

**For discussion on  
11 February 2020**

## **Legislative Council Panel on Manpower**

### **Employment (Amendment) Bill 2019**

#### **Introduction**

The Government introduced the Employment (Amendment) Bill 2019 (“the Bill”) into the Legislative Council (“LegCo”) for scrutiny on 8 January 2020. The Government’s motion for the Second Reading debate on the Bill be adjourned and the Bill be referred to the Panel on Manpower instead of the House Committee was passed by the LegCo at its meeting on 16 January 2020.

#### **The Bill**

2. The Bill proposes that the maternity leave (“ML”) under the Employment Ordinance (“EO”) (Cap. 57) be increased by four weeks and be taken by the employee continuously after the 10 weeks’ ML, if so entitled. The current statutory rate of maternity leave pay (“MLP”) (i.e. four-fifths of the employee’s average daily wages) would be maintained for calculating the additional MLP in respect of the extension of ML, subject to a cap of \$36,822 per employee.<sup>1</sup> Employers are required to pay the aforesaid additional MLP to the eligible employees on the normal pay day. The Bill also proposes two technical amendments, including updating the definition of “miscarriage” under EO from “before 28 weeks of pregnancy” to “before 24 weeks of pregnancy” which will entitle a female employee whose child is incapable of survival after being born at or after 24 weeks of pregnancy to ML if other conditions are met; and accepting a certificate of attendance issued by professionally trained persons as documentary proof for entitling the eligible employee to sickness allowance for any day on which the employee has attended a medical examination in relation to her pregnancy. For details of the Bill, please refer to the LegCo Brief at Annex.

3. The Government has committed that for the amount of additional MLP that is required to be paid under EO and has been paid by the employers, the employers may apply to the Government for reimbursement. The

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<sup>1</sup> The cap amount may be reviewed from time to time. While the cap is stipulated in the Bill, the employer is not prohibited from paying a higher amount to the employee under the contract of employment.

reimbursement will be done by way of an administrative scheme to maintain suitable flexibility in implementation. The Labour Department is developing the new reimbursement regime for the additional MLP to employers.

### **Advice Sought**

4. Members are invited to give views on the Bill.

**Labour and Welfare Bureau  
Labour Department  
February 2020**

## LEGISLATIVE COUNCIL BRIEF

Employment Ordinance  
(Chapter 57)

### EMPLOYMENT (AMENDMENT) BILL 2019

#### INTRODUCTION

A At the meeting of the Executive Council on 17 December 2019, the Council ADVISED and the Acting Chief Executive ORDERED that the Employment (Amendment) Bill 2019 (the Bill) at **Annex A** be introduced into the Legislative Council (LegCo) to increase the statutory maternity leave (ML) by four weeks and introduce certain technical amendments to rationalise the current statutory ML regime.

#### JUSTIFICATIONS

2. Under the Employment Ordinance (EO) (Cap. 57), a female employee employed under a continuous contract<sup>1</sup> immediately before her ML commences<sup>2</sup> 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 maternity leave pay (MLP) at the rate of four-fifths of her average daily wages. The employee may also take an additional period of leave for not more than four weeks on illness or disability arising out of the pregnancy or confinement. Labour unions and women groups have been urging Government to provide for a longer period of ML, making references to practices in other economies; while employers have remained resistant because of the substantial labour costs so incurred to employment of female

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<sup>1</sup> 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.

<sup>2</sup> 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.

employees.

3. In 2018, the Labour Department (LD) conducted a review of ML with special focus on the duration of ML. Pursuant to the outcome of the review, LD recommends that EO be amended to –

- (a) extend ML by four weeks with details as follows –
  - (i) the proposed extension of ML by four weeks should take effect in one go;
  - (ii) the current statutory rate of MLP, i.e. four-fifths of the employees' average daily wages, should apply to the additional MLP in respect of the extension of ML (additional MLP);
  - (iii) the additional MLP will be funded by Government on a reimbursement basis, subject to the employer having paid the eligible employee and making application for the Government's reimbursement with proof of payment; and
  - (iv) the additional MLP should be calculated on the same basis as the employer's payment of the current 10 weeks' MLP but subject to a cap of \$36,822<sup>3</sup> per employee. The cap will be reviewed from time to time;
- (b) update the definition of “miscarriage”<sup>4</sup> from “before 28 weeks of pregnancy” to “before 24 weeks of pregnancy” so that a female employee who suffers a miscarriage at or after 24 weeks of pregnancy may be entitled to ML; and
- (c) entitle employees who have attended medical examination in relation to a pregnancy to sickness allowance under EO if they are able to produce the related documentary proof.

## **Details of the legislative proposal**

### **(A) Extending the duration of ML**

(i) *To extend ML to 14 weeks*

4. The existing 10 weeks' ML as provided under section 12(2)(a) of EO would be increased by a continuous period of four weeks. This period of ML

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<sup>3</sup> The cap of \$36,822 is equivalent to four-fifths of the wages of an employee with a monthly wage of \$50,000 in four weeks. The four weeks' MLP as calculated in accordance with EO would be:  $(\$50,000 \times 12 \text{ months} / 365 \text{ days}) \times 28 \text{ days} \times 4/5 = \$36,822$ . Employees with a monthly wage of \$50,000 or below account for about 95% of female employees in Hong Kong.

<sup>4</sup> Under EO, the definition of “miscarriage” is the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy.

would become the 11<sup>th</sup> to 14<sup>th</sup> weeks of ML and be taken by the employee continuously after the 10 weeks' ML, if so entitled. This has taken account of the needs of pregnant employees and the fact that Government would reimburse the concerned employers the additional MLP to eligible employees.

(ii) *To maintain paying the additional MLP to eligible employees at four-fifths of their average daily wages*

5. Section 14(3A) of EO provides that the MLP rate is pitched at four-fifths of the employee's average daily wages. The current MLP rate would continue to apply to the additional ML noting that this rate compares favourably with that in other economies, including that recommended by the International Labour Organisation (i.e., no less than two-thirds of the employee's previous earnings).

(iii) *To require employers to pay the additional MLP to their eligible employees on the normal pay day subject to a cap of \$36,822 per employee*

6. The employer would be required to pay the additional MLP to the employee on the normal pay day – same as what they are currently required to do in respect of the first 10 weeks' MLP. The amount of additional MLP payable under EO is subject to a cap of \$36,822 per employee. The cap is essentially 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 employees in Hong Kong. The cap amount may be reviewed from time to time. While the cap is stipulated in the Bill, the employer is not prohibited from paying a higher amount to the employee under the contract of employment.

7. The Government has committed that for the amount of additional MLP that is required to be paid under EO and has been paid by the employers, the employers may apply to the Government for reimbursement. We consider that the reimbursement should be done by way of an administrative, rather than statutory, scheme to maintain suitable flexibility in implementation.

**(B) Updating the definition of “miscarriage” from “before 28 weeks of pregnancy” to “before 24 weeks of pregnancy”**

8. To dovetail with the prevailing medical definition and practices, it is necessary to introduce a technical change to update the definition of “miscarriage” in EO from “before 28 weeks of pregnancy” to “before 24 weeks of pregnancy”. This will entitle a female employee whose child is incapable of survival after being born at or after 24 weeks of pregnancy to ML if other 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.

**(C) Entitling employees who have attended medical examination in relation to pregnancy to sickness allowance if they are able to produce, other than a medical certificate, a certificate of attendance (COA)**

9. Under EO, a female employee who is absent from work for attending a medical examination in relation to her pregnancy and is able to produce an appropriate medical certificate<sup>5</sup> as defined under EO would be entitled to sickness allowance. From time to time, there are cases of female employees attending medical examination in relation to pregnancy being issued with a COA rather than a medical certificate. To ensure a consistent delivery of the initial objective of the provisions of EO to accord female employees attending pregnancy-related medical examination with sickness allowance, we propose to introduce technical amendments to make it clear that a COA, issued by professionally trained persons, viz. registered medical practitioners, registered Chinese medicine practitioners, registered midwives or registered nurses, would be accepted as documentary proof for entitling the eligible employee to sickness allowance under EO for any day on which the employee has attended a medical examination in relation to her pregnancy. Other aspects in relation to entitlement to sickness allowance are maintained as currently provided by EO.

