

## Obligations of Employers under the Minimum Wage Ordinance (“MWO”)

The MWO was passed by the Legislative Council on 17 July 2010 and was gazetted on 23 July 2010. This note sets out the main obligations under the MWO.

### A. What obligations are imposed by the MWO?

1. Under the MWO an employer is obliged to pay to every *employee* an amount of *wages* in respect of any *wage period* of not less than the *minimum wage*. To establish whether this obligation has been satisfied each employer will need to determine:
  - (a) the amount of minimum wage to which an employee is entitled in a particular wage period, and
  - (b) the actual wages payable to the employee in that wage period.

These questions are not as simple to answer as they are to pose. However we have set out the methodology for answering them in the form of a table in **Attachment 1**.

2. The MWO also amends the Employment Ordinance (“EO”) to extend the existing obligations on each employer to keep certain types of records for employees. More particularly employers are obliged to retain records of the

total number of hours worked by each employee in a wage period. This obligation applies in respect of each employee in a wage period whose wages in that wage period are less than the level set out in the Ninth Schedule to the MWO, which is currently set at HK\$11,500. From 1 May 2013 onwards, the monthly cap will increase to HK\$12,300 per month.

### B. Who is covered by the MWO?

3. The MWO applies to every employee, his/her employer and their respective contracts of employment.
4. The MWO does not apply to:
  - (a) a person to whom the EO does not apply because of s.4(2) of the EO<sup>1</sup> or to a person who is engaged under a contract of apprenticeship registered under the Apprenticeship Ordinance,
  - (b) a *domestic worker*<sup>2</sup> who is employed in or in connection with a household and who dwells in that household free of charge,
  - (c) a *student intern*,
  - (d) a *work experience student* during a period of *exempt student employment*.

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<sup>1</sup> s.4(2) of the EO provides that, subject to Part IVA, the EO does not apply:

- a) to a person who is a member of the family of the proprietor of the business in which he is employed and who dwells in the same dwelling as the proprietor,
- b) to an employee as defined under the Contracts for Employment Outside Hong Kong Ordinance,
- c) to a person who is serving under a crew agreement within the meaning of the Merchant Shipping (Seafarers) Ordinance, or on board a ship which is not registered in Hong Kong

<sup>2</sup> A “domestic worker” is a domestic helper, carer, chauffeur, gardener, boat-boy or other personal helper employed in, or in connection with, a household.

5. A “student intern” is:
- (a) a student undergoing a period of work arranged or endorsed by a specified education institution in connection with an accredited programme provided by the institution to the student, or
  - (b) a student resident in Hong Kong and undergoing a period of work arranged or endorsed by an institution in connection with a non-local education programme<sup>3</sup> provided by the institution to the student.
6. A work experience student<sup>4</sup> and his/her employer may agree to treat a continuous period of up to 59 days during the contract of employment (the “current contract”) as a period of “exempt student employment” if:
- (a) the work experience student has not engaged in another period of exempt student employment under another contract of employment which commenced in the same calendar year as the current contract, and
  - (b) the work experience student provides to the employer before the commencement of the current contract a statutory declaration (or a copy) verifying the facts in (a).
- travelling in connection with his or her employment excluding travelling (in either direction) between the employee’s place of residence and the *place of employment* other than a *place of employment* that is outside Hong Kong and is not his or her usual *place of employment*.
9. What amounts to “**hours worked**” will depend to a large degree on whether the work performed is in accordance with the terms of the contract of employment or the agreement or at the direction of the employer. To reduce the risk of dispute an employer should clearly set out in the contract of employment when an employee is considered to be working.
10. The MWO provides that the “**wage period**” of an employee is the period in respect of which wages are *payable* to the employee for work done or to be done under the employee’s contract of employment. Unless the contrary is proved, the wage period will be one month. The MWO adopts similar language to s.22 EO which also defines a wage period by reference to the wages “payable”. The Court has said that the wage period under s.22 EO depends on the genuine agreement of the parties. To reduce the risk of dispute an employer should clearly set out in the contract of employment the wage period for which wages are payable (e.g. when they accrue, when they are capable of being calculated, or some other timeframe).
11. A “**place of employment**” is defined to mean any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training. For example, if an employee attended at the employer’s office in Central for a social gathering unconnected with work (say, to view fireworks), such attendance would not be at a “place of employment” and would not be considered “hours worked”.

