kong employment agencies (EAs) to take out loans from financial institutions and make repayment of loans to EAs in their home countries

2. A Member enquired about the possibility of Hong Kong EAs arranging FDHs to take out loans from financial institutions and to repay loans to EAs in their home countries, and making arrangements with the latter EAs on splitting the repayment, so as to evade the requirement under the Employment Ordinance (Cap. 57) (EO) that EAs cannot receive from a job-seeker any amount of payment that exceeds the prescribed commission. The Member asked how the Government could plug this loophole.

3. According to section 57(a) of Part XII of the EO, as well as Regulation 10 and Part II of Schedule 2 of the Employment Agencies Regulation (EAR) (Cap. 57A), the maximum commission which an EA may receive from job-seeker shall not exceed 10% of the first month's wages of the job-seeker upon successful placement (the prescribed commission). Apart from the prescribed commission, an EA must not directly or indirectly receive from a job-seeker any reward or payment of any kind on account of having obtained, or in connection with obtaining employment for that person. In the proposed section 60(7) of the Bill, the maximum penalty for contravening the abovementioned provisions would be raised from the current level of a fine of $50,000 to a fine of $350,000 and imprisonment for three years. Although Part XII of the EO only applies to EAs carried on in Hong Kong, if there is sufficient evidence indicating that a Hong Kong EA has, through an overseas EA, received from job-seekers (including FDHs) a payment on account of having obtained employment for such job-seekers, and that the amount of payment concerned exceeds the prescribed commission, the Labour Department (LD) will conduct prosecution in accordance with established procedures.

4. In addition, paragraph 4.12 of the Code of Practice for EAs (the Code) expressly states that EAs should not be directly or indirectly involved in the financial affairs of job-seekers, and should not advise, arrange, encourage or force job-seekers to take out loans from any financial institutions or individuals. If it is found that an EA contravenes the requirements or standards in the Code, the LD would issue written warnings or even revoke the licence of the EA. Since the implementation of the Code, the LD has issued written warnings to two EAs suspected of involving in the financial affairs of job-seekers. Although no further actions could be taken as the relevant job-seekers could not be contacted to obtain sufficient evidence, the LD will continue to monitor them closely and will consider revoking the licence of the relevant EAs if there is further finding.

5. Apart from rigorous enforcement, it is equally important to raise the awareness of FDHs through promotion and education. The LD has thus through various channels reminded FDHs not to sign any documents or agreements etc. that they do not understand with any person or organisation, and not to take out loans from financial institutions for making payments to EAs. These channels include publicity publications (such as the "Dos and Don'ts" leaflet for FDHs, employers and EAs concerning the employment of FDHs) and the dedicated websites for FDHs and for EAs. These messages have also been disseminated to FDHs through the Consulates General (CGs) of FDH-sending countries.

(B) Suggestion to change the summary offence of overcharging into an indictable offence

6. Members suggested the Government to consider changing the summary offence of overcharging into an indictable offence, so as to get rid of the six-month time limit for making a complaint or laying information, and to allow complainants and the LD sufficient time to file complaints and to conduct prosecution.

7. According to section 26 of Magistrates Ordinance (Cap. 227), "In any case of an offence, other than an indictable offence, where no time is limited by any enactment for making any complaint or laying any information in respect of such offence, such complaint shall be made or such information laid within 6 months from the time when the matter of such complaint or information respectively arose." There is no corresponding time limit for indictable offences.

8. The offence in the proposed section 60(7) of the Bill (i.e. the overcharging offence) is not an indictable offence. There is also no specification on the time limit for making a complaint or laying information for this offence. Hence, in respect of this offence, the complaint shall be made or information laid within six months from the time when the matter of such complaint or information respectively arose.

9. Effective enforcement of the relevant legislation and successful prosecution of unlawful EAs would depend on whether there is sufficient evidence to satisfy the Court that the EA concerned has, beyond any reasonable doubt, committed the relevant offence. Generally speaking, it would be more likely that evidence would get lost and the memory of the witness on the case would fade with the lapse of time. According to our enforcement experience, cases concerning overcharging of job-seekers (especially FDHs) rely heavily on the witness's statement. It would facilitate the successful prosecution of law-defying EAs if the victims can file the complaint early so that relevant investigation and evidence collection can commence as soon as possible. Moreover, our experience also reflects that the person overcharging commission from FDHs may not necessarily be the licensee. The licensee could often evade conviction by pledging innocence under the existing legislation. In order to plug the loophole and to increase the deterrent effect, we have proposed in the Bill to expand the scope of the overcharging offence to associates of the licensee.

10. Having regard to the views of Members, we have been reviewing the relevant issues arising from Members' suggestion, including, among others, whether it is appropriate to change the summary offence of overcharging into an indictable offence, as well as the implications to the prosecution procedures and evidence collection, in considering whether there is a need to extend or remove the time limit for the overcharging offence.

