

For information on
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Legislative Council Panel on Manpower

Strengthening the regulation of employment agencies

Purpose

This paper briefs members on the initiatives taken by the Labour Department (LD) to strengthen the regulation of employment agencies (EAs), including the implementation of the Code of Practice for EAs (the Code); the publicity and educational efforts in deepening the understanding of job-seekers and employers about their employment rights and obligations, and the points to note while engaging the service of EAs; as well as the proposal for introducing legislative amendments to provide a legal basis for the Code, 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 are not allowed under the laws.

Current regulations of EAs

2. EAs in Hong Kong are regulated by Part XII of the Employment Ordinance (EO) (Cap.57) and the Employment Agency Regulations (EAR) (Cap. 57A). As provided under these laws, EAs must obtain a licence or a Certificate of Exemption (CoE) from the Commissioner for Labour (C for L), and should not charge job-seekers excessive commission. Up to end-January 2017, there were 2 988 licensed EAs in Hong Kong, amongst which 1 397 provided placement services of foreign domestic helpers (FDHs) (hereinafter referred to as “FDH EAs”).

3. The Employment Agencies Administration (EAA) of the LD is responsible for enforcing the abovementioned laws. It carries out enforcement actions including regular and surprise inspections to EAs, complaint investigations and prosecuting against law-defying EAs, etc., to ensure EAs are operating in compliance with the laws. LD has all along been taking rigorous actions against violations of EO and EAR by EAs. Upon receipt of complaints, it will initiate investigation immediately. Prosecution will be instituted accordingly when there is sufficient evidence. C for L will also consider revoking or refusing to renew the licence of the EA-concerned.

4. EAA¹ has stepped up the inspections of EAs since 2014 by increasing the annual inspection target from 1 300 to 1 800 inspections per year (an increase of 38%). In 2015 and 2016, EAA conducted a total of 1 803 and 1 816 inspections to EAs respectively, amongst which 1 348 and 1 417 were targeted at FDH EAs.

5. In 2015, LD successfully prosecuted 12 EAs, with 11 were against FDH EAs. Amongst these cases, nine were convicted of overcharging FDHs. For 2016, a total of eight EAs (which were all FDH EAs) were successfully prosecuted. Amongst these cases, five were convicted of overcharging FDH commission. In 2015 and 2016, C for L revoked or refused to renew the licenses of five EAs each year, all involving FDH EAs, on the grounds that the licensee was convicted of overcharging commission from FDHs and unlicensed operation before a license was issued, as well as C for L had reasonable grounds to satisfy that the licensee was not a fit and proper person to operate an EA.

Implementation of the Code

6. To promote professionalism and quality service of the industry, C for L decided to promulgate a Code for EAs to follow during operations. LD conducted a consultation on the draft Code for around two months in April to June 2016 to collect the views of various stakeholders, including consulting this Panel on 19 April 2016 and its special meeting on 24 May 2016. After carefully examining the views received during the consultation and refining the Code, LD promulgated the Code on 13 January this year.

7. The Code highlights the salient legislative requirements that EA operators must follow, including, inter alia, EO, EAR, the Immigration Ordinance and the Personal Data (Privacy) Ordinance etc.. EAs should ensure that their operations are in full compliance with all laws of Hong Kong at all times. The Code also sets out the minimum standards which C for L expects of EA licensees in their operations, some of which are particularly relevant to EAs providing placement service of FDHs. For example, EAs should maintain transparency in business operations, draw up service agreements with job-seekers and with employers, provide payment receipts, promoting

¹ There are currently 17 Labour Officer (LO) grade officers (including three officers who are on-loan temporarily from other divisions to handle the ad-hoc tasks of the drafting of the Code and making preparation for its introduction) in the EAA. They are responsible for enforcing Part XII of EO and EAR, including handling of licensing matters, conducting inspections to EAs, investigating into complaints, prosecutions, as well as carrying out other duties such as implementing the Code and monitoring the effectiveness, conducting relevant publicity and educational efforts, as well as handling the administrative work, etc..

job-seekers and employers' awareness of their rights and obligations, and avoid getting involved in financial affairs of job-seekers.

