

LEGISLATIVE COUNCIL BRIEF

Employment Ordinance
(Chapter 57)

EMPLOYMENT (AMENDMENT) BILL 2022

INTRODUCTION

A At the meeting of the Executive Council on 25 February 2022, the Council ADVISED and the Chief Executive (“CE”) ORDERED that the Employment (Amendment) Bill 2022 (“Bill”) at **Annex A** should be introduced into the Legislative Council (“LegCo”) to give effect to the following three proposals –

- (a) to make it explicit that the absence from work of employees for compliance with a requirement with restriction on movement imposed under the Prevention and Control of Disease Ordinance (“Cap. 599”) (except restriction imposed on people travelling to Hong Kong) will be deemed as sickness day(s) under the Employment Ordinance (Cap. 57) (“EO”) and to provide for sickness allowance to eligible employees absent from work under the above circumstances, subject to the fulfilment of the relevant criteria under EO;
- (b) to make it explicit that dismissal of an employee by reason of the employee being subject to restriction on movement imposed under Cap. 599 (except restriction imposed on people travelling to Hong Kong) is considered as unreasonable dismissal; and
- (c) to make it explicit with a sunset provision that dismissal of employees due to refusal to receive vaccination without sufficient medical reasons after request being made by employers is not considered as unreasonable dismissal.

JUSTIFICATIONS

2. Against the backdrop of the severe impact of the COVID-19 pandemic on our society, new public health emergency regulations for epidemic control under Cap. 599 are introduced to restrict people’s

movement to avoid spreading of the disease. With a view to better safeguarding the employment rights and benefits of employees and encouraging employees to receive vaccination, the Government proposes to amend EO along the three recommendations as described in paragraphs 3 to 8.

Recommendation (a) – Absence from work of employees for compliance with Cap. 599 be deemed as sickness day(s) under EO and to provide for sickness allowance to eligible employees

3. Under EO, an employee employed under a continuous contract will be entitled to sickness allowance upon fulfilling certain criteria¹. An employee who has to be absent from work in order to comply with movement restrictions imposed under Cap. 599 (such as quarantine or isolation orders) may not be entitled to sickness allowance because the employee's absence may not be due to his/her injury or sickness and he/she may not be issued an "appropriate medical certificate"² as currently required under EO. To achieve the policy intent that an employee who is absent from work by reason of his/her compliance with movement restrictions imposed under Cap. 599 (except restrictions imposed on people travelling to Hong Kong) should be entitled to sickness allowance, the present exercise proposes to amend the definition of "sickness day"³ and to provide for the kind(s) of documents that are acceptable as proof of entitlement to sickness allowance such that it is not confined to an "appropriate medical certificate". We consider this necessary having regard to the features and circumstances of the movement restrictions imposed under Cap. 599. Other existing provisions relating to sickness allowance under EO remain unchanged to avoid creating undue burden on employers.

Recommendation (b) – Dismissal of employees by reason of the employee being subject to restriction on movement imposed under Cap. 599 (except restriction imposed on people travelling to Hong Kong) be considered as unreasonable dismissal

4. We propose to make it clear under EO that dismissal of employees by reason of their under movement restriction imposed under

¹ Such criteria include: (a) the sick leave taken is not less than four consecutive days; (b) the sick leave is supported by an appropriate medical certificate; and (c) the employee has accumulated sufficient number of paid sickness days.

² "Appropriate medical certificate" should be issued by a registered medical practitioner, a registered Chinese medicine practitioner or a registered dentist, and should specify the number of days on which, and the nature of the sickness or injury on account of which, the employee is unfit for work.

³ "Sickness day", under EO, 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.

Cap. 599 (except restriction imposed on people travelling to Hong Kong) is considered as unreasonable dismissal. The proposal will effectively preserve the employment protection of employees so that they can comply with the movement restriction with the surety that the resultant absence from work will not become a valid reason for dismissal. This is fair, and promotes compliance with movement restrictions issued under Cap. 599 for anti-epidemic purposes. To align with the prevailing employment protection regime under EO, we further propose to set it out clearly in EO that it should not be a valid reason for variation of the terms of the employment contract of an employee by reason of their under movement restriction by virtue of Cap. 599 (except restriction imposed on people travelling to Hong Kong).

Recommendation (c) - Dismissal of employees due to refusal to receive vaccination without sufficient medical reasons not considered as unreasonable dismissal (with sunset provision)

5. To deal with issues in relation to employees' refusal to comply with a "vaccine pass" implemented under the Prevention and Control of Disease (Vaccine Pass) Regulation (Cap. 599 sub. leg. L)("Cap. 599L"), and to encourage employees to receive vaccination pursuant to a legitimate vaccination request by an employer in the interest of protecting public health, we propose to provide in EO that dismissal due to refusal to vaccinate is a valid reason for dismissal. The "refusal to vaccinate" by an employee is construed as either:

- (a) non-compliance of the vaccination requirement of the "vaccine pass" scheme under Cap. 599L; or
- (b) if Cap. 599L is not applicable, failure to produce proof of having vaccinated of any COVID-19 vaccine recognized by the Government to the employer

by a date after being requested by the employer in writing.

The provision to regard refusal to vaccinate as a valid reason for refusal will have a sunset clause, to be repealed when the pandemic is under control and vaccination is no longer a matter of public health concern.