### C. How is the minimum wage calculated?

7. The “minimum wage” is calculated as follows<sup>5</sup>:

$$\text{minimum wage} = \text{hours worked} \times \text{minimum hourly wage rate}$$

8. The “hours worked” by an employee in a *wage period* include any time during which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer:
- in attendance at a *place of employment*, irrespective of whether he or she is provided with work or training at that time, or

<sup>3</sup> A “non-local education programme” is a full-time programme of education which leads to an award of a non-local academic qualification at the level of degree or higher.

<sup>4</sup> “Work experience student” means a student who  
a) is enrolled in an accredited programme; or  
b) is resident in Hong Kong and enrolled in a non-local education programme, and who is engaged under a contract of employment at the beginning of which he or she is under the age of 26 years.

<sup>5</sup> See Attachment 1 for further details.

12. The “minimum hourly wage rate” for an employee is set out in the following table:

| Category |   | Minimum hourly wage rate  |
|----------|---|---|
| (a)      | For a person who holds a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation (“PWD”) undergoing a trial period of employment   | 50% of the prescribed minimum hourly rate   |
| (b)      | For an <i>employee with a disability</i> <sup>6</sup>   | [the prescribed minimum hourly wage rate] x [the employee’s assessed degree of productivity as stated in the certificate of assessment] |
| (c)      | For an assessment-opting PWD who continues to be employed to do the same work for the same employer - until the end of the day on which the assessment of his/her degree of productivity in performing that work is completed | the percentage specified in the option form of the prescribed minimum hourly wage rate  |
| (d)      | In any other case (this will be the one that applies to the majority of the relevant employees)   | the minimum hourly wage rate  |

The prescribed minimum hourly wage rate is HK\$28. From 1 May 2013 onwards, the new rate will be HK\$30. The monthly cap (above which it is not necessary to keep a written record of hours worked) will increase to HK\$12,300 per month.

13. The treatment of employees with a disability and PWDs is considered in H below.

#### D. What wages can an employer take into account to determine if it has complied with the MWO?

14. The expression “wages” used in the MWO has the same meaning as in the EO, which contains a very broad definition with 11 specified exceptions. Therefore an employer may wish to consider how its remuneration is structured to weigh up the pros and cons of certain elements being considered to be “wages”.

15. The MWO also expressly provides that:

- (a) any deduction from the wages of the employee under the EO (except for deduction for absence from work) in respect of a wage period must be counted as part of the wages payable in respect of that period (e.g. the amount deducted from wages for the recovery of a loan made by the employer would be included as part of the wages payable),
- (b) a payment made to an employee in any wage period for any time that is not hours worked by

the employee must not be counted as part of the wages payable in respect of that or any other wage period. This would include any amounts paid under the EO (e.g. statutory holiday pay, annual leave pay, sickness allowance) as well as amounts paid as a matter of contract for time when the employee is not working (e.g. rest days or other time spent not at work),

- (c) an advance or over-payment of wages made to an employee in any wage period must not be counted as part of the wages payable in respect of that wage period (but can be taken into account in the wage period in which the advance is “deducted” from wages as per (a) above, e.g. an advance of June’s wages made to an employee in May should be taken into account in June),
- (d) a payment of arrears of wages in respect of an earlier wage period made to an employee in any wage period must not be counted as part of the wages payable in respect of the wage period in which it is paid (but rather should be counted as part of the wages when it was originally payable) (e.g. the payment of June’s

<sup>6</sup> an “employee with a disability” is an employee who is a PWD and whose degree of productivity in performing the work required under the contract of employment has been assessed by an approved assessor and is stated in a certificate of assessment.

wages in August should be taken into account for the June wage period),

- (e) any commission paid at any time after the first 7 days of a wage period but before the end of the 7th day immediately after that period must be counted as part of the wages payable in respect of that period irrespective of when the work is done or the commission is otherwise payable under the contract of employment (e.g. an employee performs work in October generating commission which is paid on December 13 should have that commission considered as wages in the December wage period).

