

For meeting
on 18 December 2018

Legislative Council Panel on Manpower

Review of Statutory Maternity Leave

PURPOSE

This paper reports on the outcome of the review on statutory maternity leave (“ML”) under the Employment Ordinance (“EO”) (Cap. 57) and seeks Members’ views on the proposed changes.

BACKGROUND

2. The Chief Executive announced in the 2018 Policy Address that the Government has completed the review on the statutory ML. To allow mothers more time to spend with and take care of their newborn babies, it is proposed to extend the statutory ML under EO from the current 10 weeks to 14 weeks. The review also recommends technical amendments be made to certain ML provisions under EO. Details of the recommendations and the justifications are set out in paragraphs 3 to 18 below.

RECOMMENDATIONS ON THE STATUTORY ML REGIME

3. Having considered the standard of ML recommended by the International Labour Organisation (“ILO”), the practices of other economies and the operational experience in respect of the maternity provisions in EO, we have come up with the following recommendations –

- (a) to extend ML from the current 10 weeks to 14 weeks under EO with details as follows –
 - (i) the proposed extension of ML by a continuous period of four weeks should take effect in one go to become the 11th to 14th weeks of statutory ML;
 - (ii) the rate of the ML pay (“MLP”) in relation to the additional four weeks of ML should be maintained at four-fifths of the employees’ average daily wages;
 - (iii) the cost for this additional four weeks’ MLP (i.e. MLP for the 11th to 14th weeks) would be funded by Government. If an employee is entitled to the existing 10 weeks’ MLP under EO, the employer will be required to pay the additional four weeks’ MLP to the employee on the normal pay day as what the employer does now for payment of the current 10 weeks’ MLP. The employer may seek reimbursement from Government subject to proof of payment; and
 - (iv) the additional four weeks’ MLP should be subject to a cap of \$36,822 per employee. The cap is equivalent to four-fifths of the wages of an employee with a monthly wage of \$50,000 in four weeks.

- (b) to make two technical amendments to EO –
 - (i) to update the definition of miscarriage in EO from before 28 weeks of pregnancy to before 24 weeks of pregnancy. According to EO, the current definition of miscarriage is “the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy”; and
 - (ii) to entitle an employee who has attended pre-natal medical examination in relation to her pregnancy¹ to sickness

¹ Currently section 33(3A) of EO stipulates that where a female employee who is pregnant and is required to attend a medical examination in relation to her pregnancy, any day on which she is absent from work for such examination shall be a sickness day. However, section 33(5)(a)

allowance² by producing, other than a medical certificate, relevant documentary proof of having attended such medical examination.

Apart from the above proposed changes, the other arrangements concerning maternity provisions under EO shall continue to operate as they currently do.

JUSTIFICATIONS

Recommendation (a): Extending the duration of ML

Existing ML provisions

4. Under EO, a female employee employed under a continuous contract³ immediately before her ML commences⁴ is entitled to a continuous period of 10 weeks' ML. If the employee has been employed under a continuous contract for not less than 40 weeks immediately before the commencement of the scheduled ML, she is further entitled to MLP at the rate of four-fifths of her average daily wages. The employee may also take an additional period of leave for a period of not more than four weeks on illness or disability arising out of the pregnancy or confinement.

provides that an employer shall not be liable to pay sickness allowance to an employee in respect of any sickness day, unless such day is a day specified in the appropriate medical certificate as a day on which the employee is unfit for work on account of sickness or injury.

² Subject to the employee having fulfilled the other required conditions for receiving sickness allowance (see paragraph 16 for details)

³ Under EO, an employee who has been employed continuously by the same employer for four weeks or more and has been working for at least 18 hours each week is regarded as being employed under a continuous contract.

⁴ With the agreement of her employer, a pregnant employee may decide on the date of commencement of her 10 weeks' ML, provided that such date is within a period of not less than two weeks before, and not more than four weeks before, the expected date of confinement. If the employee does not exercise the above option to decide on the date of commencement, or if she fails to secure her employer's agreement to her proposed leave schedule, the date of commencement of ML shall be four weeks immediately before the expected date of confinement. If confinement occurs before the date of commencement as determined above, the commencement of ML would be the actual date of confinement.