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

**THE BILL**

11. The main provisions are as follows –

- (a) Clause 3 amends the definition of “miscarriage” in section 2(1) of EO by shortening the period of pregnancy mentioned in the definition from 28 weeks to 24 weeks.
- (b) Clause 4 amends section 12(2)(a) of EO to extend the maternity leave under that section from 10 weeks to 14 weeks.
- (c) Clause 6 amends section 14 of EO to provide that the maternity leave pay in respect of the extension of maternity leave is subject to a cap. The cap is specified in the newly added Schedule 1A and may be amended by the Commissioner for Labour by notice published in the Gazette. Clause 6 also expressly states that any reduction under section 14(7) of EO is to be made to the maternity leave pay as determined after taking into account the cap.

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<sup>5</sup> 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.

- (d) Clause 10 amends section 33 of EO to provide that a certificate of attendance may also be accepted as proof in respect of entitlement to sickness allowance for a day on which a female employee attends a medical examination in relation to her pregnancy.
- (e) Clause 11 adds a new section 33A to EO to set out the requirements for a certificate of attendance for a medical examination in relation to a pregnancy, including the requirement as to who may issue the certificate.
- (f) Clause 12 adds a new section 78 to EO to provide for transitional matters. The transitional provisions are contained in the newly added Schedule 10.

B 12. The existing provisions being amended are at **Annex B**.

### **LEGISLATIVE TIMETABLE**

13. The legislative timetable is as follows –

Publication in the Gazette	27 December 2019
First Reading and commencement of Second Reading debate	8 January 2020
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

14. LD is in parallel developing the new reimbursement regime for the additional MLP to employers. This includes working out the requirements for paying reimbursement to employers (reimbursement office), and securing LegCo’s funding approval as necessary. Taking account of the lead time required for the related information technology system procurement and development, and staff recruitment and training for the reimbursement office, we expect the reimbursement mechanism would be put in place by end-2021.

### **IMPLICATIONS OF THE PROPOSAL**

C 15. The economic, financial, civil service, family, gender and sustainability implications of the proposal are set out at **Annex C**. The proposal is in conformity with the Basic Law, including provisions concerning human rights. It does not affect the current binding effect of EO, and has no productivity or environmental implications.

## **PUBLIC CONSULTATION**

16. LD reported the outcome of the review of ML to the Labour Advisory Board (LAB) and sought its views on 30 November 2018. The LegCo Panel on Manpower was also consulted on 18 December 2018. Both LAB and the Panel on Manpower were on the whole supportive of the proposal for extending the statutory ML by four weeks, while some pro-labour Members expressed reservation on imposing a cap on the additional MLP. While EO has set out the statutory minimum requirements only, we would encourage employers to offer employment terms including maternity benefits that are more favourable than those stipulated under EO. Members of the Panel on Manpower also demanded further improvements to the statutory ML regime such as extending the additional MLP to employees of fixed-term contracts after the expiry of their contracts. We have also consulted the Women's Commission and the Family Council, both of which welcomed the proposal to extend ML.

17. We have consulted the relevant healthcare professional bodies in respect of the issuance of COAs (as specified in paragraph 9 above) by registered medical practitioners, registered Chinese medicine practitioners, registered midwives and registered nurses. They have no objection to the issuance of COAs by the healthcare professionals stated above for the purpose.

## **PUBLICITY**

18. A press release will be issued on the day when the Bill is gazetted. A spokesman from LD will address media enquiries.

D 19. A list of abbreviations used in this brief is at **Annex D**.

## **ENQUIRIES**

20. Enquiries on this brief can be addressed to Mr Raymond LIANG, Assistant Commissioner for Labour (Labour Relations), on 2852 4099; Ms Jade WONG, Chief Labour Officer (Labour Relations), on 2852 3457; or Ms Rebecca CHAN, Senior Labour Officer (Labour Relations)(Maternity Leave Policy), on 2852 3948.

**Labour and Welfare Bureau**  
**24 December 2019**



**Employment (Amendment) Bill 2019**

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# A BILL

## To

Amend the Employment Ordinance to extend the statutory maternity leave by 4 weeks; to introduce a cap on the maternity leave pay in respect of the extension of maternity leave; to shorten the period of pregnancy mentioned in the definition of *miscarriage*; to allow a certificate of attendance to be accepted as proof in respect of entitlement to sickness allowance for a day on which a female employee attends a medical examination in relation to her pregnancy; and to provide for transitional and related matters.

Enacted by the Legislative Council.

### 1. Short title and commencement

- (1) This Ordinance may be cited as the Employment (Amendment) Ordinance 2019.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

### 2. Employment Ordinance amended

The Employment Ordinance (Cap. 57) is amended as set out in sections 3 to 14.

### 3. Section 2 amended (interpretation)

Section 2(1), definition of *miscarriage*—

#### Repeal

“28”

#### Substitute

“24”.

### 4. Section 12 amended (maternity leave)

Section 12(2)(a)—

#### Repeal

“10”

#### Substitute

“14”.

### 5. Section 12AA amended (commencement of maternity leave)

Section 12AA(1)—

#### Repeal

“10 weeks maternity leave”

#### Substitute

“maternity leave for the purposes of section 12(2)(a)(i)”.

### 6. Section 14 amended (payment for maternity leave)

(1) Section 14(3A)—

#### Repeal

“Maternity”

#### Substitute

“Subject to subsection (3E), maternity”.

(2) After section 14(3D)—

#### Add

“(3E) The maximum amount of maternity leave pay payable for the latter period of maternity leave under this section is the amount specified in Schedule 1A.”.

- (3) Section 14(7), after “that period”—  
**Add**  
 “(including, for the latter period of maternity leave, after the application of subsection (3E))”.
- (4) After section 14(7)—  
**Add**  
 “(8) The Commissioner may, by notice published in the Gazette, amend the amount specified in Schedule 1A.  
 (9) In this section—  
*latter period of maternity leave* (產假末段期間), in relation to a female employee, means the period of maternity leave taken by the employee and to which the employee is entitled under section 12(2)(a), but does not include the first 10 weeks of the period.”.
7. **Section 15 amended (prohibition against termination of employment)**  
 Section 15(2)(c)—  
**Repeal**  
 “10”  
**Substitute**  
 “14”.
8. **Section 15E amended (entitlement to paternity leave)**  
 Section 15E(3)(b)—  
**Repeal**  
 “10”  
**Substitute**  
 “14”.

9. **Section 15G amended (paternity leave not affected by other leave entitlements)**  
 Section 15G(4)—  
**Repeal**  
 “10-week”  
**Substitute**  
 “14-week”.
10. **Section 33 amended (sickness allowance)**  
 (1) Section 33(5)(a)—  
**Repeal**  
 “subsection (5A)”  
**Substitute**  
 “subsections (5A) and (5B)”.
- (2) After section 33(5A)—  
**Add**  
 “(5B) For a sickness day under subsection (3A) on which a female employee attends a medical examination in relation to her pregnancy, the employer is liable to pay sickness allowance for that day if the employee produces, in relation to the examination, a certificate of attendance described in section 33A.”.
11. **Section 33A added**  
 After section 33—  
**Add**

**“33A. Requirements for certificate of attendance for medical examination in relation to pregnancy**

- (1) For the purposes of section 33(5B), this section sets out the requirements for a certificate of attendance in relation to a female employee’s attendance on a particular day at a medical examination in relation to her pregnancy.
- (2) The certificate—
  - (a) must state that the employee attends the examination on that day; and
  - (b) subject to subsections (3), (4) and (5), must be issued by a medical professional.
- (3) If the employee attends the examination as an in-patient in a hospital, the certificate must be issued by a medical professional who conducts the examination.
- (4) If, in relation to the examination—
  - (a) the employee takes paid sickness days entered in category 2 of the record kept for the employee under section 37(1A); and
  - (b) the employer requires the employee to attend the examination in a hospital,
 the certificate must be issued by a medical professional who conducts the examination for the employee as an out-patient or in-patient in a hospital.
- (5) If the employer operates a recognized scheme of medical treatment, the certificate must be issued by a registered medical practitioner, or a registered Chinese medicine practitioner, engaged by the employer for the purposes of the scheme.
- (6) However, subsection (5) does not apply if—

- (a) subsection (3) or (4) applies in relation to the employee;
  - (b) the employee chooses to be examined by a registered medical practitioner and no registered medical practitioner is engaged by the employer for the purposes of the scheme;
  - (c) the employee chooses to be examined by a registered Chinese medicine practitioner and no registered Chinese medicine practitioner is engaged by the employer for the purposes of the scheme; or
  - (d) the employee has a reasonable excuse not to attend the examination under the scheme.
- (7) In this section—
- hospital* (醫院) has the meaning given by section 33(6)(a);
- medical professional* (醫療專業人員) means—
- (a) a registered medical practitioner;
  - (b) a registered Chinese medicine practitioner;
  - (c) a midwife registered under section 8 of the Midwives Registration Ordinance (Cap. 162) or deemed to be registered under section 25 of that Ordinance; or
  - (d) a nurse registered under section 9 of the Nurses Registration Ordinance (Cap. 164) or deemed to be registered under section 26 of that Ordinance.”.

