

Legislative Council Panel on Economic Development
Motion passed under Agenda Item IV on “Travel Industry Bill”
at the Meeting on 23 January 2017
Government’s Response

Purpose

At the meeting of the Panel on 23 January 2017, a motion moved by Hon Luk Chung-hung and amended by Hon Yiu Si-wing was passed under Agenda Item IV on “Travel Industry Bill (the Bill)” (at Annex). This paper sets out the Government’s response.

Co-operation Relationship between Travel Agents and Front-line Practitioners

2. The Government understands that the travel trade holds different views on whether the co-operation relationship between travel agents and tourist guides as well as tour escorts should be regulated through the Bill, and has yet to reach a consensus. As Hong Kong is a free market and there is no legislation mandating for any particular sector that all practitioners providing services must be employees, we consider it inappropriate to mandate the co-operation relationship between travel agents and tourist guides as well as tour escorts to be an employer-employee one across the board through the Bill.

3. Indeed, as in the case of other sectors, to avoid any misunderstanding or dispute, the most important thing is that travel agents and tourist guides or tour escorts, before entering into co-operation, should understand clearly their mode of co-operation according to their intention, and that the tourist guides or tour escorts should identify their identities as employees or self-employed persons, to safeguard mutual rights and benefits. In differentiating the two identities, all relevant factors of the case should be taken into account. The court has set out different factors for distinguishing an employee from a self-employed person in past cases¹.

¹ The common important factors include: control over work procedures, working time and method; ownership and provision of work equipment, tools and materials; whether the person is carrying on business on his own account with investment and management responsibilities; whether the person is properly regarded as part of the employer’s organisation; whether the person is free to hire helpers to assist in the work; bearing of financial risk over business (e.g. any prospect of profit or risk of loss); responsibilities in insurance and tax; traditional structure and practices of the trade or profession concerned; and other factors that the court considers as relevant.

4. On the other hand, a travel agent should cautiously assess the risks involved before entering into a contract to engage a tourist guide or tour escort as a self-employed person. Even though the tourist guide or tour escort is called a self-employed person or has been labelled as a self-employed person in the contract, if in essence there exists an employer-employee relationship between the travel agent and tourist guide or tour escort, the travel agent is still required to fulfil its responsibilities under the relevant legislation, including the Employment Ordinance (Chapter 57), Employees' Compensation Ordinance (Chapter 282), etc., by paying statutory benefits retroactively to the tourist guide or tour escort who is falsely labelled as a self-employed person. Furthermore, the travel agent may be liable to criminal sanctions under the relevant legislation.

5. We note that some members of the travel trade are concerned about the issue of "false self-employment". The Labour Department has been educating the public and employers on the differences, pros and cons as well as legal rights and obligations of the two contractual relationships of employment and self-employment. It has also adopted different measures to deter the malpractices of evading liabilities by purposely and falsely labelling an employee as a self-employed person. Such measures include providing consultation and conciliation service to those involved in "false self-employment" disputes, and taking enforcement actions against any employers who fail to fulfil their responsibilities under labour legislation.

6. We understand that tourist guides and tour escorts, as front-line practitioners, hope that the new regulatory regime can enhance the protection of their rights and interests. We have proposed that the Travel Industry Authority should introduce administrative measures to require that a travel agent must sign a service agreement with its tourist guide(s) or tour escort(s) before entering into co-operation, whereby the travel agent (a) must pay service remuneration to the tourist guide(s) or tour escort(s); (b) must not require its tourist guide(s) or tour escort(s) to bear or unreasonably advance any payment for a tour group received; and (c) must not delay the reimbursement for any advance payment made by its tourist guide(s) or tour escort(s). A travel agent contravening any of the administrative measures will also be subject to a disciplinary order.

Tourism Commission
Commerce and Economic Development Bureau
June 2017

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That, given the seriousness of the “false self-employment” problem among tourist guides and tour escorts in the travel industry, practitioners have long been unable to enjoy their legitimate rights as employees, and they are worried that they will be entrusted with responsibility but not given due protection under the Travel Industry Ordinance in future and they have to act without the proper status, this Panel urges the Administration, upon introduction of the Travel Industry Bill into the Legislative Council, to clearly regulate the employment relationships between travel agents and tourist guides, and between travel agents and tour escorts, so as to ensure that employers and employees are entitled to their legitimate rights, including labour insurance coverage.