6. The proposal does not require or encourage an employer to dismiss their employees who fail to comply with the vaccination requirements under Cap. 599L or refuse to show proof of having been vaccinated. The proposal only serves to discharge the employer from the liability for alleged "unreasonable dismissal" if a dismissal does take place by reason of non-vaccination of employees.

7. To be fair to both employers and employees, and ensure practical feasibility, we propose that an employer may cite “refusal to vaccinate” as a valid reason for dismissal only after serving a written notice to all employees (or all employees of the same job nature) and allowing the affected employees 56 days (i.e. eight weeks) before requiring them to present proof of vaccination.

8. An employer may not cite “refusal to vaccinate” as a valid reason for dismissal in respect of any employee who is exempted from compliance with the vaccination requirement of the “vaccine pass” scheme as stipulated in Cap. 599L. For situations where Cap. 599L does not apply, the exemptions to vaccinate will include:

- (a) employees with medical exemption certificate specified in Cap. 599L during the compliance period of the certificate;
- (b) pregnant employees and lactating employees; and
- (c) employees who are in the first 6-month period after being diagnosed COVID-19.

OTHER OPTIONS

9. Introducing legislative amendments is the only way to achieve the policy objectives to give effect to the proposals in paragraph 1 above.

THE BILL

10. The main provisions of the Bill are as follows -

- (a) Clause 1 sets out the short title and provides for commencement.
- (b) Clause 3 amends the definition of sickness day in section 2(1) of EO to include a day on which an employee is absent from work by reason of the employee’s compliance with a Cap. 599 requirement and also provides for the definition of Cap. 599 requirement.
- (c) Clause 5 adds new sections 32KA and 32KB to EO to—
 - (i) provide that in determining whether an employer has a valid reason for the dismissal of an employee or the variation of the terms of the contract of employment with the employee, the employee’s absence due to the employee’s compliance with a Cap. 599 requirement does not constitute a valid reason for the dismissal or variation; and
 - (ii) provide that an employee who fails to comply with a

legitimate vaccination request (being a written request that meets all the conditions set out in Part 1 of the new Schedule 12 added by clause 13 and in relation to which the new section 32KB(2)(b) is complied with) made to the employee by the employer is regarded as being incapable of performing the employee's work.

- (d) Clause 7 amends section 33 of EO to—
 - (i) provide for the circumstances under which sickness allowance is payable to an affected employee in respect of a day of absence; and
 - (ii) provide that an employee is not entitled to sickness allowance if the employee is subject to a Cap. 599 requirement due to the employee's serious and wilful misconduct.
- (e) Clause 8 amends section 35 of EO to provide that no sickness allowance is payable in respect of a day on which an employee would not have worked had the employee not been absent from work due to the employee's compliance with a Cap. 599 requirement.
- (f) Clause 9 amends section 41AA of EO so that any period of absence from work due to the employee's compliance with a Cap. 599 requirement occurring during a period of annual leave ("annual leave period") is not to be counted as part of that annual leave unless the period of absence commences after the commencement of the annual leave period.
- (g) Clause 10 adds new sections 68A and 68B to EO so that the Commissioner for Labour may, by notice published in the Gazette, amend the new Schedules 11 and 12.
- (h) Clause 12 amends the First Schedule to EO so that if in any hour an employee is absent from work due to the employee's compliance with a Cap. 599 requirement, that hour is to be counted as an hour in which the employee has worked.
- (i) Clause 13 adds—
 - (i) new Schedule 11 to EO to set out the list of requirements each of which constitutes a Cap. 599 requirement and also the means specified for the purposes of the new section 33(5)(ab); and
 - (ii) new Schedule 12 to EO to provide for the conditions for a legitimate vaccination request referred to in the new section 32KB.
- (j) The new sections 32KB and 68B and the new Schedule 12 are to expire on a day to be appointed by the Commissioner for Labour. Clauses 4(2), 6, 11 and 14 provide for the repeal of those sections and that Schedule and the related amendment to section 32K(b) of EO.

- (k) This Bill makes no amendment in respect of other aspects of statutory sick leave and sickness allowance.

B 11. The existing provisions being amended are at **Annex B**.

LEGISLATIVE TIMETABLE

12. The legislative timetable will be -

Publication in the Gazette	25 February 2022
First Reading and commencement of Second Reading debate	16 March 2022
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

IMPLICATIONS OF THE PROPOSAL

13. The proposal is in conformity with the Basic Law provisions, including the provisions concerning human rights. It does not affect the current binding effect of EO and has no productivity; environmental; gender and sustainability implications. The proposal will have slight positive impact on employees subject to restriction(s) on movement imposed under Cap. 599 by providing them with income and employment protection as they can be entitled to sickness allowance upon fulfilling the criteria under EO which will help safeguard the financial well-being of the employees and their families. In light of the public health emergency situation in Hong Kong, measures to restrict people's freedom of movement for disease prevention and control under Cap. 599 and to encourage employees to receive vaccination in the interest of protecting public health are vital elements in the overall epidemic control strategy. For recommendations (a) and (b) in relation to employer's obligation to employees complying with Cap. 599 requirements, on balance, we consider the societal benefit (i.e. preventing the spread of infectious disease) outweighs the possible economic loss to private-sector employers and establishments. As regards recommendation (c) which deals with issues in relation to, after request being made by employers, employees' refusal to comply with a "vaccine pass" scheme implemented under Cap. 599L or to receive vaccination without sufficient medical reasons, it is formulated for the sake of addressing the public health concern. It puts in place a sunset provision such that its effect is temporary.