**12. Section 78 added**

After section 77—

**Add**

**“78. Transitional provisions relating to Employment (Amendment) Ordinance 2019**

The transitional provisions contained in Schedule 10 have effect.”.

**13. Schedule 1A added**

After the First Schedule—

**Add**

**“Schedule 1A**

[s. 14]

**Maximum Amount of Maternity Leave Pay for Latter Period of Maternity Leave**

\$36,822”.

**14. Schedule 10 added**

After the Ninth Schedule—

**Add**

**“Schedule 10**

[s. 78]

**Transitional Provisions relating to Employment (Amendment) Ordinance 2019**

**1. Interpretation of Schedule 10**

In this Schedule—

*2019 Amendment Ordinance* (《2019年修訂條例》) means the Employment (Amendment) Ordinance 2019 ( of 2019);

*amendment date* (修訂日期), in relation to a section, means the date on which a provision of the 2019 Amendment Ordinance that amends the section comes into operation.

**2. Transitional provisions relating to sections 12(2)(a), 12AA(1) and 14**

(1) If a female employee’s confinement occurs before the amendment date for sections 12(2)(a), 12AA(1) and 14, those sections, as in force immediately before that date, continue to apply in relation to her entitlement to maternity leave and maternity leave pay.

(2) If—

(a) a female employee gives notice of her pregnancy and of her intention to take maternity leave under section 12(4) before the amendment date for sections 12(2)(a), 12AA(1) and 14; but

(b) her confinement occurs on or after that date, sections 12(2)(a), 12AA(1) and 14, as amended by the 2019 Amendment Ordinance, apply in relation to her entitlement to maternity leave and maternity leave pay.

**3. Transitional provisions relating to section 15(2)(c)**

If—

- (a) a female employee's contract of employment is terminated by her employer in contravention of section 15(1)(a) or (b); and
- (b) the date of termination of the contract falls on or after the amendment date for section 15(2)(c),

section 15(2)(c), as amended by the 2019 Amendment Ordinance, applies in relation to the contravention, unless the employee's confinement occurs before that amendment date.

**4. Transitional provisions relating to sections 15E(3)(b) and 15G(4)**

- (1) If a male employee's child is born before the amendment date for sections 15E(3)(b) and 15G(4), those sections, as in force immediately before that date, continue to apply in relation to his entitlement to paternity leave in respect of the birth of the child.
- (2) If—
  - (a) a male employee gives notification under section 15F(1) for taking paternity leave in respect of the birth of his child before the amendment date for sections 15E(3)(b) and 15G(4); but
  - (b) the child is born on or after that date,
 sections 15E(3)(b) and 15G(4), as amended by the 2019 Amendment Ordinance, apply in relation to his entitlement to paternity leave in respect of the birth of the child.”.

**Explanatory Memorandum**

The main objects of this Bill are to amend the Employment Ordinance (Cap. 57) (*Ordinance*) to—

- (a) extend the statutory maternity leave by 4 weeks;
- (b) introduce a cap on the maternity leave pay in respect of the extension;
- (c) shorten the period of pregnancy mentioned in the definition of *miscarriage*; and
- (d) allow a certificate of attendance to be accepted as proof in respect of entitlement to sickness allowance for a day on which a female employee attends a medical examination in relation to her pregnancy.

- 2. Clause 1 sets out the short title and provides for commencement.
- 3. Clause 3 amends the definition of *miscarriage* in section 2(1) of the Ordinance by shortening the period of pregnancy mentioned in the definition from 28 weeks to 24 weeks.
- 4. Clause 4 amends section 12(2)(a) of the Ordinance to extend the maternity leave under that section from 10 weeks to 14 weeks.
- 5. Clause 5 makes an amendment to section 12AA of the Ordinance consequential to the extension of maternity leave.
- 6. Clause 6 amends section 14 of the Ordinance to provide that the maternity leave pay in respect of the extension of maternity leave is subject to a cap. The cap is specified in the newly added Schedule 1A and may be amended by the Commissioner for Labour by notice published in the Gazette. Clause 6 also expressly states that any reduction under section 14(7) of the Ordinance is to be made to the maternity leave pay as determined after taking into account the cap.

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7. Clauses 7, 8 and 9 make amendments to sections 15, 15E and 15G of the Ordinance consequential to the extension of maternity leave.
  8. Clause 10 amends section 33 of the Ordinance to provide that a certificate of attendance may also be accepted as proof in respect of entitlement to sickness allowance for a day on which a female employee attends a medical examination in relation to her pregnancy.
  9. Clause 11 adds a new section 33A to the Ordinance to set out the requirements for a certificate of attendance for a medical examination in relation to a pregnancy, including the requirement as to who may issue the certificate.
  10. Clause 12 adds a new section 78 to the Ordinance to provide for transitional matters. The transitional provisions are contained in the newly added Schedule 10.

## 2. Interpretation

(1) In this Ordinance, unless the context otherwise requires — (*Amended 48 of 1984 s. 2*)

**alternative holiday** (另定假日) means a holiday granted or to be granted under section 39(2) and (2A); (*Added 39 of 1973 s. 2. Amended 137 of 1997 s. 2*)

**annual leave** (年假) means the annual leave provided for in Part VIIIA; (*Added 53 of 1977 s. 2*)

**annual leave pay** (年假薪酬) means the annual leave pay required by this Ordinance to be paid in respect of a period of annual leave and any sum required to be paid under section 41D; (*Added 53 of 1977 s. 2*)

**business** (業務) includes a trade or profession and any like activity carried on by a person; (*Added 76 of 1985 s. 2*)

**cease** (停止), in relation to Part VA, Part VB, the Third Schedule and the Sixth Schedule, means cease either permanently or temporarily and from whatsoever cause, and **diminish** (縮減) has a corresponding meaning; (*Added 76 of 1985 s. 2*)

**child** (兒童) means a person under the age of 15 years; (*Replaced 41 of 1990 s. 2*)

**Commissioner** (處長) means the Commissioner for Labour and includes a Deputy Commissioner for Labour and an Assistant Commissioner for Labour; (*Amended L.N. 142 of 1974; 61 of 1993 s. 2*)

**confinement** (分娩) means the delivery of a child; (*Added 5 of 1970 s. 3*)

**contract of employment** (僱傭合約) means any agreement, whether in writing or oral, express or implied, whereby one person agrees to employ another and that other agrees to serve his employer as an employee and also a contract of apprenticeship;

**dangerous drug** (危險藥物) has the meaning assigned to it in the Dangerous Drugs Ordinance (Cap. 134);

**Director** (署長) means the Director of Health; (*Added 39 of 1973 s. 2. Amended L.N. 76 of 1989*)

**domestic servant** (家庭傭工) includes a garden servant, chauffeur and boat-boy and any other personal servant of a like class;



*(Added 76 of 1985 s. 2)*

**employee** (僱員) means an employee to whom, by virtue of section 4, this Ordinance applies;

**employer** (僱主) means any person who has entered into a contract of employment to employ any other person as an employee and the duly authorized agent, manager or factor of such first mentioned person;