International standards for maternity benefits

5. ILO has formulated three International Labour Conventions (“ILCs”) on maternity protection⁵. Of these three Conventions, one has been applied to Hong Kong with modifications since 29 June 1982. The other two, which are not applied to Hong Kong, specify a longer ML of 12 weeks and 14 weeks respectively. All these ILCs stipulate that the cash benefits during ML shall be no less than two-thirds of the employee’s previous earnings. While ILO suggests that ML benefits are to be provided out of public funds or some form of insurance, this element is further qualified in the most recent ILC (No. 183) that employers are not to be individually liable for costs of the benefits unless so provided before adoption of the Convention.

Maternity benefits of selected places

6. We have looked into the maternity benefits of Singapore, the Republic of Korea, Taiwan, Japan, the Mainland, the United Kingdom (“UK”), Canada and the United States (“US”) as summarised at **Annex**. In general, the duration of ML in these places ranges from eight weeks (in Taiwan) to 52 weeks (in UK). Except for US where ML is unpaid, the rate of MLP in these places ranges from 50% to 100% of the employee’s wages. The level of MLP varies from one place to another. Some are subject to a ceiling and some are only paid for a certain period of the ML. In some places, the level of MLP is different for different periods of ML. MLP in most of these places are funded either wholly by public funds or national insurance or partly by public funds or national insurance and partly by the employer.

7. Taking into account the needs of working mothers and international practices, we recommend extending the duration of ML by four weeks to 14 weeks, and the MLP so arising be taken up by Government. Details are as follows.

⁵ The three Conventions are ILC Nos. 3, 103 and 183, promulgated in 1919, 1952 and 2000 respectively.

(i) The proposed four-week extension to take effect in one go

8. We recommend to implement the proposed increase in ML by a continuous period of four weeks in one go taking account of the needs of pregnant employees and the fact that the Government would reimburse the concerned employers the additional MLP. This period of ML would become the 11th to 14th weeks of ML and be taken by the employee continuously after the 10 weeks' ML.

(ii) To pay the four weeks' additional MLP to eligible employees at four-fifths of their average daily wages

9. We propose to maintain the current MLP rate for the additional four weeks' ML, i.e., four-fifths of the employee's average daily wages, noting that this rate compares favourably with that in other economies, including that recommended by ILO (i.e., no less than two-thirds of the employee's previous earnings).

(iii) The cost for the additional four weeks' MLP should be funded by Government, with employers paying the additional four weeks' MLP to their eligible employees on the normal pay day with reimbursement from Government

10. There is a concern that requiring employers to shoulder the additional four weeks' MLP would become a disincentive for them to hire, retain or promote female employees, hence jeopardising the employment opportunities of women. Furthermore, it is a prevalent practice around the world to have at least part of MLP borne by Government or central funds. It is therefore recommended that Government should take up the cost for the additional four weeks' MLP.

11. To ensure timely payment⁶ and easy administration, it is proposed that the employer would be required to first pay the additional four weeks' MLP

⁶ Under EO, the employer should pay MLP to the employee on her normal pay day. An employer who fails to grant ML or fails to pay MLP to an eligible employee is liable to prosecution and, upon conviction, to a maximum fine of \$50,000.

to the employee on the normal pay day like the first 10 weeks' MLP. Government funding support for the additional four weeks' MLP would be provided by way of reimbursement to the employer, subject to proof of payment, etc.

(iv) The additional four weeks' MLP should be subject to a cap of \$36,822 per employee

12. Given the wide spectrum of female employees' wages and to ensure the appropriate use of public money, Government's funding support should only aim at covering the great majority of the cases but not those with exceedingly high pay. To this end, it is recommended that the amount of funding support for the additional four weeks' MLP (i.e. MLP for the 11th to 14th weeks) to be provided by Government for each confinement of an eligible female employee be subject to a cap of \$36,822⁷ per employee, the amount of which may be adjusted from time to time. The cap is equivalent to four-fifths of the wages of an employee with a monthly wage of \$50,000 in four weeks. Employees with a monthly wage of \$50,000 or below account for about 95% of female employees⁸ in Hong Kong.