PUBLIC CONSULTATION

14. The Labour and Welfare Bureau/Labour Department (“LD”) consulted the LegCo Panel on Manpower and the Labour Advisory Board on 4 February and 9 February 2022 respectively.

PUBLICITY

15. A press release was issued on 25 February 2022 immediately after CE in Council’s approval of the Bill. A Government spokesperson from LD will be made available to handle media enquiries.

ENQUIRIES

16. Enquiries relating to this brief can be directed to Mr Raymond LIANG, Assistant Commissioner for Labour (Labour Relations), at 2852 4099; Mr MA Kwok-kuen, Chief Labour Officer (Labour Relations), at 2852 3457; or Ms Pearl KWOK, Senior Labour Officer (Labour Relations)(Liaison), at 2852 3602.

**Labour and Welfare Bureau
Labour Department
2 March 2022**

Employment (Amendment) Bill 2022

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A BILL

To

Amend the Employment Ordinance to regard a day on which an employee (*affected employee*) is subject to any restriction on movement imposed under the Prevention and Control of Disease Ordinance as a sickness day; to provide for sickness allowance to be paid to the affected employee under certain circumstances; to provide that it is not a valid reason to dismiss an employee or vary the terms of the employee's contract of employment on the ground of the employee being an affected employee; to provide that it is a valid reason to dismiss an employee (other than an employee that falls within a specified category) or vary the terms of the employee's contract of employment if he or she refuses to produce proof of vaccination after a request is made by the employer; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Employment (Amendment) Ordinance 2022.
- (2) Subject to subsection (3), this Ordinance comes into operation on the day on which it is published in the Gazette.
- (3) Sections 4(2), 6, 11 and 14 come into operation on a day to be appointed by the Commissioner for Labour 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)

- (1) Section 2(1)—

Repeal the definition of *sickness day*

Substitute

“*sickness day* (病假日)—

- (a) means a day on which an employee is absent from the employee's work by reason of the employee being unfit for work on account of injury or sickness; and
- (b) includes a day on which an employee is absent from the employee's work by reason of the employee's compliance with a Cap. 599 requirement;”.

- (2) Section 2(1)—

Add in alphabetical order

“*Cap. 599 requirement* (《第 599 章》規定) means a requirement set out in Part 1 of Schedule 11 that imposes a restriction on movement;”.

4. Section 32K amended (reasons for the dismissal or the variation of the terms of the contract of employment)

- (1) Section 32K(b), before “the capability”—

Add

“subject to section 32KB;”.

- (2) Section 32K(b)—

Repeal

“subject to section 32KB;”.

- (3) Section 32K(b)—

Repeal

“which he”

Substitute

“that the employee”.

5. Sections 32KA and 32KB added

After section 32K—

Add

“32KA. Compliance with Cap. 599 requirement not valid reason for dismissal etc.

- (1) This section applies in relation to an employee who is subject to a Cap. 599 requirement, and is dismissed or has the terms of the employee’s contract of employment varied by the employer.
- (2) In determining for the purposes of this Part whether the employer has a valid reason for the dismissal of the employee or the variation of the terms of the employee’s contract of employment within the meaning of section 32K, the employee’s absence from work due to the employee’s compliance with the Cap. 599 requirement does not constitute a valid reason for the dismissal or variation.

32KB. Failure to comply with legitimate vaccination request regarded as incapable of performing work

- (1) For the purposes of section 32K(b), an employee who fails to comply with a legitimate vaccination request made to the employee by his or her employer is regarded as being incapable of performing work of the kind that the employee was employed by the employer to do.

- (2) For subsection (1), a legitimate vaccination request is made to the employee (*subject employee*) by the employer if—
 - (a) a written request that meets all the conditions set out in Part 1 of Schedule 12 is made to the subject employee by the employer; and
 - (b) if any other employee (*fellow employee*) of the employer performs work the nature of which is the same as, or similar to, that of the subject employee’s work—a written request that meets all the conditions set out in Part 1 of Schedule 12 is made to every fellow employee by the employer.”.

6. Section 32KB repealed (failure to comply with legitimate vaccination request regarded as incapable of performing work)

Section 32KB—

Repeal the section.

7. Section 33 amended (sickness allowance)

- (1) Section 33(5)(a), after “subject to”—

Add

“paragraph (ab) and”.

- (2) After section 33(5)(a)—

Add

- “(ab) (if the employee is absent from work due to the employee’s compliance with a Cap. 599 requirement) subject to subsection (8), unless such day is shown, by any of the means specified in Part 2 of Schedule 11, to be a day on which the employee is subject to the Cap. 599 requirement;

(ac) if the employee is subject to a Cap. 599 requirement due to the employee's serious and wilful misconduct;"

(3) Section 33(5A), before "entered"—

Add

"(other than any sickness day that falls within paragraph (b) of the definition of *sickness day* in section 2(1))".

(4) After section 33(7)—

Add

"(8) An employee is entitled to sickness allowance in respect of a sickness day that falls within paragraph (b) of the definition of *sickness day* in section 2(1) only if—

- (a) the period of the employee's absence from work lasts for 4 or more consecutive days; and
- (b) the sickness day falls on or after the specified date.

(9) For the purposes of subsection (8), it does not matter—

- (a) whether the period of the employee's absence from work begins before the specified date;
- (b) whether the period relates to more than one Cap. 599 requirement; and
- (c) whether the period relates to more than one order, notice, declaration, direction or other instruction or request (however described) made, issued, published or given under the Prevention and Control of Disease Ordinance (Cap. 599).