**holiday** (假日) means—

- (a) a statutory holiday;
- (b) an alternative holiday;
- (c) a substituted holiday; or
- (d) a day on which an employee is required by section 39(4) to be granted a holiday; *(Added 39 of 1973 s. 2. Amended 137 of 1997 s. 2)*

**holiday pay** (假日薪酬) means the holiday pay provided for by section 40; *(Added 39 of 1973 s. 2)*

**issue** (後嗣) means a child whether under the age of majority or not of a deceased employee and—

- (a) includes a step-child;
- (b) includes a child adopted by the employee, but (subject to paragraph (ba)) does not include a child of the employee adopted by another person; *(Amended 28 of 2004 s. 35)*
- (ba) includes a child of the employee adopted by another person under an adoption order granted under paragraph (c) of section 5(1) of the Adoption Ordinance (Cap. 290) where the employee is the parent referred to in that paragraph; *(Added 28 of 2004 s. 35)*
- (c) does not include an illegitimate child; and
- (d) where polygamy lawfully subsists, does not include a child who is not an adopted child of the employee unless his mother was, at the time of his birth, the employee's principal wife—
  - (i) in case the relevant marriage or, where appropriate, each such marriage constitutes a customary marriage for the purposes of the Marriage Reform Ordinance (Cap. 178), according to Chinese law and custom; or
  - (ii) in any other case, according to the law which, as regards the relevant marriage or marriages, was the proper personal law of the employee; *(Added 52 of 1988 s. 2)*

- Labour Tribunal** (勞資審裁處) means the Labour Tribunal established by section 3 of the Labour Tribunal Ordinance (Cap. 25); (*Added 76 of 1985 s. 2*)
- lock-out** (閉廠) has the meaning assigned to it by section 2 of the Trade Unions Ordinance (Cap. 332); (*Added 76 of 1985 s. 2*)
- long service payment** (長期服務金) means the long service payment payable by an employer to an employee under section 31R or to a person entitled to such payment under section 31RA; (*Added 76 of 1985 s. 2. Amended 41 of 1990 s. 2*)
- mandatory provident fund scheme** (強制性公積金計劃) means a provident fund scheme registered under the Mandatory Provident Fund Schemes Ordinance (Cap. 485); (*Added 4 of 1998 s. 5*)
- maternity leave** (產假) means absence from work, in accordance with the provisions of Part III, by a female employee because of her pregnancy or confinement; (*Added 5 of 1970 s. 3*)
- maternity leave pay** (產假薪酬) means pay in respect of maternity leave payable to a female employee under section 14; (*Added 22 of 1981 s. 2*)
- Minor Employment Claims Adjudication Board** (小額薪酬索償仲裁處) means the Minor Employment Claims Adjudication Board established by section 3 of the Minor Employment Claims Adjudication Board Ordinance (Cap. 453); (*Added 61 of 1994 s. 49*)
- miscarriage** (流產) means the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy; (*Added 22 of 1981 s. 2*)
- occupational retirement scheme** (職業退休計劃) means a scheme or arrangement under which benefits, based on length of service, are payable in respect of employees on retirement, death, incapacity or termination of service, but does not include a mandatory provident fund scheme; (*Added 4 of 1998 s. 5*)
- outworker** (外發工) means a person to whom articles or materials are, for payment or reward, given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale, in his own home or on other premises not under the control or management of the person who gave out the articles or materials; (*Added 76 of 1985 s. 2*)
- paid sickness day** (有薪病假日) means a sickness day in respect of which an employee is entitled to be paid sickness allowance; (*Added 39 of 1973 s. 2*)

**paternity leave** (侍產假) means the paternity leave provided for in Part IIIA; (*Added 21 of 2014 s. 3*)

**paternity leave pay** (侍產假薪酬) means pay payable in respect of paternity leave; (*Added 21 of 2014 s. 3*)

**recognized scheme of medical treatment** (認可醫療計劃) means a scheme of medical treatment operated by an employer and approved by the Director for the purposes of this Ordinance under section 34(1); (*Added 39 of 1973 s. 2*)

**registered Chinese medicine practitioner** (註冊中醫) has the meaning assigned to it by section 2 of the Chinese Medicine Ordinance (Cap. 549); (*Added 16 of 2006 s. 2*)

**registered dentist** (註冊牙醫) has the same meaning as in section 2(1) of the Dentists Registration Ordinance (Cap. 156); (*Added 5 of 1995 s. 2*)

**registered medical practitioner** (註冊醫生) has the same meaning as in section 2 of the Medical Registration Ordinance (Cap. 161); (*Added 61 of 1993 s. 2*)

**relevant date** (有關日期), in relation to the termination of employment of an employee, means—

- (a) where the employee's contract of employment is terminated by notice in accordance with section 6, the date on which that notice expires;
- (b) where the employee's contract of employment is terminated by payment in lieu of notice in accordance with section 7, the date up to which such wages are calculated;
- (c) where the employee terminates his contract of employment without notice or payment in lieu in accordance with section 10, the date on which termination takes effect;
- (d) where the employee is employed under a contract for a fixed term and that term expires, the date on which that term expires;
- (e) where a continuous contract of employment specifies an age of retirement and the employee retires at that age, the date of retirement;
- (f) where the employee dies, the date of his death; and
- (g) where the employee's contract of employment is terminated other than in accordance with the provisions of this Ordinance, the date of termination; (*Replaced 52 of 1988 s. 2*)

**relevant mandatory provident fund scheme benefit** (有關強制性公積金計劃權益), in relation to an employee, means the accrued benefits of the employee held by the approved trustee of a mandatory provident fund scheme in respect of the employee, but does not include any part of the benefit that is attributable to the contributions paid to the scheme by the employee; (*Added 4 of 1998 s. 5*)

**relevant occupational retirement scheme benefit** (有關職業退休計劃利益), in relation to an employee, means a benefit payable under an occupational retirement scheme on the retirement, death, incapacity or termination of service of the employee, but does not include any part of the benefit that is attributable to the contributions paid to the scheme by the employee; (*Added 4 of 1998 s. 5*)

**renewal** (續訂) includes extension, and any reference to renewing a contract shall be construed accordingly; (*Added 76 of 1985 s. 2*)

**rest day** (休息日) means a continuous period of not less than 24 hours during which an employee is entitled under Part IV to abstain from working for his employer; (*Added 23 of 1970 s. 2. Amended 71 of 1976 s. 2*)

**severance payment** (遣散費) means the severance payment payable by an employer to an employee under section 31B(1); (*Added 76 of 1985 s. 2*)

**sickness allowance** (疾病津貼) means the sickness allowance provided for by section 33; (*Added 39 of 1973 s. 2*)

**sickness day** (病假日) means a day on which an employee is absent from his work by reason of his being unfit therefor on account of injury or sickness; (*Added 39 of 1973 s. 2*)

**spouse** (配偶) means, in relation to a married employee, the person to whom the employee is lawfully married; (*Added 52 of 1988 s. 2*)

**statutory holiday** (法定假日) means a holiday specified as a statutory holiday in section 39(1); (*Added 39 of 1973 s. 2. Amended 71 of 1976 s. 2; 137 of 1997 s. 2*)

**strike** (罷工) has the meaning assigned to it by section 2 of the Trade Unions Ordinance (Cap. 332); (*Added 76 of 1985 s. 2*)

**substituted holiday** (代替假日) means a holiday granted or to be granted under section 39(3); (*Added 39 of 1973 s. 2. Amended 137 of 1997 s. 2*)

**tips and service charges** (小費及服務費), in relation to wages, means sums of money received, directly or indirectly, by an

employee in the course of and in connection with his employment which are—

- (a) paid or derived from payments made by persons other than the employer; and
- (b) recognized by the employer as part of the employee's wages; (*Added 48 of 1984 s. 2*)

**wage period** (工資期) means the period in respect of which wages are payable under a contract of employment or under section 22;

**wages** (工資), subject to subsections (2) and (3), means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment, but does not include— (*Amended 48 of 1984 s. 2; 76 of 1985 s. 2; 74 of 1997 s. 3*)