- 16. All overtime pay (regardless of whether it is of a constant character or is equivalent to or exceeds 20% of the employee's average monthly wages) will be wages for the purposes of determining whether the employer has complied with its obligation to pay not less than the minimum wage.

#### E. What are the consequences if an employer fails to comply with the minimum wage obligations of the MWO?

- 17. If the wages payable to an employee in a wage period are less than the minimum wage then the relevant contract of employment will be taken to provide *for all purposes* that the employee is entitled to additional remuneration in respect of that wage period being the difference between the wages payable and the minimum wage. Therefore any entitlement under, for example, the EO, Mandatory Provident Fund Schemes Ordinance and the Employees' Compensation Ordinance will also need to be adjusted upwards.
- 18. In addition to any civil remedies the employee may have for recovery of the additional remuneration, failure to pay the additional remuneration to which an employee is entitled may be dealt with in the same way as a failure to pay wages under the EO. So, this may include prosecution for breaching s.23 EO (failure to pay wages within 7 days after the wage period) which is an offence punishable by a fine up to HK\$350,000 and three years imprisonment. It may also trigger the ability for an employee to claim constructive dismissal (and consequential damages) under section 10A EO.

#### F. What record keeping obligations are imposed by the new legislation?

- 19. If the employee is subject to the MWO and earns wages less than an amount to be specified in a particular wage period, the MWO imposes an obligation on his/her employer to keep a record of the total number of hours (including part of an hour) that are hours worked in the wage period. The employer must maintain such record for the preceding 12 months and for a period of 6 months after the employee ceases to be employed.
- 20. There are certain obligations to keep other records in respect of respect of any student intern and work experience student.

#### G. Can an employer contract out of the MWO?

- 21. No. A provision in a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the MWO is void.

#### H. How is the minimum hourly wage rate calculated for an employee with a disability and PWDs?

- 22. The MWO provides specifically for the treatment of:
  - (a) PWD, and
  - (b) an employee with a disability who is a person:
    - (i) who is a PWD, and
    - (ii) whose degree of productivity in performing work required under the contract of employment has been assessed by an approved assessor and has been issued a certificate of assessment.
- 23. For these categories of employees, the MWO provides a mechanism for calculating a different minimum hourly wage rate. This is set out in more detail in **Attachment 2**.
- 24. Any employee who does not hold a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation will not be accorded the different treatment set out in the MWO for a PWD or an *employee with a disability*, even though he/she may have a disability.

## I. What are the practical issues for employers?

25. Most employees in Hong Kong are paid by a monthly salary. Such an amount would cover every day of the month - and the employee therefore gets paid on every day, whether or not he/she is contractually required to work on that day. However, under the MWO payments made to an employee in respect of any time that is not hours worked by the employee (e.g. statutory holiday, annual leave, sick leave, rest days or other time spent not at work) must be discounted from the wages payable in respect of that or any other wage period (see para.15(b) above). The amount of wages which an employer can take into account to discharge its obligations to pay statutory minimum wage is therefore reduced.
26. The concept of “hours worked” can also in practice give rise to uncertainty. An employee may work beyond contractual hours at the office or from home, and not necessarily at the written agreement or direction of the employer. Indeed, an employer might not even know about any of this. Employers may encounter practical difficulty with tracking the actual hours worked by an employee (particularly in respect of hours outside normal working hours). Given that there may be criminal sanctions for failing to keep appropriate records of hours worked of employees earning wages less than \$11,500 in a wage period, the consequences of breach can be serious (the
- monthly cap will increase to \$12,300 per month from 1 May 2013 onwards).
27. Most employers who pay overtime have an arrangement that the overtime pay earned for the overtime work would be paid in the month following the month in which it was earned for administrative purpose. The court has treated these payments as payable in respect of the month in which they were paid, rather than the month in which they were earned. The MWO treats wages paid in a wage period as wages payable in respect of that wage period. So, there is a mismatch between the wage period in which the overtime hours are worked and that in which the overtime pay is paid.
28. Clarity is key. To that end employers are advised to make appropriate changes to employment contracts or handbooks. For more details, please see the article “The Minimum Wage Ordinance - The Devils in the Detail and what to do about them” by Duncan A. W. Abate in **Attachment 3**.