(10) In subsections (8) and (9)—

specified date (指明日期) means the day on which the Employment (Amendment) Ordinance 2022 (of 2022) is published in the Gazette."

8. Section 35 amended (rate of sickness allowance)

Section 35(2)—

Repeal

"he not been sick"

Substitute

"the employee not been sick or injured or absent from work due to the employee's compliance with a Cap. 599 requirement".

9. Section 41AA amended (annual leave)

Section 41AA(7), after "injury"—

Add

"or absence from work due to the employee's compliance with a Cap. 599 requirement".

10. Sections 68A and 68B added

After section 68—

Add

"68A. Commissioner may amend Schedule 11

The Commissioner may, by notice published in the Gazette, amend Schedule 11.

68B. Commissioner may amend Schedule 12

The Commissioner may, by notice published in the Gazette, amend Schedule 12."

11. Section 68B repealed (Commissioner may amend Schedule 12)

Section 68B—

Repeal the section.

12. First Schedule amended (continuous employment)

(1) First Schedule, paragraph 3(2)(a)—

Repeal

“; or”

Substitute a semicolon.

(2) First Schedule, after paragraph 3(2)(a)—

Add

“(ab) absent from work due to the employee’s compliance with a Cap. 599 requirement; or”.

13. Schedules 11 and 12 added

After Schedule 10—

Add**“Schedule 11**

[ss. 2, 33 & 68A]

Requirements and Means**Part 1****Cap. 599 Requirements**

1. The requirements under section 29(1) and (2) of the Prevention and Control of Disease Regulation (Cap. 599 sub. leg. A) where the employee—
 - (a) is placed under quarantine or isolation under that Regulation; or

(b) is within a place that is placed under isolation under that Regulation.

2. The requirement not to contravene sections 13(1) and 16(1) of the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (Cap. 599 sub. leg. J) in relation to compulsory testing.
3. The requirement not to contravene section 19C(1) of the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (Cap. 599 sub. leg. J).

Part 2**Means Specified for purposes of Section 33(5)(ab)**

1. The means specified for the purposes of section 33(5)(ab) are—
 - (a) a document (in hard copy form or electronic form)—
 - (i) issued by a public officer or any person on behalf of the Government; and
 - (ii) that shows the prescribed information relating to the employee;
 - (b) electronic data—
 - (i) access to which can be obtained, by telecommunications, in a manner specified by a public officer; and
 - (ii) that shows the prescribed information relating to the employee.
2. In section 1 of this Part—

prescribed information (訂明資料) means—

- (a) the name of the employee who is subject to the Cap. 599 requirement mentioned in section 33(5)(ab) (or information that could identify the identity of the employee);
- (b) the type of the restriction imposed by that requirement; and
- (c) the commencement date and the expiry date of the period for the restriction imposed by that requirement.

Schedule 12

[ss. 32KB & 68B]

Legitimate Vaccination Request

Part 1

Conditions

1. The request is one that requests the employee to produce, within 56 days from the date of the making of the request (*compliance period*), to the employer—
 - (a) if the place of work is situated in any premises, or if the place of work is a public transport carrier, in respect of which a Cap. 599L direction is in force—a record, document or information showing that the employee has, in relation to the premises or the carrier, been vaccinated in the specified manner for

- the purposes of the direction within the meaning of the Vaccine Pass Regulation; or
 - (b) a record, document or information showing that—
 - (i) if the Government, by any means other than a Cap. 599L direction, imposes a requirement (or makes a recommendation) that persons who perform a particular kind of work are to be (or should be) administered with a certain number of dose of a vaccine as defined by section 2 of the Prevention and Control of Disease (Use of Vaccines) Regulation (Cap. 599 sub. leg. K) (*vaccine*) in relation to the specified disease as at the date of the making of the request, and the work performed by the employee falls within that kind of work—the employee has been administered with that number of dose of the vaccine; or
 - (ii) if no Cap. 599L direction or a requirement or recommendation mentioned in subparagraph (i) applies to the employee—the employee has been administered with at least one dose of the vaccine.
2. When making the request, the employer reasonably believes, having regard to the nature of the employee's work and the related operational requirements, that if the employee contracts the specified disease, the persons with whom the employee may come into face-to-face contact when the employee performs the employee's work will be exposed to the risk of infection.
 3. The request is not made to an employee—

- (a) if section 1(a) or (b)(i) of this Part applies in relation to the employee—who is a person referred to in section 5(2) of the Vaccine Pass Regulation; or
- (b) if section 1(b)(ii) of this Part applies in relation to the employee—
 - (i) who is pregnant;
 - (ii) who is breastfeeding;
 - (iii) who is issued with a specified medical exemption certificate within the meaning of section 17 of the Vaccine Pass Regulation showing that it is unsuitable for the employee to get vaccinated during the compliance period; or
 - (iv) in relation to whom all of the following conditions are met—
 - (A) the employee holds a proof of discharge or recovery issued by a person specified by the Director certifying that the employee was diagnosed on a particular date as having contracted the specified disease;
 - (B) that date falls within 6 months before the date on which the request is proposed to be made.

Part 2

Interpretation

1. In this Schedule—

Cap. 599L direction (《第 599L 章》指示) means a direction issued under section 3(1) of the Vaccine Pass Regulation;

specified disease (指明疾病) means the coronavirus disease 2019 (COVID-19), which is specified in item 8A of Schedule 1 to the Prevention and Control of Disease Ordinance (Cap. 599);

Vaccine Pass Regulation (《疫苗通行證規例》) means the Prevention and Control of Disease (Vaccine Pass) Regulation (Cap. 599 sub. leg. L).”