- (a) the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;
- (b) any contribution paid by the employer on his own account to any retirement scheme; (*Amended 41 of 1990 s. 2*)
- (c) any commission which is of a gratuitous nature or which is payable only at the discretion of the employer; (*Replaced 74 of 1997 s. 3*)
- (ca) any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer; (*Added 74 of 1997 s. 3*)
- (cb) any travelling allowance which is of a non-recurrent nature; (*Added 74 of 1997 s. 3*)
- (cc) any travelling allowance payable to the employee to defray actual expenses incurred by him by the nature of his employment; (*Added 74 of 1997 s. 3*)
- (cd) the value of any travelling concession; (*Added 74 of 1997 s. 3*)
- (d) any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;
- (da) any end of year payment, or any proportion thereof, which is payable under Part IIA; (*Added 48 of 1984 s. 2*)

- (e) any gratuity payable on completion or termination of a contract of employment; or
- (f) any annual bonus, or any proportion thereof, which is of a gratuitous nature or which is payable only at the discretion of the employer;

**week** (星期), for the purposes of section 11 and Parts VA and VB, means the period between midnight on Saturday night and midnight on the succeeding Saturday night; *(Added 76 of 1985 s. 2. Amended 41 of 1990 s. 2)*

**young person** (青年) means a person who has attained the age of 15 years but not the age of 18 years. *(Replaced 41 of 1990 s. 2)*

*(Amended 4 of 1998 s. 5)*

- (2) No account of overtime pay shall be taken in calculating the wages of an employee for the purpose of—
  - (a) any end of year payment under Part IIA;
  - (b) any maternity leave pay under Part III;
  - (ba) any paternity leave pay under Part IIIA; *(Added 21 of 2014 s. 3)*
  - (c) any severance payment under Part VA;
  - (ca) any long service payment under Part VB; *(Added 76 of 1985 s. 2)*
  - (d) any sickness allowance under Part VII;
  - (e) any holiday pay under Part VIII; or
  - (f) any annual leave pay under Part VIIIA,

unless the overtime pay is of a constant character or the monthly average of the overtime pay over a period of 12 months (or if not applicable, such shorter period of employment) immediately preceding the respective dates specified in subsections (2A) and (2B) is equivalent to or exceeds 20% of his average monthly wages during the same period. *(Added 48 of 1984 s. 2. Amended 74 of 1997 s. 3)*

- (2A) In the calculation of the monthly average of the overtime pay under subsection (2), the date specified for the purpose of that subsection is—
  - (a) in relation to any end of year payment under Part IIA, the expiry date of the payment period;
  - (b) in relation to any maternity leave pay under Part III, the commencement date of maternity leave;
  - (ba) in relation to any paternity leave pay under Part IIIA—

- (i) if paternity leave is taken in a period of consecutive days, the date on which that period begins; or
    - (ii) in any other case, the date on which paternity leave is taken; *(Added 21 of 2014 s. 3)*
  - (c) in relation to any severance payment under Part VA and any long service payment under Part VB—
    - (i) subject to subparagraph (ii), the relevant date;
    - (ii) where the employee's contract of employment is terminated by payment in lieu of notice in accordance with section 7, the date on which the termination takes effect;
  - (d) in relation to any sickness allowance under Part VII, the first sickness day;
  - (e) in relation to any holiday pay under Part VIII, the first day of the holiday; and
  - (f) in relation to any annual leave pay under Part VIIIA, the first day of the annual leave. *(Added 74 of 1997 s. 3)*
- (2B) Notwithstanding anything contained in subsection (2A), the date specified for the purpose of subsection (2) in relation to any termination of employment is—
- (a) subject to paragraph (b), the relevant date;
  - (b) where the employee's contract of employment is terminated by payment in lieu of notice in accordance with section 7, the date on which the termination takes effect. *(Added 74 of 1997 s. 3)*
- (3) Where an employee who has been employed under a continuous contract—
- (a) is dismissed; or
  - (b) is laid off within the meaning of section 31E; or
  - (c) terminates his contract of employment in circumstances specified in section 10(aa) or 31R(1)(b); or
  - (d) dies in circumstances specified in section 31RA(1),
- and for any period of that contract he had not been paid his wages, or his full wages, by reason of any leave taken by him in accordance with the provisions of this Ordinance or the Employees' Compensation Ordinance (Cap. 282) or with the agreement of his employer, or by reason of his not being provided by his employer with work on any normal working day, then the employee shall be deemed, for the purposes of Parts VA and VB and notwithstanding any other provision of this Ordinance, to have been paid, for that period, his full

wages under, and at the frequency required by, that contract as if he had continued in the normal course in the employment to which that contract relates, and any calculation under section 31G or 31V shall be made accordingly. *(Replaced 62 of 1992 s. 2)*

## 12. Maternity leave

- (1) A female employee employed under a continuous contract immediately before taking any leave under this Part shall be entitled to maternity leave under this Part. *(Replaced 73 of 1997 s. 3)*
- (2) Maternity leave shall be the aggregate of—
  - (a) a continuous period of 10 weeks from and inclusive of—
    - (i) the date of commencement of maternity leave as determined under section 12AA; or
    - (ii) the actual date of confinement, if confinement occurs before the date of commencement mentioned in subparagraph (i);
  - (b) a further period equal to the number of days, if any, beginning on the day after the expected date of confinement up to and including the actual date of confinement; such further period of leave is to be taken immediately following the period of leave under paragraph (a); and
  - (c) a further period, not exceeding 4 weeks, on grounds of illness or disability arising out of the pregnancy or confinement. *(Replaced 73 of 1997 s. 3)*
- (3) The period of maternity leave under subsection (2)(c) may be taken—
  - (a) wholly or in part immediately before the period mentioned in subsection (2)(a);
  - (b) wholly or in part immediately after the period mentioned in subsection (2)(a) or (b), as the case may be. *(Replaced 73 of 1997 s. 3)*
- (4) Before taking leave, a female employee who intends to take any period of maternity leave under subsection (2) shall give notice of her pregnancy and of her intention to take maternity leave to her employer after her pregnancy has been confirmed by a medical certificate; the presentation of a medical certificate to the employer by the female employee confirming her pregnancy shall be a notice for the purpose of this subsection. *(Replaced 73 of 1997 s. 3)*



- (4A) A female employee who has given notice under subsection (4) shall, if her pregnancy ceases otherwise than by reason of confinement, give notice of such cessation of pregnancy to her employer as soon as is reasonably practicable. *(Added 55 of 1987 s. 3)*
- (5) If her confinement takes place—
- (a) before notice under subsection (4) is given; or
  - (b) after notice under subsection (4) is given but before the commencement of the period of maternity leave under subsection (2)(a)(i),
- the female employee shall, within 7 days of her confinement, give notice to her employer of the date of confinement and of her intention to take any period of maternity leave under subsection (2)(a). *(Replaced 73 of 1997 s. 3)*
- (6) A female employee who gives notice under subsection (4) shall, if so required by her employer, produce a medical certificate specifying the expected date of confinement. *(Replaced 73 of 1997 s. 3)*
- (7) A female employee who gives notice under subsection (5) shall, if so required by her employer, produce a medical certificate specifying the date of confinement. *(Replaced 73 of 1997 s. 3)*
- (7A) A female employee who may take any period of maternity leave under subsection (2)(b) shall, if so required by her employer, produce a medical certificate specifying the date of confinement. *(Added 73 of 1997 s. 3)*
- (8) A female employee who intends to take any period of maternity leave under subsection (2)(c) shall give notice to that effect to her employer and shall, if so required by her employer, produce a medical certificate certifying as to the illness or disability. *(Amended 73 of 1997 s. 3)*
- (9) *(Repealed 73 of 1997 s. 3)*
- (10) The continuity of employment of a female employee shall not be treated as broken by her taking maternity leave. *(Added 22 of 1981 s. 3)*

- (11) For the avoidance of doubt it is declared that maternity leave is, and shall be granted, in addition to annual leave to which a female employee is entitled under this Ordinance and that any rest day or holiday that falls due during maternity leave shall be counted as part of the maternity leave and shall not give rise to any entitlement to an additional or other rest day or holiday or to holiday pay in the case of a female employee who is paid maternity leave pay for that holiday; and where no maternity leave pay is paid to the female employee for that holiday she shall be paid holiday pay for that holiday. *(Added 22 of 1981 s. 3. Amended 48 of 1984 s. 7)*

#### **12AA. Commencement of maternity leave**

- (1) With the agreement of her employer, a pregnant employee may decide on the date of commencement of her 10 weeks maternity leave, provided that such date is within a period of not less than 2 weeks before, and not more than 4 weeks before, the expected date of confinement.
- (2) If the employee does not exercise her option to decide on the date of commencement in subsection (1), or if she fails to secure her employer's agreement to her proposed leave schedule, the date of commencement of maternity leave shall be 4 weeks immediately before the expected date of confinement.