8. EA operators must comply with the statutory requirements and standards set out in the Code. This is one of the important factors that C for L will take into account when considering whether the licensee is a fit and proper person to operate an EA under section 53(1)(c)(v) of EO. EAA will conduct inspections to EA regularly, and will 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. Furthermore, C for L may exercise his power under section 53(1)(c)(v), if satisfied that the licensee concerned is 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.

9. LD has already sent a copy of the Code to all EAs and advised them to comply with the statutory requirements and standards therein. The Code can be downloaded at LD's webpage, or obtained at offices of LD and the Home Affairs Enquiry Centres of the Home Affairs Department for free. To enhance public awareness of the Code, LD has also put in place a series of publicity and promotional efforts, including issuing press release, broadcasting radio announcement in public interests (API), producing posters and web banners, etc.. LD shall organize briefings for EAs to help EA operators and their staff to familiarise with the content of the Code.

Other publicity and educational efforts in relation to employment of FDHs

10. LD has all along been running a series of publicity and educational efforts in promoting job-seekers' (including FDHs') and employers' awareness of their employment rights and obligations, and points to note when engaging the service of EAs. In April 2016, LD published a simple and easy to understand leaflet on "Do's and Don'ts leaflet for FDHs, employers and EAs", to facilitate FDHs and FDH employers' understanding on their rights and obligations under EO and the Standard Employment Contract (SEC), what kind of services EAs should offer to FDHs and their employers, and the practices which EAs should avoid. In addition, LD launched in April last year a dedicated website on employment of FDHs (www.fdh.labour.gov.hk), which contains information and useful links related to the employment of FDHs. Publications and publicity videos related to the employment rights of FDHs are also uploaded to the website to help FDHs, FDH employers and the public access to the relevant policies and labour laws.

11. To help the public (including employers and job-seekers) gain access to information relating to regulation of EAs in Hong Kong, LD has launched another one-stop platform about EAs - Employment Agencies Portal (the EA Portal) (www.eaa.labour.gov.hk) since 13 January this year. The EA Portal provides a user-friendly search function so that the public can easily check if an EA has a valid licence. They can search for EAs by using different criteria such as district and placement type. The EA Portal also contains useful reference materials and publications, including the Code and the press releases issued upon cases of successful prosecutions, revocations or refusal of renewal of EA licences, etc..

12. Employers and job-seekers are encouraged to browse the EA Portal to understand their rights and obligations before engaging an EA or making any payment to EAs. Operators and staff of EA should also refer to the corresponding parts of the EA Portal for the salient legislative requirements that they must follow, as well as the various procedures in relation to making EA license applications. LD will update the EA Portal from time to time to provide the public with the latest information related to EAs.

Proposed legislative amendments

13. In addition to promulgating the Code and continue with the various publicity efforts, we propose to take out legislative amendments to further strengthen the regulation of EAs. The legislative proposal targets on four aspects, including (a) to provide legal basis for the Code; (b) to impose more potent deterrence against overcharging job-seekers commission by EAs; (c) to impose more potent deterrence against unlicensed operation of EAs; and (d) to extend the criminal liability of the offence of overcharging job-seekers commission to responsible person(s) in addition to the licensee. Details are set out below: -

(a) Providing legal basis for the Code

14. The Code is an administrative measure for the industry to follow during their operations, thereby promoting EAs' professional level and service quality. We now propose to provide a legal basis for the Code by amending EO. This will facilitate the effective implementation of the Code. Specifically, we propose to provide in the EO that C for L may issue from time to time Codes of Practice on EA operations for those operators to follow.

(b) Imposing heavier penalties on EAs for overcharging job-seekers commission

15. Section 57(a) of EO stipulates that EA licensee shall not, directly or indirectly, receive from any person on account of having obtained, or in connection with obtaining or seeking to obtain, employment for that person any reward of any kind, or any payment or other advantage in respect of expenses or otherwise, except the prescribed commission. Regulation 10 and Part II of the Second Schedule of EAR provides that, the maximum commission which may be received by an EA from each person applying to the EA for employment, work or contract or hire of his services shall be an amount not exceeding a sum equal to 10% of the first month's wages received by such person after he has been placed in employment by the EA. EAs charging job-seekers excessive commission is an offence, and shall be liable to a maximum penalty of a fine of HK\$50,000 under section 60(7) of EO.