## Attachment 1

### Summary of statutory minimum wage calculation

$$\text{Wages payable} \geq \text{minimum wage} = \text{hours worked} \times \text{minimum hourly wage rate}$$

- “wages” has the same meaning as in the EO
- a deduction from the wages of the employee under the EO (except for deduction for absence from work) in respect of a wage period must be counted as part of the wages payable in respect of that period
- a payment made to an employee in any wage period for any time that is not hours worked by the employee must not be counted as part of the wages payable in respect of that or any other wage period (e.g. statutory holiday pay, annual leave pay, sickness allowance)
- an advance or over-payment of wages made to an employee in any wage period must not be counted as part of the wages payable in respect of that wage period (but can be taken into account in the wage period when the advance/over-payment is actually earned by the employee)
- a payment of arrears of wages in respect of an earlier wage period made to an employee in any wage period must not be counted as part of the wages payable in respect of the wage period in which it is paid (but rather should be counted as part of the wages when it was originally payable)
- any commission paid, with the prior agreement of the employee, at any time after the first 7 days of a wage period but before the end of the 7th day immediately after that period must be counted as part of the wages payable in respect of that period irrespective of when the work is done or the commission is otherwise payable under the contract of employment
- all overtime pay, regardless of whether it is of a constant character or is equivalent to or exceeds 20% of the employee’s average monthly wages, will be wages

The “hours worked” by an employee in a *wage period* include any time during which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer -

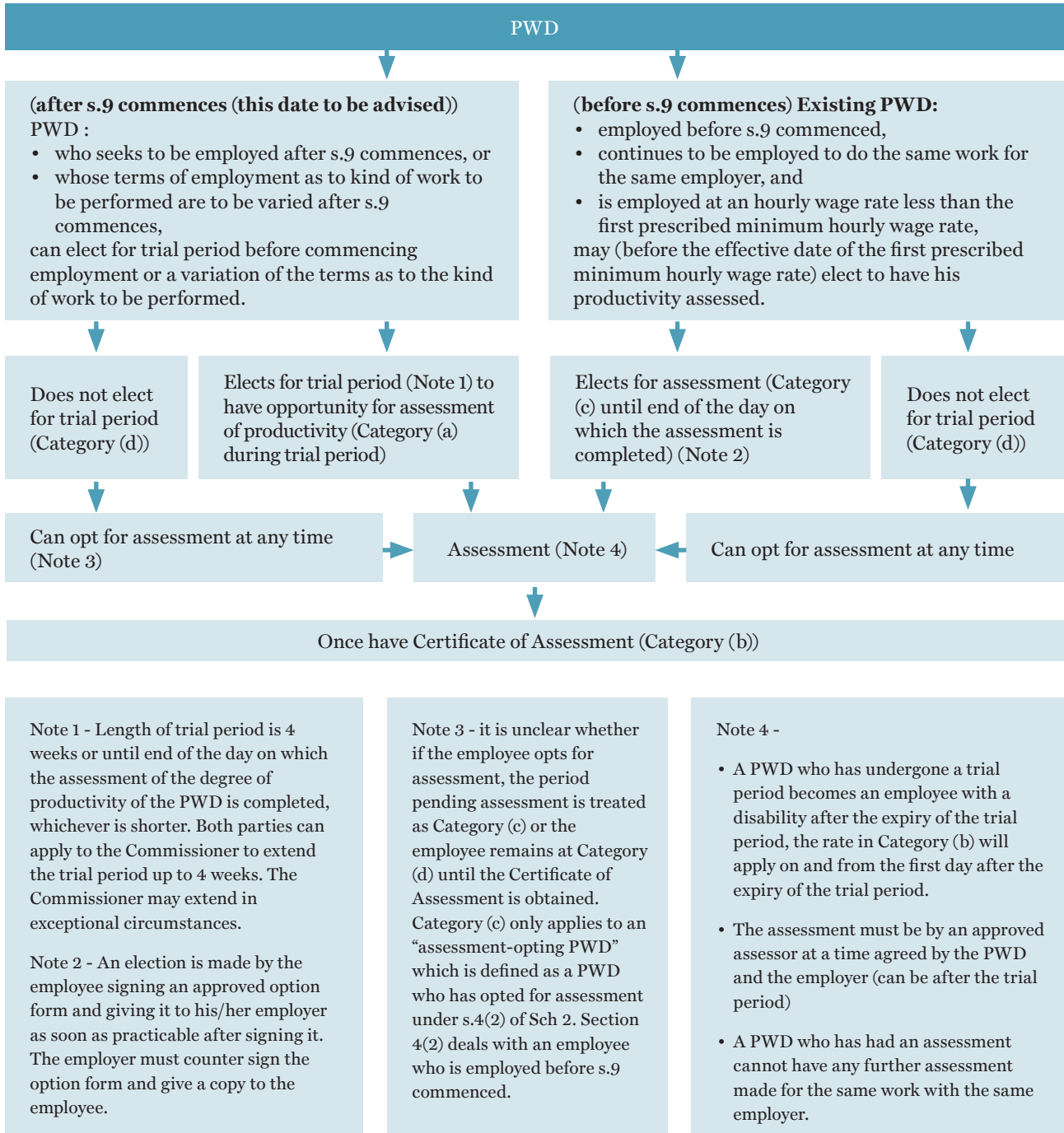
- in attendance at a *place of employment*, irrespective of whether he or she is provided with work or training at that time, or
- travelling in connection with his or her employment excluding travelling (in either direction) between the employee’s place of residence and *place of employment* other than a *place of employment* that is outside Hong Kong and is not his or her usual *place of employment*.

A “place of employment” is any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training.

| Category  | Minimum hourly wage rate  |
|---|---|
| (a) For a person who holds a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation (“PWD”) undergoing a trial period of employment   | 50% of the prescribed minimum hourly rate   |
| (b) For an <i>employee with a disability</i>  | [the prescribed minimum hourly wage rate] x [the employee’s assessed degree of productivity as stated in the certificate of assessment] |
| (c) For an assessment-opting PWD who continues to be employed to do the same work for the same employer - until the end of the day on which the assessment of his/her degree of productivity in performing that work is completed | the percentage specified in the option form of the prescribed minimum hourly wage rate  |
| (d) In any other case (this will be the one that applies to the majority of the relevant employees)   | the minimum hourly wage rate  |

\* See Attachment 2 for an explanation of when the different categories in (d) to (c) will apply

## Attachment 2



## The Minimum Wage Ordinance - The Devils in the Detail and what to do about them

By Duncan A. W. Abate

Legal Update - [Employee Benefits](#), [Employment](#), [Employment & Benefits](#), Hong Kong

When it comes to legislation, especially legislation introducing brand new concepts, the old maxim that the "devil is in the detail" rings truer than ever.

With the recent announcement by the Chief Executive of a \$28 minimum wage we can now turn our minds to other details of the legislation to try to tempt out those pesky devils!