*(Added 73 of 1997 s. 4)*

#### **14. Payment for maternity leave**

- (1) A female employee shall not be entitled to wages in respect of the period of her maternity leave except as provided in this section or as provided in her contract of employment if such contract provides for paid maternity leave on terms better than in this section.
- (2) An employer shall pay a female employee maternity leave pay for the period of maternity leave taken by her and to which she is entitled under section 12(2)(a) if she— *(Amended 73 of 1997 s. 6)*
  - (a) has been employed by that employer under a continuous contract for a period of not less than 40 weeks immediately before the date of her commencement of maternity leave as determined under section 12AA; *(Amended 5 of 1995 s. 4; 73 of 1997 s. 6)*
  - (b) has given notice under section 12(4) or (5);

- (c) has complied with any requirement by her employer under section 12(6) or (7); and
  - (d) *(Repealed 73 of 1997 s. 6)*
- (3) For the purposes of subsections (3A), (3B) and (3C), **wages** (工資) includes any sum paid by an employer in respect of—
- (a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;
  - (b) a day of leave taken by the employee with the agreement of her employer;
  - (c) a normal working day on which the employee is not provided with work;
  - (d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282). *(Replaced 7 of 2007 s. 6)*
- (3A) Maternity leave pay payable under this section is to be calculated at four-fifths of the daily average of the wages earned by the female employee during—
- (a) the period of 12 months immediately before the date of commencement of her maternity leave; or
  - (b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the date of commencement of her maternity leave, the shorter period,
- but no maternity leave pay is payable in respect of a day on which the female employee would not have worked had she not been on maternity leave and for which no wages would normally be payable by the employer. *(Added 7 of 2007 s. 6)*
- (3B) In calculating the daily average of the wages earned by a female employee during the period of 12 months or the shorter period—
- (a) any period therein for which the employee was not paid her wages or full wages by reason of—
    - (i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;
    - (ii) any leave taken by the employee with the agreement of her employer;
    - (iii) her not being provided by her employer with work on any normal working day; or

- (iv) her absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282); and
  - (b) any wages paid to her for the period referred to in paragraph (a),  
are to be disregarded. *(Added 7 of 2007 s. 6)*
- (3C) For the avoidance of doubt, if the amount of the wages paid to a female employee in respect of a day specified in subsection (3) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (3B). *(Added 7 of 2007 s. 6)*
- (3D) Despite subsection (3A), if for any reason it is impracticable to calculate the daily average of the wages earned by a female employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the date of commencement of the employee's maternity leave, or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of commencement of the employee's maternity leave. *(Added 7 of 2007 s. 6)*
- (4) Maternity leave pay under this section shall be paid by an employer on the same day and in the same manner as he would have been required to pay wages to the female employee if she had not taken maternity leave and had continued in his employ.
- (5) A female employee who, without the prior permission of her employer, works for another employer during any period of maternity leave under section 12(2)(a) shall forfeit her entitlement to maternity leave pay during that period of maternity leave. *(Amended 73 of 1997 s. 6)*
- (6) *(Repealed 73 of 1997 s. 6)*
- (7) If, pursuant to the terms of her contract of employment or any other agreement or for any other reason, a female employee is paid by her employer a sum of money in respect of any period of her maternity leave, the maternity leave pay payable to the employee in respect of that period is to be reduced by that sum. *(Added 7 of 2007 s. 6)*

*(Replaced 22 of 1981 s. 4)*

## 15. Prohibition against termination of employment

- (1) Subject to subsections (1A) and (1B)—
- (a) after a pregnant employee has served notice of pregnancy on her employer, the employer shall not terminate her continuous contract of employment otherwise than in accordance with section 9 during the period from the date on which her pregnancy is confirmed by a medical certificate to the date on which she is due to return to work on the expiry of her maternity leave or the date of cessation of pregnancy (otherwise than by reason of confinement);
  - (b) if a pregnant employee has served such notice on her employer immediately after being informed of the termination of her contract of employment where the termination was made otherwise than in accordance with section 9 by her employer, the employer shall immediately withdraw the termination or notice of termination in which event the termination or notice of termination shall be treated as if it had not taken place.  
*(Replaced 7 of 2001 s. 5)*
- (1A) Where in a contract of employment of a pregnant employee, whether in writing or oral, it has been expressly agreed that the employment is on probation, subsection (1) shall not prevent the termination by an employer of such contract for reasons other than pregnancy during the period of probation if the period does not exceed 12 weeks, or during the first 12 weeks of probation if the period of probation exceeds 12 weeks.  
*(Replaced 73 of 1997 s. 7)*
- (1B) An employer who terminates the continuous contract of employment of a pregnant employee shall be taken for the purposes of subsection (1)(a) or (b) to terminate the contract otherwise than in accordance with section 9—
- (a) unless the contrary is proved; or
  - (b) subject to subsection (1C), unless the employer proves that—
    - (i) he purported to terminate the contract in accordance with that section; and
    - (ii) at the time of such termination, he reasonably believed that he had a ground to do so. *(Added 7 of 2001 s. 5)*
- (1C) Subsection (1B)(b) shall not apply in the case of civil proceedings. *(Added 7 of 2001 s. 5)*

- (1D) For the purposes of subsections (2)(b), (2A) and (2B), *wages* (工資) includes any sum paid by an employer in respect of—
- (a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;
  - (b) a day of leave taken by the employee with the agreement of her employer;
  - (c) a normal working day on which the employee is not provided with work;
  - (d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282). (*Added 7 of 2007 s. 7*)
- (2) An employer who contravenes subsection (1)(a) or (b) shall be liable to pay to the female employee— (*Amended 7 of 2001 s. 5*)
- (a) the sum which would have been payable if the contract had been terminated by the employer under section 7 provided that she has not received any such payment under that section; (*Amended 73 of 1997 s. 7*)
  - (b) a further sum equivalent to the monthly average of the wages earned by the employee during—
    - (i) the period of 12 months immediately before the date of termination of the contract of employment; or
    - (ii) if the employee has been employed by the employer for a period shorter than 12 months immediately before the date of termination of the contract, the shorter period; and (*Replaced 7 of 2007 s. 7*)
  - (c) where the employee is or would have been entitled to maternity leave pay, maternity leave pay for 10 weeks. (*Added 22 of 1981 s. 5*)
- (2A) In calculating the monthly average of the wages earned by a female employee during the period of 12 months or the shorter period—
- (a) any period therein for which the employee was not paid her wages or full wages by reason of—
    - (i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;
    - (ii) any leave taken by the employee with the agreement of her employer;

- (iii) her not being provided by her employer with work on any normal working day; or
    - (iv) her absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282); and
  - (b) any wages paid to her for the period referred to in paragraph (a),  
are to be disregarded. (*Added 7 of 2007 s. 7*)
- (2B) For the avoidance of doubt, if the amount of the wages paid to a female employee in respect of a day specified in subsection (1D) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (2A). (*Added 7 of 2007 s. 7*)
- (2C) Despite subsection (2)(b), if for any reason it is impracticable to calculate the monthly average of the wages earned by a female employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the date of termination of the employee's contract of employment, or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of termination of the employee's contract of employment. (*Added 7 of 2007 s. 7*)
- (3) (*Repealed 7 of 2007 s. 7*)
- (4) Any employer who contravenes subsection (1)(a) or (b) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. (*Replaced 7 of 2001 s. 5*)