(C) The legal basis for providing for a three-year imprisonment term under the summary offence of overcharging

11. Under the proposed section 60(7) of the Bill, the maximum penalty for the offence of contravening section 57(1)(a) (i.e. the prohibited act of overcharging, which is a summary offence) would be increased from the current level of a fine of $50,000 to a fine of $350,000 and imprisonment for three years. A Member asked about the legal basis for providing for a three-year imprisonment term under this summary offence.

12. Summary offences are heard at Magistrates' Courts under the existing judicial system. Since there is no provision in Magistrates Ordinance that expressly provides for the maximum penalties that a magistrate may impose on summary offences, the maximum penalties that a magistrate may impose on individual offences is subject to the maximum penalties prescribed in the relevant provisions in individual ordinances[1]. In fact, the offences relating to payment of wages under section 63C of the EO are also summary offences, and the maximum penalties concerned are also at the same level of a fine of $350,000 and imprisonment for three years.

(D) The proportion of EAs involving in arranging local workers and workers from the Mainland to work in residential care homes for the elderly (RCHEs); and intermediary companies arranging carers to provide services to RCHEs by false self-employment and receiving "kick-backs"

13. A Member enquired about the proportion of EAs involving in arranging local workers and workers from the Mainland to work in RCHEs; and enquired how the Government would address the situation where some intermediary companies exploit carers and deprive them of the labour rights and benefits by arranging the latter to provide services to RCHEs by way of false self-employment; or deduct wages from these employees as "kick-backs".

14. Under existing legislation, any persons who obtain employment for another person or supply the labour of another person must obtain an EA licence. The legislation does not provide for different types of licences according to the service types of the EAs (such as EAs for professionals/managers (the so-called "headhunters") or companies providing job-placement for general local workers). As regards the proportion of EAs involving in arranging local and Mainland workers to work in RCHEs, the LD does not keep such statistical breakdown.

15. As for whether an intermediary company providing care services to clients is regulated by the abovementioned legislation, it would depend on the relationship between the carer and the client. If the two have an employee-employer relationship, then the relevant intermediary company would fall under the definition of an EA and is regulated by Part XII of the EO. If the carer provides care services to the client by way of self-employment, then the relevant referral does not fall under the scope of Part XII of the EO. The amount of commission or service fee and receiving arrangement between the intermediary

[1] For example, the maximum term of imprisonment provided for under sections 11 and 74 of the Private Columbaria Ordinance (Cap. 630) is three years.

company and the carer should be worked out in accordance with the service agreement or contract entered into between the two parties.

16. If there is an actual employer-employee relationship between the intermediary company and the carer, i.e. the intermediary company recruits the employees on its own and dispatches them to provide services for the client, then such dispatch does not fall under the scope of Part XII of the EO. However, if the intermediary company is the employer of the person being dispatched to work, then the former has to fulfill its obligation to the carer as employer under the relevant legislation, including the requirement of timely and full payment of wages under the EO. Otherwise, the intermediary company would contravene the law and is liable to a maximum penalty of a fine of $350,000 and imprisonment for three years. Whether a worker is actually an employee or self-employed person is determined by the facts, but not purely by the name of the post or the contract or by the allegations of any one party. It is necessary to take into account the actual circumstances surrounding the provision of services, as well as all relevant details of individual cases. In case of doubt, the person concerned may seek the advice and assistance from the Labour Relations Division of the LD.

17. In order to deter employers who intend to evade their obligations to their employees in terms of labour rights and benefits, the LD has adopted a three-pronged approach to combat false self-employment, including stepping up promotional and publicity efforts, providing convenient consultation and voluntary conciliation service, and taking enforcement actions in cases involving the deprivation of rights and benefits of employees by way of false self-employment. Paragraph 4.13 of the Code also states clearly that EAs should explain clearly to a job-seeker the nature of the job, including whether or not the job-seeker will be engaged as an employee with the organisation that he/she is placed, be employed as the EA's direct employee, or a self-employed person/contractor. EAs should inform the job-seekers about the difference between an employee and a self-employed person/contractor, in particular the rights and benefits that he/she may not enjoy in the latter case. EAs should not change or encourage employers to change the status of their employees to become self-employed persons/contractors for the reasons of evading their obligations under the EO, the Employees' Compensation Ordinance and any relevant laws. In addition, the LD's labour inspectors would conduct surprise inspections in workplaces of various industries to uncover wage and other offences. If an employee suspects himself/herself being deprived of his/her labour rights and benefits due to false self-employment, he/she may report to the LD. If there is sufficient evidence, the LD will proceed with prosecution against the law-defying employer (including the intermediary company which has been confirmed as the employer). If an intermediary company is found out

to be an EA and has overcharged commission, the LD will conduct prosecution in accordance with Part XII of the EO.

18. As for imported workers working in Hong Kong under the Supplementary Labour Scheme (SLS), they must sign with their employers the standard employment contract (SEC) for SLS. The imported worker must be directly employed by the employer specified in the SEC for the whole period he/she is permitted to work in Hong Kong, and he/she is not allowed to change employer or job. In addition, the EA-concerned must abide by the regulations of Part XII of the EO and not to charge any individual imported worker a commission that exceeds 10% of the worker's first month's wages.

Labour and Welfare Bureau
Labour Department
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