14. Schedule 12 repealed (legitimate vaccination request)

Schedule 12—

Repeal the Schedule.

Explanatory Memorandum

The main object of this Bill is to amend the Employment Ordinance (Cap. 57) (*principal Ordinance*)—

- (a) to regard a day on which an employee (*affected employee*) is absent from work (*day of absence*) by reason of the employee's compliance with a requirement imposed under the Prevention and Control of Disease Ordinance (Cap. 599) that restricts the movement of the employee (*Cap. 599 requirement*) as a sickness day under the principal Ordinance;
 - (b) to provide for sickness allowance to be paid to an affected employee for the day of absence under certain circumstances;
 - (c) to provide that it is not a valid reason to dismiss, or vary the terms of the contract of employment of, an employee on the ground of the employee being an affected employee; and
 - (d) to provide that it is a valid reason to dismiss, or vary the terms of the contract of employment of, an employee (other than an employee that falls within a specified category) if the employee refuses to accede to a request for proof of vaccination made by the employer.
2. Clause 1 sets out the short title and provides for commencement.
 3. Clause 3 amends the definition of *sickness day* in section 2(1) of the principal Ordinance to include a day on which an employee is absent from work by reason of the employee's compliance with a Cap. 599 requirement and also provides for the definition of *Cap. 599 requirement*.

4. Clause 5 adds new sections 32KA and 32KB to the principal Ordinance to—
 - (a) provide that in determining whether an employer has a valid reason for the dismissal of an employee or the variation of the terms of the contract of employment with the employee, the employee's absence from work due to the employee's compliance with a Cap. 599 requirement does not constitute a valid reason for the dismissal or variation; and
 - (b) provide that an employee who fails to comply with a legitimate vaccination request (being a written request that meets all the conditions set out in Part 1 of the new Schedule 12 added by clause 13 and in relation to which the new section 32KB(2)(b) is complied with) made to the employee by the employer is regarded as being incapable of performing the employee's work.
5. Clause 7 amends section 33 of the principal Ordinance to—
 - (a) provide for the circumstances under which sickness allowance is payable to an affected employee in respect of a day of absence; and
 - (b) provide that an employee is not entitled to sickness allowance if the employee is subject to a Cap. 599 requirement due to the employee's serious and wilful misconduct.
6. Clause 8 amends section 35 of the principal Ordinance to provide that no sickness allowance is payable in respect of a day on which an employee would not have worked had the employee not been absent from work due to the employee's compliance with a Cap. 599 requirement.
7. Clause 9 amends section 41AA of the principal Ordinance so that any period of absence from work due to the employee's compliance

- with a Cap. 599 requirement occurring during a period of annual leave (*annual leave period*) is not to be counted as part of that annual leave unless the period of absence commences after the commencement of the annual leave period.
8. Clause 10 adds new sections 68A and 68B to the principal Ordinance so that the Commissioner for Labour may, by notice published in the Gazette, amend the new Schedules 11 and 12.
 9. Clause 12 amends the First Schedule to the principal Ordinance so that if in any hour an employee is absent from work due to the employee's compliance with a Cap. 599 requirement, that hour is to be counted as an hour in which the employee has worked.
 10. Clause 13 adds—
 - (a) new Schedule 11 to the principal Ordinance to set out the list of requirements each of which constitutes a Cap. 599 requirement and also the means specified for the purposes of the new section 33(5)(ab); and
 - (b) new Schedule 12 to the principal Ordinance to provide for the conditions for a legitimate vaccination request referred to in the new section 32KB.
 11. The new sections 32KB and 68B and the new Schedule 12 are to expire on a day to be appointed by the Commissioner for Labour. Clauses 4(2), 6, 11 and 14 provide for the repeal of those sections and that Schedule and the related amendment to section 32K(b) of the principal Ordinance.
 12. The Bill makes no amendment in respect of other aspects of statutory sick leave and sickness allowance.

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 24 weeks of pregnancy; (*Added 22 of 1981 s. 2. Amended 13 of 2020 s. 3*)

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)*

32A. Employee's entitlement to employment protection

- (1) An employee may be granted remedies against his employer under this Part—
 - (a) where he has been employed under a continuous contract for a period of not less than 24 months ending with the relevant date and he is dismissed by the employer because the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance;
 - (b) where he is employed under a continuous contract and the employer, without his consent and, in the absence of an express term in his contract of employment which so permits, varies the terms of his contract of employment because the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance; or
 - (c) where he is dismissed by the employer other than for a valid reason within the meaning of section 32K and in contravention of—
 - (i) section 15(1), 21B(2)(b), 33(4B) or 72B(1);
 - (ii) section 6 of the Factories and Industrial Undertakings Ordinance (Cap. 59); or
 - (iii) section 48 of the Employees' Compensation Ordinance (Cap. 282),
whether or not the employer has been convicted of an offence in respect of the dismissal.
- (2) For the purposes of subsection (1)(a), an employee who has been dismissed by the employer shall, unless a valid reason is shown for that dismissal within the meaning of section 32K, be taken to have been so dismissed because the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance.