#### **15E. Entitlement to paternity leave**

- (1) A male employee is entitled to paternity leave in respect of the birth of a child if—
  - (a) he is the child's father;
  - (b) he has been employed under a continuous contract immediately before taking leave; and
  - (c) he has complied with all the requirements in section 15F.
- (2) For subsection (1), the employee—

- (a) subject to section 15G, is entitled to take leave during the period specified in subsection (3) on the date or dates notified to the employer under section 15F(1); and
- (b) is entitled to take leave for not more than—
  - (i) for a child born on or after 27 February 2015 but before the commencement date\* of the Employment (Amendment) (No. 3) Ordinance 2018 (30 of 2018)—3 days; or
  - (ii) for a child born on or after that commencement date\*—5 days,
 whether consecutive or not, for each confinement.  
*(Replaced 30 of 2018 s. 3)*
- (3) For subsection (2)(a), the period—
  - (a) begins 4 weeks before the expected date of the delivery of the child; and
  - (b) ends 10 weeks beginning on the actual date of the delivery of the child.
- (4) For subsection (2)(b), multiple births in one pregnancy are taken to be one confinement.
- (5) Subsection (1) does not apply in relation to—
  - (a) a miscarriage; or
  - (b) a child born before 27 February 2015. *(Replaced 30 of 2018 s. 3)*

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Editorial Note:

\* Commencement date: 18 January 2019.

### **15G. Paternity leave not affected by other leave entitlements**

- (1) Paternity leave is in addition to rest days, holidays and annual leave to which an employee is entitled under this Ordinance.
- (2) If—
  - (a) an employee has, in compliance with the requirement in section 15F(1), notified the employer that he intends to take paternity leave on a particular day; and
  - (b) that day falls on a rest day or holiday or falls within a period of annual leave,
 he is entitled to take the leave on the day immediately after the rest day, holiday or period of annual leave.



- (3) Despite subsection (2), the employee is entitled to take the leave on another day he chooses if he has notified the employer of his choice at least 2 days before that other day.
- (4) The employee is entitled to take leave on the day mentioned in subsection (2) even if that day falls on a day after the 10-week period mentioned in section 15E(3)(b).
- (5) However, subsection (3) does not entitle the employee to take leave on a day that falls on a day outside the period specified in section 15E(3).

**33. Sickness allowance**

- (1) An employee who has been employed by his employer under a continuous contract for a period of 1 month or more immediately preceding a sickness day shall be paid by his employer sickness allowance in accordance with this section and section 35. *(Amended 1 of 1977 s. 2; 48 of 1984 s. 14)*
- (2) Subject to subsection (2A), an entitlement to sickness allowance shall accrue at the rate of—
  - (a) 2 paid sickness days for each completed month of the employee's employment under the continuous contract with his employer during the first 12 months of such employment; and
  - (b) 4 paid sickness days for each such month thereafter, and may be accumulated from time to time up to a maximum of 120 paid sickness days. *(Replaced 57 of 1983 s. 5)*
- (2A) In the case of an employee who has been employed by his employer under a continuous contract for a period of 1 month or more immediately preceding the commencement\* of the Employment (Amendment) Ordinance 1983 (57 of 1983), the employee's entitlement to sickness allowance shall, with effect from and without prejudice to the entitlement to sickness allowance accrued at such commencement, accrue at the rate prescribed by subsection (2) as amended by that Ordinance, and his employment for part of a month (if any) at such commencement shall be taken into account in calculating his entitlement to sickness allowance under and at the rate prescribed by that subsection. *(Added 57 of 1983 s. 5)*
- (3) Subject to subsection (3C), an employee who takes less than 4 consecutive days as sickness days shall not be entitled to be paid sickness allowance in respect thereof. *(Amended 22 of 1981 s. 7)*

- (3A) Where a female employee who is pregnant or who has given birth to a child and who is required to attend a medical examination in relation to her pregnancy or post confinement medical treatment, any day on which she is absent from work for such examination or treatment shall be a sickness day. *(Added 22 of 1981 s. 7)*
- (3B) Where a female employee suffers a miscarriage, any day on which she is absent from work by reason of such miscarriage shall be a sickness day. *(Added 22 of 1981 s. 7)*
- (3C) A female employee who has an entitlement to a sickness allowance under this section shall, notwithstanding subsection (3), be paid sickness allowance for every sickness day under subsection (3A) or (3B), and subsections (4), (4A), (5), (5A) and (7) shall apply to any such sickness day and sickness allowance in respect thereof. *(Added 22 of 1981 s. 7. Amended 57 of 1983 s. 5)*
- (4) Subject to subsections (5) and (5A), an employee who takes 4 or more consecutive days as sickness days shall be entitled to be paid sickness allowance for the total number of sickness days taken by him, but not exceeding the number of paid sickness days accumulated by him, under subsections (2) and (2A), immediately before the commencement of the sickness days taken. *(Replaced 57 of 1983 s. 5)*
- (4A) The number of sickness days in respect of which an employee has been paid sickness allowance under subsection (4) shall be deducted in accordance with section 37(1B) from the total number of paid sickness days accumulated by him. *(Added 57 of 1983 s. 5)*
- (4B) Subject to subsection (4BAA), an employer shall not terminate a contract of employment of an employee otherwise than in accordance with section 9 on any sickness day taken by the employee in respect of which sickness allowance is payable under this section. *(Replaced 7 of 2001 s. 8)*
- (4BAAA) For the purposes of subsections (4BA)(b), (4BAAB) and (4BAAC), **wages** (工資) includes any sum paid by an employer in respect of—
- (a) a day of maternity leave, a day of paternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee; *(Amended 21 of 2014 s. 9)*
  - (b) a day of leave taken by the employee with the agreement of his employer;
  - (c) a normal working day on which the employee is not provided with work;

(d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282). *(Added 7 of 2007 s. 9)*

(4BA) An employer who contravenes subsection (4B) shall be liable to pay to the dismissed employee—

(a) the sum which would have been payable if the contract had been terminated by the employer under section 7; and

(b) a further sum equivalent to 7 times the daily average of the wages earned by the employee during—

(i) the period of 12 months immediately before the date of termination of the contract of employment; or

(ii) if the employee has been employed by the employer for a period shorter than 12 months immediately before the date of termination of the contract, the shorter period. *(Replaced 7 of 2007 s. 9)*

*(Added 103 of 1995 s. 13)*

(4BAAB) In calculating the daily average of the wages earned by an employee during the period of 12 months or the shorter period —

(a) any period therein for which the employee was not paid his wages or full wages by reason of—

(i) any maternity leave, paternity leave, rest day, sickness day, holiday or annual leave taken by the employee; *(Amended 21 of 2014 s. 9)*

(ii) any leave taken by the employee with the agreement of his employer;

(iii) his not being provided by his employer with work on any normal working day; or

(iv) his absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282); and

(b) any wages paid to him for the period referred to in paragraph (a),

are to be disregarded. *(Added 7 of 2007 s. 9)*

- (4BAAC) For the avoidance of doubt, if the amount of the wages paid to an employee in respect of a day specified in subsection (4BAAA) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (4BAAB). *(Added 7 of 2007 s. 9)*
- (4BAAD) Despite subsection (4BA)(b), if for any reason it is impracticable to calculate the daily average of the wages earned by an employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the date of termination of the employee's contract of employment, or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of termination of the employee's contract of employment. *(Added 7 of 2007 s. 9)*
- (4BAA) An employer who terminates the continuous contract of employment of an employee on any sickness day taken by the employee in respect of which sickness allowance is payable under this section shall be taken for the purposes of subsection (4B) to terminate the contract otherwise than in accordance with section 9—
- (a) unless the contrary is proved; or
  - (b) subject to subsection (4BAB), unless the employer proves that—
    - (i) he purported to terminate the contract in accordance with that section; and
    - (ii) at the time of such termination, he reasonably believed that he had a ground to do so. *(Added 7 of 2001 s. 8)*
- (4BAB) Subsection (4BAA)(b) shall not apply in the case of civil proceedings. *(Added 7 of 2001 s. 8)*
- (4BB) Any employer who contravenes subsection (4B) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. *(Replaced 7 of 2001 s. 8)*