Recommendation (b): Technical amendments

(i) To update the definition of miscarriage from before 28 weeks of pregnancy to before 24 weeks of pregnancy

13. Under EO, "miscarriage" means "the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy". While a female employee who gives birth to a dead child on or after 28 weeks of her pregnancy is entitled to ML, a female employee who has a miscarriage is entitled to sick leave. As the medical profession advances, there

⁷ With a monthly wage of \$50,000, the four weeks' MLP as calculated in accordance with EO would be: $[(\$50,000 \times 12 \text{ months} / 365 \text{ days}) \times 28 \text{ days} \times 4/5 = \$36,822]$

⁸ According to the 2016 Annual Earnings and Hours Survey conducted by the Census and Statistics Department, the 95th percentile monthly wages of female employees as at May - June 2016 was \$51,200.

are from time to time cases in which an employee whose child is born dead before 28 weeks of her pregnancy is issued with a ML certificate by the medical doctor with her case being considered as stillbirth rather than miscarriage. This gives rise to confusion between employers and employees.

14. As advised by the Food and Health Bureau, while it would be up to individual attending doctor to certify a stillbirth, under the professional guidelines issued by the Hong Kong College of Obstetricians and Gynaecologists stillbirth is defined as a baby born without sign of life, at or after 24 weeks of gestation, or with a birth weight of more than 500 grams when the gestational age is uncertain. We also note that the Offences Against the Person Ordinance (Cap. 212) also adopts 24 weeks of pregnancy as the cut-off for the different requirements for lawful termination of pregnancy by medical procedure. There is therefore a case for EO to adopt 24 weeks as the cut-off between miscarriage and stillbirth to align with the prevailing medical definition and practices being adopted in other legislation.

15. Updating the definition of “miscarriage” in EO from “before 28 weeks of pregnancy” to “before 24 weeks of pregnancy” will entitle a female employee whose child is incapable of survival after being born in the 24th week of pregnancy or after to ML where the other required conditions are met, while currently a similar cessation of pregnancy between 24 weeks and before 28 weeks of pregnancy would only entitle the female employee to sick leave.

(ii) To entitle an employee who has attended pre-natal medical examination in relation to her pregnancy to sickness allowance by producing, other than a medical certificate, relevant documentary proof of having attended such medical examination

16. Under EO, a female employee who is absent from work for attending pre-natal medical examination in relation to her pregnancy and is able to produce an appropriate medical certificate⁹ as defined under EO would be entitled to sickness allowance. This stipulation was made in 1980 with the

⁹ Under EO, an appropriate medical certificate that would entitle an employee to sickness allowance should be issued by a registered medical practitioner or registered Chinese medicine practitioner. It shall specify the number of days on which the employee is unfit for work and the nature of the sickness or injury.

initial purpose of according female employees who have attended pre-natal medical examination relating to their pregnancy with sickness allowance (subject to their having fulfilled the required conditions for receiving sickness allowance¹⁰), while dispensing with the requirement that such “sickness day” needs to be in a period of not less than four consecutive days.

17. From time to time there are cases of female employees attending pre-natal medical examination being issued with a “certificate of attendance” (“COA”) rather than a “medical certificate”. While a COA certifies that a person has attended medical examination on a certain day, it is not a medical certificate that can entitle the person to sickness allowance. There are also cases where female employees attending pre-natal checkups are attended by mid-wives or nurses whose capacity only permits them to issue COA but not medical certificates.

18. To ensure the proper delivery of the initial objective of the provisions on employees attending pre-natal medical examination, and to remove the uncertainties caused by different practices of the medical profession, we propose to introduce technical amendments to the relevant stipulations in EO to make it clear that a COA, to be issued by, or be issued under the supervision of, designated professionally trained persons in the medical profession or the Chinese medicine profession, would be accepted as documentary proof for regarding any day on which an employee who has attended pre-natal medical examination in relation to her pregnancy as a sickness day and entitling the eligible employee to sickness allowance under EO.