- (3) For the purposes of subsection (1)(b), the variation of the terms of the contract of employment by the employer as referred to in that subsection shall, unless a valid reason is shown for that variation within the meaning of section 32K, be taken to be a variation of the terms of the contract of employment by the employer by reason that the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance.
- (4) For the purposes of subsection (1)(c)—
 - (a) it shall not be necessary for an employee to show in relation to—
 - (i) subsection (1)(c)(i), that his contract of employment was terminated by reason of his exercising any of the rights vested in an employee by or by virtue of section 21B(1) or by reason of the fact of his doing any of the things mentioned in section 72B(1);
 - (ii) subsection (1)(c)(ii), that his contract of employment was terminated by reason of the fact of his doing any of the things mentioned in section 6 of the Factories and Industrial Undertakings Ordinance (Cap. 59); and
 - (b) an employee who has been dismissed by the employer shall be taken to have been dismissed without a valid reason unless a valid reason is shown for that dismissal within the meaning of section 32K.
- (5) For the purposes of subsection (1)(c), an employee shall be entitled to remedies under this Part if and only if—
 - (a) in relation to a dismissal in contravention of section 21B(2)(b), the employee has exercised any of the rights mentioned in section 21B(1) within a period of 12 months immediately preceding such dismissal by the employer;
 - (b) in relation to a dismissal in contravention of section 72B(1), the employee has done any of the things mentioned in that section within a period of 12 months immediately preceding such dismissal by the employer;
 - (c) in relation to a dismissal in contravention of section 6 of the Factories and Industrial Undertakings Ordinance (Cap. 59), the employee has done any of the things mentioned in that section within a period of 12 months immediately preceding such dismissal by the employer.

32K. Reasons for the dismissal or the variation of the terms of the contract of employment

For the purposes of this Part, it shall be a valid reason for the employer to show that the dismissal of the employee or the variation of the terms of the contract of employment with the employee was by the reason of—

- (a) the conduct of the employee;

- (b) the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;
- (c) the redundancy of the employee or other genuine operational requirements of the business of the employer;
- (d) the fact that the employee or the employer or both of them would, in relation to the employment, be in contravention of the law, if the employee were to continue in the employment of the employer or, were to so continue without that variation of the terms of his contract of employment; or
- (e) any other reason of substance, which, in the opinion of the court or the Labour Tribunal, was sufficient cause to warrant the dismissal of the employee or the variation of the terms of that contract of employment.

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 subsections (5A) and (5B), 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; 13 of 2020 s. 10)*
 - (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*)
- (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. (*Added 13 of 2020 s. 10*)

- (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 licensed under the Private Healthcare Facilities Ordinance (Cap. 633); (*Amended 81 of 1991 s. 2; 2 of 2012 s. 3; 34 of 2018 s. 152 and E.R. 5 of 2018*)
 - (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*)

Editorial Note:

* Commencement date: 1 November 1983.

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.

(Added 13 of 2020 s. 11)

34. Recognized scheme of medical treatment

- (1) The Director may recognize for the purposes of this Ordinance a scheme of medical treatment operated by an employer, if he is satisfied that each employee, who is qualified to be paid sickness allowance by the employer by whom the scheme is operated, is provided, without expense to the employee, by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist with such medical treatment as an out-patient as the Director considers reasonable. *(Amended 5 of 1995 s. 10; 16 of 2006 s. 8)*
- (2) The Director may, having given to the employer by whom the scheme is operated not less than 1 month's notice of his intention so to do, withdraw his recognition of any scheme of medical treatment.
- (3) Whenever the Director has recognized, or has withdrawn his recognition of, any scheme of medical treatment, he shall publish a notice thereof in the Gazette.

35. Rate of sickness allowance

- (1) For the purposes of subsections (2), (2A) and (2B), **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. 10)*
 - (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). *(Replaced 7 of 2007 s. 10)*
- (2) The daily rate of sickness allowance is a sum equivalent to four-fifths of the daily average of the wages earned by the employee during—
- (a) the period of 12 months immediately before the sickness day or first sickness day (as appropriate); or
 - (b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the sickness day or first sickness day (as appropriate), the shorter period,
- but no sickness allowance is payable in respect of a day on which the employee would not have worked had he not been sick and for which no wages would normally be payable by the employer. *(Replaced 7 of 2007 s. 10)*
- (2A) 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. 10)*
 - (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. 10)*
- (2B) For the avoidance of doubt, if the amount of the wages paid to an employee in respect of a day specified in subsection (1) 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. 10)*

- (2C) Despite subsection (2), 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 employee's sickness day or first sickness day (as appropriate), 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 employee's sickness day or first sickness day (as appropriate). *(Added 7 of 2007 s. 10)*
- (3) Where a contract of employment of an employee is terminated, sickness allowance payable under section 33(4C) shall be calculated in accordance with this section. *(Added 48 of 1984 s. 15. Amended 7 of 2007 s. 10)*
- (4) If, pursuant to the terms of his contract of employment or any other agreement or for any other reason, an employee is paid by his employer a sum of money in respect of a paid sickness day taken by him, the sickness allowance payable to the employee in respect of that sickness day is to be reduced by the sum. *(Added 7 of 2007 s. 10)*

(Amended 1 of 1977 s. 3)

35A. Transitional

Section 35 as in force immediately before the commencement* of the Employment (Amendment) Ordinance 1996 (60 of 1996) shall continue to apply in the calculation of sickness allowance payable to an employee under section 33 in respect of sickness days taken by that employee before that commencement.