16. We note that there is generally a concern in the community about EAs (especially FDH EAs) overcharging commission from job-seekers, and the majority of the members of the public recognise the need of protecting the over 350 000 FDHs in Hong Kong. Without any support from families and peers, or because of the language barriers (in particular for FDHs who first come to work in Hong Kong), FDHs may not fully appreciate their statutory rights and benefits, e.g., EAs are not allowed to charge them an amount which exceeds 10% of their first month's salary. To afford better protection to job-seekers (including local job-seekers and FDHs) to prevent them from being exploited, we propose to impose heavier penalty on EAs charging job-seekers excessive fees, from a maximum fine of HK\$50,000 at present to a maximum fine of HK\$350,000 and an imprisonment of 3 years, so as to generate greater deterrence.

(c) Imposing heavier penalties on EAs for unlicensed operations

17. Pursuant to section 51(1) of EO, any person who wishes to operate an EA² in Hong Kong is required to obtain a licence or CoE from C for L beforehand. Operating an EA without a licence is an offence and shall be liable to a penalty of maximum fine of HK\$50,000 upon conviction under section 60(6) of EO (i.e. the same level of penalty as that of the offence of overcharging

² According to section 50(1) of EO, EA means 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.

job-seekers). Should the penalty for the offence of overcharging job-seekers has been raised as per the legislative amendment proposal set out in paragraph 16 above but the penalty for unlicensed operation remained unchanged, there will be a loophole that EAs overcharging job-seekers without obtaining a licence will be facing lighter penalty. We suggest to correspondingly raise the penalty on EA for unlicensed operation to a maximum fine of HK\$ 350,000 and imprisonment of 3 years.

(d) Extending criminal liability of the offence of overcharging job-seekers to responsible person(s) in addition to the licensee

18. The present overcharging offence could only penalise EA licensee but not covering EA staff or other relevant person(s) who are involved in charging job-seekers excessive fees. For example, if the licensee is a limited company, even if there is sufficient evidence showing that its director(s) or staff etc. have overcharged job-seekers commission, LD can only take out prosecution against the limited company. If the EA is run under a sole-proprietorship or partnership, even if there is sufficient evidence that the job-seeker(s) was overcharged by the EA staff or any person(s) who colluded with the licensee, should the licensee argued that he/she was not in the know or he/she has no gain during the process, LD may still be unable to take out prosecution owing to the restrictions in the provision.

19. To combat vigorously exploitation of job-seekers (especially FDHs) by EAs, we propose to extend the criminal liability of overcharging job-seekers to the management of EAs, including any director, manager, secretary, other similar officer of the company, and any other person who have the authority or power to make decisions concerning the operation of the EA (including the “nominated operator” appointed under regulation 7 of EAR³); or in the case of partnership, any partner. The staff of the EAs who have direct dealings with job-seekers should also be covered as well.

Way Forward

20. We will closely monitor the implementation of the Code, including how it has been complied by the industry, and will consider introducing corresponding measures to suitably regulate the industry. We will also continue with implementing publicity and promotional measures to raise the

³ According to regulation 7 of EAR, a company to which a licence is issued shall notify C for L in writing the name of the person appointed by the company to operate, manage or assist in the management of, the EA to which the licence relates. The person so nominated is referred to as “nominated operator”.

awareness of employers and job-seekers (including FDHs) about the points to note while engaging the service of EA (e.g. EAs are not allowed to charge job-seekers a commission which exceeds 10% of their first month's salary), so that they can exercise their rights and make informed decisions. To more effectively protect the rights of FDHs, we will continue to enhance their awareness about the rights they enjoyed under EO and SEC, and channels for seeking assistance. We will consider stakeholders' views on paragraphs 13 to 19 above relating to the proposed legislative amendments for drafting the relevant amendment bill. We plan to submit the legislative amendment proposal to the Legislative Council in the second quarter of this year.

Views sought

21. Members are invited to offer their views on the abovementioned measures which are aimed to strengthen the regulation of EAs.

Labour and Welfare Bureau
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