COST IMPACT ASSESSMENT

19. With reference to the situation in 2016, we conducted a broad-brush assessment of the cost impact brought about by the proposed enhancement of the statutory ML benefits. With the Government funding support being subject to

¹⁰ To be entitled to sickness allowance, the employee should have accumulated sufficient number of paid sickness days. An employee can accumulate paid sickness days after having been employed under a continuous contract. Paid sickness days are accumulated at the rate of two paid sickness days for each completed month of the employee’s employment during the first 12 months, and four paid sickness days for each completed month of employment thereafter. Paid sickness days can be accumulated throughout the whole employment period, but shall not exceed 120 days at any one time.

a maximum of \$36,822 for each ML case, the annual cost to be borne by Government would be around \$479 million.

VIEWS OF THE LABOUR ADVISORY BOARD

20. LD reported the outcome of the review of statutory ML to the Labour Advisory Board (“LAB”) and consulted its views on 30 November 2018. The employer and employee representatives were on the whole supportive of the proposal for increasing ML from 10 weeks to 14 weeks, while employee representatives expressed reservation on imposing a cap on the ML pay for the 11th to 14th weeks’ ML. LAB also supported the two aforesaid technical amendments and agreed that the Government’s proposals apart, the other arrangements concerning maternity provisions in EO should be left unchanged.

IMPLEMENTATION TIMETABLE

21. To take forward this proposal which is a major change to the existing ML regime, we need to make legislative amendments to EO and develop a new mechanism supported by a dedicated office in the Labour Department (“LD”) for making reimbursement to employers. The Government would proceed with the drafting of the enabling legal instrument and aims at introducing a bill to amend EO into the Legislative Council (“LegCo”) in late 2019.

VIEWS SOUGHT

22. Members are invited to give views on the recommendations on the improvement of statutory ML as set out in paragraph 3 above. Subject to Members’ views, we will seek the necessary funding approval from LegCo.

**Labour and Welfare Bureau
Labour Department
December 2018**

Statutory maternity leave and maternity leave pay in other places

Economy	Duration of ML	Rate of MLP
Singapore	16 weeks (if the employee's child is a Singapore citizen ¹)	<ul style="list-style-type: none"> • Full pay • <u>1st & 2nd child</u> : Paid by employer for the whole period. Reimbursed by Government for last eight weeks (up to S\$10,000 (HK\$59,978) per four weeks) • <u>3rd and subsequent child</u> : The entire 16 weeks reimbursed by Government (up to S\$10,000 (HK\$59,978) per four weeks)
The Republic of Korea	90 days (12.9 weeks)	<ul style="list-style-type: none"> • Full pay • First 60 days (8.6 weeks) : paid by employer • Last 30 days (4.3 weeks) : paid by Employment Insurance Fund • Up to a ceiling of 4.05M won for 90 days, i.e. 1.35M won (HK\$9,045) per month • Employer needs to make up the payment shortfall if ceiling is lower than the actual earnings
Taiwan	8 weeks	<ul style="list-style-type: none"> • Full pay • 50% of wages if employed for less than six months • Paid by employer

¹ If the child is a non-Singaporean citizen, the employee would be entitled to 12 weeks of maternity leave.

Economy	Duration of ML	Rate of MLP
Japan	14 weeks	<ul style="list-style-type: none"> • No statutory requirement on MLP • Usually about 2/3 of the base salary under the insurance system
Mainland	14 weeks	<ul style="list-style-type: none"> • Full pay • Funded by insurance scheme if enrolled, otherwise paid by employer
United Kingdom	52 weeks (only the first two weeks after child birth is compulsory)	<ul style="list-style-type: none"> • First six weeks : 90% of the employee's average wages • Next 33 weeks : at a flat rate of £140.98 (HK\$1,570) per week or 90% of the employee's average weekly earnings, whichever is lower • Last 13 weeks : unpaid • Employer can claim reimbursement from National Insurance
Canada	17 weeks	<ul style="list-style-type: none"> • First 15 weeks : 55% of the employee's average weekly insurable earnings subject to a maximum amount of C\$547 (HK\$3,329) per week • Last two weeks : unpaid • Provided by the Employment Insurance Program
United States	12 weeks	<ul style="list-style-type: none"> • Unpaid

Source of information: Internet search conducted by the Labour Department in March 2018