(Added 60 of 1996 s. 3)

Editorial Note:

* Commencement date: 1 November 1996

36. Time for payment of sickness allowance

- (1) Except in the case of an employee who is normally paid his wages daily, sickness allowance shall be paid to the employee or his duly appointed agent in the manner and at the place specified in section 26 not later than the day on which the employee is next paid his wages.
- (2) In the case of an employee who is normally paid his wages daily, sickness allowance shall be paid to him or his duly appointed agent in the manner and at the place specified in section 26 at least once in every 7 days.

- (3) Where a contract of employment of an employee is terminated, sickness allowance payable under section 33(4C) shall be paid to that employee in accordance with subsection (1) or (2) whichever is applicable to the employee as if the contract of employment had not been terminated. *(Added 48 of 1984 s. 16)*

37. Employer to keep record of sickness days

- (1) Every employer shall keep a record—
- (a) of the date of commencement and termination of the employment of each employee;
 - (b) in accordance with subsection (1A), of all paid sickness days accumulated by each employee under section 33;
 - (c) of all paid sickness days taken by each employee in respect of which sickness allowance is payable under section 33, and such sickness days shall be deducted in accordance with subsection (1B); and
 - (d) of all sickness allowance paid to each employee and the sickness days in respect of which the sickness allowance was paid. *(Replaced 57 of 1983 s. 6)*
- (1A) A record kept for the purposes of subsection (1)(b) shall contain the following heads and details—

Category 1: in which shall be entered the number of paid sickness days accumulated by an employee—

(a) under section 33(2A); and

(b) in respect of each month under section 33(2),

but so however that the total number of paid sickness days in this category does not at the time of entry exceed 36 days; and

Category 2: in which shall be entered every paid sickness day in excess of 36 days which cannot be entered in category 1, but so however that the total number of paid sickness days in this category does not at the time of entry exceed 84 days,

and references in this section to category 1 and category 2 shall be construed as references to category 1 and category 2 respectively in this subsection. *(Added 57 of 1983 s. 6)*

- (1B) The number of paid sickness days taken consecutively by an employee shall be deducted from the total number of paid sickness days in category 1 accumulated by him immediately before the commencement of those sickness days and where the number of paid sickness days taken exceeds the total number of paid sickness days in that category, the excess paid sickness days shall be deducted from the total number of paid sickness days in category 2 accumulated by him immediately before such commencement. (*Added 57 of 1983 s. 6*)
- (2) If an employer maintains a record under subsection (1)—
- (a) an employee who returns to work after a sickness day shall, as soon as is practicable but not later than 7 days after his return to work, sign the entry in the record specifying the days on which he has been absent;
 - (b) an employee shall be entitled to inspect that part of the record which relates to him at any reasonable time during working hours and, where an employee has ceased to be employed by his employer, he may inspect that part of the record which relates to him at any reasonable time during working hours in the period of 2 months next following the date on which he ceased to be employed.
- (3) If an employer fails to maintain the record under subsection (1) in respect of any employee employed by him, or if the record is lost or destroyed, the employee shall, notwithstanding any sickness allowance paid to him by his employer under section 33, be entitled to paid sickness days for each completed month of his employment in accordance with section 33. (*Amended 57 of 1983 s. 6*)

38. Records to be produced to Commissioner

For the purposes of section 37, the Commissioner may, either by notice in writing served by registered post or by notice in the Gazette, require any employer or class of employers to send to him all or any records of sickness days in respect of any period not exceeding 2 years preceding the date of the notice.

41AA. Annual leave

- (1) Subject to this Part, every employee who has been in employment under a continuous contract for not less than 12 months shall, in respect of each leave year, be entitled to paid leave (in this Part referred to as *annual leave*) calculated in accordance with subsection (2).
- (2) Where an employee has been in employment under a continuous contract for a period specified in column (1) of the Table to this section, the amount of annual leave to which he shall be entitled in respect of any leave year in that period shall be the number of days specified in column (2) of such Table in respect of the period.

- (3) Subject to subsection (5)(c), times at which annual leave is granted shall be determined by the employer after consultation with the employee concerned or his representatives.
- (4) An employer shall give an employee not less than 14 days' notice in writing of the time he has determined for the grant of a period of annual leave, except where a shorter period of notice is agreed to by the employer and employee.
- (5) Annual leave to which an employee is entitled—
 - (a) shall be granted by his employer and be taken by the employee within the period of 12 months beginning immediately after the expiration of the leave year to which it relates;
 - (b) subject to paragraph (c), shall be for an unbroken period; and
 - (c) subject to subsection (9), shall, if the employee so requests his employer, be divided as follows—
 - (i) where the leave entitlement does not exceed 10 days, it shall be granted on consecutive days except that not more than 3 days of the period of leave may be granted on any day or days (whether consecutive or not); and
 - (ii) where such entitlement exceeds 10 days, 7 days of the period of leave shall be granted on consecutive days and the remaining leave may be granted on any day or days (whether consecutive or not).
- (6) If a rest day or holiday falls within any period of annual leave granted in accordance with this section, it shall be counted as annual leave and another rest day or holiday shall be substituted in accordance with section 18(5) or section 39(2), (2A), (3) or (4), as the case may require. (*Amended 137 of 1997 s. 5*)
- (7) No period of total incapacity for work by reason of sickness or injury occurring during a period of annual leave shall count as part of that annual leave unless it commences after the commencement of the period of annual leave.
- (8) Where—
 - (a) an employer continues to employ an employee after the expiration of a period during which annual leave should have been granted to him and the employer has not granted that leave, then at the option of the employee but subject to paragraph (b) the employer shall (whether or not proceedings have been taken for an offence under section 63(4)(e))—
 - (i) pay to the employee, in addition to any pay due to him, compensation equal in amount to the annual leave pay which he would have received had the leave been granted so as to end on