- (4C) Where an employer terminates a contract of employment of an employee on any sickness day taken by the employee, the employer shall, notwithstanding the termination of the contract of employment, pay to the employee sickness allowance for the total number of sickness days in respect of which the employee would have been entitled to be paid sickness allowance under subsection (4), and subsections (5), (5A) and (7) shall apply to any such sickness day and sickness allowance in respect thereof as if the contract of employment had not been terminated. (*Added 57 of 1983 s. 5*)
- (5) An employer shall not be liable to pay sickness allowance to an employee in respect of any sickness day—
- (a) subject to subsection (5A), unless such day is a day specified in the appropriate medical certificate as a day on which, in the opinion of the registered medical practitioner, registered Chinese medicine practitioner or registered dentist who issued the certificate, the employee was, is or will be, as the case may be, unfit for work on account of sickness or injury; (*Amended 57 of 1983 s. 5; 5 of 1995 s. 9; 16 of 2006 s. 7*)
  - (b) if, where the employer is operating a recognized scheme of medical treatment, the employee, at any time during the sickness or injury, unless he is a patient in a hospital, refuses without reasonable excuse to submit himself for treatment under the scheme; (*Amended 57 of 1983 s. 5; 5 of 1995 s. 9; 16 of 2006 s. 7*)
  - (c) if, where the employer is operating a recognized scheme of medical treatment, the employee, having submitted himself for treatment by the registered medical practitioner, registered Chinese medicine practitioner or registered dentist engaged by the employer for the purposes of the scheme or being a patient in a hospital, at any time during the sickness or injury, without reasonable excuse, disregards— (*Amended 16 of 2006 s. 7*)
    - (i) the advice of such medical practitioner, Chinese medicine practitioner or dentist; or
    - (ii) the advice of the registered medical practitioner, registered Chinese medicine practitioner or registered dentist who is attending him in the hospital; (*Amended 57 of 1983 s. 5; 5 of 1995 s. 9; 16 of 2006 s. 7*)
  - (d) if the unfitness for work of the employee is caused by his serious and wilful misconduct;

- (e) if the unfitness for work of the employee is on account of an injury or occupational disease in respect of which compensation is payable in accordance with the Employees' Compensation Ordinance (Cap. 282);
  - (f) in respect of which the employee has received holiday pay.
- (5AA) Where a medical certificate issued for the purposes of subsection (5)—
- (a) is issued by a registered medical practitioner, subsection (5)(b) applies only if the recognized scheme of medical treatment operated by the employer covers medical treatment given by a registered medical practitioner;
  - (b) is issued by a registered Chinese medicine practitioner, subsection (5)(b) applies only if the recognized scheme of medical treatment operated by the employer covers medical treatment given by a registered Chinese medicine practitioner; or
  - (c) is issued by a registered dentist, subsection (5)(b) applies only if the recognized scheme of medical treatment operated by the employer covers medical treatment given by a registered dentist. (*Added 16 of 2006 s. 7*)
- (5A) Where an employee takes paid sickness days entered in category 2 of the record kept in respect of him under section 37(1A), he shall, if so required by his employer, produce to the employer, in respect of each such sickness day, a medical certificate that is issued by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist attending the employee as an out-patient or in-patient in a hospital. (*Added 57 of 1983 s. 5. Amended 5 of 1995 s. 9; 16 of 2006 s. 7*)
- (6) For the purposes of this section—
- (a) the expression ***hospital*** (醫院) means a hospital or specialist clinic maintained by the Government, a military hospital, a public hospital within the meaning of the Hospital Authority Ordinance (Cap. 113) or a hospital in respect of which a person is registered under the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap. 165); (*Amended 81 of 1991 s. 2; 2 of 2012 s. 3*)

- (b) in subsection (5)(a), the expression *appropriate medical certificate* (適當的醫生證明書) means—
- (i) where, on the day on which the certificate is issued, the employer is operating a recognized scheme of medical treatment—
    - (A) a certificate issued by the registered medical practitioner, registered Chinese medicine practitioner or registered dentist engaged by the employer for the purposes of the scheme;
    - (B) (if the scheme does not cover medical treatment given by a registered medical practitioner) a certificate issued by any registered medical practitioner;
    - (C) (if the scheme does not cover medical treatment given by a registered Chinese medicine practitioner) a certificate issued by any registered Chinese medicine practitioner;
    - (D) (if the scheme does not cover medical treatment given by a registered dentist) a certificate issued by any registered dentist; or
    - (E) (if the employee refuses with reasonable excuse to submit himself for treatment under the scheme) a certificate issued by any registered medical practitioner, registered Chinese medicine practitioner or registered dentist; (*Replaced 16 of 2006 s. 7*)
  - (ii) where, on the day on which the certificate is issued, the employee is a patient in a hospital, a certificate issued by the registered medical practitioner, registered Chinese medicine practitioner or registered dentist attending the employee in the hospital; or
  - (iii) in any other cases, a certificate issued by any registered medical practitioner, registered Chinese medicine practitioner or registered dentist.  
(*Replaced 57 of 1983 s. 5. Amended 5 of 1995 s. 9; 16 of 2006 s. 7*)

- (7) Every medical certificate shall, in addition to specifying the number of days on which, in the opinion of the issuer of the certificate, the employee was, is or will be, as the case may be, unfit for work, specify the nature of the sickness or injury on account of which, in the opinion of the issuer of the certificate, the employee was, is or will be, as the case may be, unfit for work and, in the case of a medical certificate produced by an employee for the purposes of subsection (5A), the medical certificate shall, if so required by his employer, contain or be accompanied by a brief record of the investigation carried out and the treatment prescribed by the issuer of the certificate.  
*(Amended 57 of 1983 s. 5; 5 of 1995 s. 9; 16 of 2006 s. 7)*

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Editorial Note:

\* Commencement date: 1 November 1983.



## **Implications of the Proposal**

### **Economic Implications**

Having regard to Hong Kong's prevailing low birth rate and the small number of working mothers eligible for ML per year relative to the size of the total working population, the additional cost arising from the increase in statutory ML by four weeks (with the MLP rate maintained at four-fifths of an employee's wages and the additional MLP capped at \$36,822 per employee) and the other proposals is unlikely to be huge. In particular, as the cost of the additional MLP (crudely estimated at \$444 million annually or 0.05% of the total wage bill of all employees, with reference to the situation in 2018) is fully borne by the Government, the other additional costs to be borne by the employers concerned should be insignificant.

### **Financial and Civil Service Implications**

2. With the Government funding support being subject to a maximum of \$36,822 for each ML case, the annual cost to be borne by the Government would be around \$444 million with reference to the situation in 2018. Besides, outsourced service contractors, publicly funded bodies and subvented organisations, etc. may seek additional funding support from the Government for hiring temporary workers to fill the void during the four weeks' additional ML.

3. Given that Government employees are already entitled to 14 weeks' ML with effect from 10 October 2018, extending statutory ML to 14 weeks will have no additional financial implications for the Government in its capacity as an employer.

4. LD will be responsible for implementing and enforcing the amended legislation (including promotion, conciliation, inspection, etc.), as well as developing and implementing a new reimbursement scheme for employers in respect of the additional MLP. The additional manpower required will be sought with justifications in accordance with the established resource allocation mechanism.

### **Family and Gender Implications**

5. The proposed extension of statutory ML will have a positive impact on working women by providing a longer leave with pay at around the birth of their child. The proposed updating of the definition of "miscarriage" and clarification of sickness allowance for medical examination in relation to pregnancy will improve the entitlement of female employees in such situations. The proposal is also conducive to a more supportive environment for forming and raising families.

## **Sustainability Implications**

6. The proposed extension of statutory ML will have positive sustainability implications for working women as set out in paragraph 5 above, and will help build a more cohesive, harmonious and caring society.

**List of Abbreviations**

Additional MLP	Maternity leave pay in respect of the extension of maternity leave
Bill	Employment (Amendment) Bill 2019
COA	Certificate of attendance
EO	Employment Ordinance
LAB	Labour Advisory Board
LD	Labour Department
LegCo	Legislative Council
ML	Maternity leave
MLP	Maternity leave pay