the expiration of the period during which it should have been granted; or

- (ii) grant the employee paid leave equal to the leave which should have been granted;
 - (b) an employee opts under paragraph (a) to take paid leave, he shall take the leave on such day or days as may be agreed to by the employer and him or, if there is no such agreement, as shall be specified by the employer.
- (9) Where—
- (a) an employer proposes to close down his business or part thereof for the purpose of granting annual leave to any of his employees; and
 - (b) notice of the proposed close down is duly given under section 41F; and
 - (c) such close down will not result in any person who has been in employment in the business under a continuous contract for 12 months or more having to take annual leave on fewer consecutive days than—
 - (i) where his leave entitlement does not exceed 10 days, the number of consecutive days' leave that would be required to be granted under subsection (5)(c)(i) were his leave being divided under that subsection;
 - (ii) 7 days where his leave entitlement exceeds 10 days,
- then nothing in this section shall prevent or restrict, or be construed as preventing or restricting, the close down.
- (10) For the avoidance of doubt it is declared that annual leave is, and shall be granted, in addition to the rest days, holidays, maternity leave and paternity leave to which an employee is entitled under this Ordinance.
(Amended 21 of 2014 s. 12)

Table

(1) Period of employment	(2) Number of days' annual leave for a leave year ending—				
	in the part of 1990 beginning on the coming into operation of this Table and ending on the following 31 December	in 1991	in 1992	in 1993	in 1994 or in any subsequent year
At least 1 year but less than 3 years	7	7	7	7	7
At least 3 years but less than 4 years	8	8	8	8	8
At least 4 years but less than 5 years	9	9	9	9	9
At least 5 years but less than 6 years	10	10	10	10	10
At least 6 years but less than 7 years	10	11	11	11	11
At least 7 years but less than 8 years	10	11	12	12	12
At least 8 years but less than 9 years	10	11	12	13	13
At least 9 years	10	11	12	13	14

(Added 53 of 1990 s. 2)

68. Amendment of forms

The Chief Executive may, by order published in the Gazette, amend Part II of the Second Schedule.

(Added 44 of 1971 s. 5. Amended 56 of 2000 s. 3)

69. Saving as to existing contracts of service

Save as is otherwise provided in this section, any agreement or contract of employment entered into between an employer and an employee, which is valid and in force at the commencement of this Ordinance, shall continue to be in force and, subject to any express conditions contained in any such agreement or contract, the parties thereto shall be subject to and entitled to the benefit of the provisions of this Ordinance:

Provided that where any express condition in the agreement or contract is contrary to the provisions of this Ordinance, the express condition shall be void.

First Schedule

[ss. 3 & 75]

(Amended 16 of 2006 s. 10)

Continuous Employment

(Format changes—E.R. 3 of 2017)

1.
 - (a) The provisions of this Schedule are to ascertain whether or not any contract of employment is a “continuous contract” for the purposes of this Ordinance.
 - (b) In the case of a contract of employment existing at the commencement of this Ordinance, such period of employment next preceding the date of commencement of the Ordinance as may be necessary shall be taken into account in order to ascertain whether or not the contract of employment is a continuous contract.
2. Subject to the following provisions, where at any time an employee has been employed under a contract of employment during the period of 4 or more weeks next preceding such time he shall be deemed to have been in continuous employment during that period.
3.
 - (1) For the purposes of paragraph 2, no week shall count unless the employee has worked for 18 hours or more in that week, and in determining whether he has worked in any hour the provisions of sub-paragraph (2) shall apply.
 - (2) If in any hour the employee is, for the whole or part of the hour—
 - (a) incapable of work in consequence of sickness or injury; provided that any such incapability in excess of 48 hours is supported by a certificate issued by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist; or *(Amended 5 of 1995 s. 11; 16 of 2006 s. 10)*
 - (b) absent from work in circumstances such that, by law, mutual arrangement or the custom of the trade, business or undertaking, he is regarded as continuing in the employment of his employer for any purpose,then, save as provided in paragraph 4, that hour shall count as an hour in which he has worked.
4. Where an employee is absent from work for the whole or part of any hour—
 - (a) because of a strike (which is not illegal) in which he takes part; or
 - (b) because of a lock-out by his employer,

that hour shall not count as an hour in which he has worked, but the continuity of his period of employment shall not be treated as broken by any such absence.

5. If a trade, business or undertaking is transferred from one person to another, the period of employment of an employee in the trade, business or undertaking at the time of the transfer shall count as a period of employment with the transferee, and the transfer shall not break the continuity of the period employment.
6. For the purposes of this Schedule, any reference to hours in which an employee has worked shall mean hours in which he has worked for his employer whether or not the hours were worked under the same or another contract of employment with that employer and whether or not they were consecutive hours. *(Replaced 41 of 1990 s. 23)*
7. In this Schedule, unless the context otherwise requires—
lock-out (閉廠) and **strike** (罷工), respectively, have the meanings assigned to them in the Trade Unions Ordinance (Cap. 332);
week (星期) means a week ending with Saturday.

(Amended 5 of 1970 s. 9; 71 of 1970 s. 6; 41 of 1990 s. 23)