### Devil #1 - The monthly paid employee

*"I have an employee who works 180 hours a month. I pay him a monthly wage of \$6,000. Even if the statutory minimum wage is \$33 per hour (which I hope it won't be!) I will be OK won't I? After all 180 x \$33 is \$5,940.00."*

Unfortunately the answer is "No" - you will not be ok!

A large proportion of employees in Hong Kong receive a monthly wage. They have contracts which set out what hours they are expected to work and in return they receive a specified amount each month. Typically such an employee will not receive additional amounts on a statutory holiday (even where the statutory holiday falls on a day when the employee is not required to work - e.g. a Saturday) as the employer will, quite rightly, say that the monthly wage covers any statutory holiday pay.

In short, employers have adopted the stance that where an employee is paid monthly wages then those wages are spread across the month as a whole. The employee therefore gets paid on every day, whether or not he works on that day. This approach has been accepted and endorsed by the Labour Department in, for example, the determination of "daily average wages" for the purposes of the Employment Ordinance.

### So, what's the problem?

The problem is that the Minimum Wage Ordinance (MWO) requires every employer to pay every employee in a wage period an amount of wages at least equal to \$28 x hours worked in that wage period. However, it also provides that any payment made to an employee in a wage period for any time that is not "hours worked" by the employee must **not be counted** as part of the wages payable in respect of that wage period (section 6(2) MWO).

This means that any payment made in respect of a day off (e.g. a Saturday and Sunday) cannot be included in the "wages" for that period.

Let's look at an example.

An employee earns \$6,000 per month. He works 8 hours per day, 5 days a week with Saturday and Sunday off. In November 2010 there are 30 days, 8 of these are weekend days and 22 are "work" days. So, in that November this employee (who, we will assume, works no overtime and does not take leave in that month) will work 176 hours (22 x 8). These are his "working hours" for the purposes of the MWO.

In order to determine compliance with the MWO, we now need to calculate how much "wages" have been paid to the employee.

The starting point will, of course, be the \$6,000 paid to the employee for that November. However, section 6(2) MWO requires us to exclude that part of the employee's wages paid for weekends (because these are days on which the employee does not work). So, there are 30 days in November - this means he gets \$200 per day (\$6,000 divided by 30). In turn this means that we must exclude \$1,600 (\$200 per day x 8 weekend days) for MWO purposes. This means the "countable" wage for MWO purposes for this employee for November 2010 is only \$4,400.

For a statutory minimum hourly wage of \$28 per hour, the **minimum wage** payable to the employee



## Attachment 3

for November will be \$4,928 (176 x \$28). But the employer has only paid \$4,400! He has to pay a further \$528.

### **What can employers do?**

The key is to have clarity in relation to what are "working hours" and also what wages are paid for what time.

We set out below some suggested possible wording which you could consider inserting in your contracts or handbooks (but see below in relation to changing contracts).

*"(a) Subject to (b) below, any wages paid to you in any wage period shall be paid for the hours worked by you only.*

*(b) Notwithstanding the above, where the Company is under a statutory or contractual obligation to make any payment for time that is not hours worked by you the wages paid shall be deemed to be paid for such time also, but only up to the amount necessary to satisfy the statutory or contractual obligation of the Company and no more.*

*(c) For the purposes of this clause the terms "wages", "wage period" and "hours worked" shall have the same meaning as in the Minimum Wage Ordinance."*

[Note: If rest days are currently paid and you are looking to make them unpaid then this will increase the "daily average wage" of an employee for the purposes of the Employment Ordinance]

### **Devil #2 - Determining "hours worked"**

A fundamental aspect of the obligations of an employer under the MWO revolve around the determination of "working hours". The MWO defines "hours worked" as any time during which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer -

- in attendance at a place of employment, irrespective of whether he or she is provided with work or training at that time; or
- travelling in connection with his or her employment excluding travelling (in either direction) between his or her place of residence and his or her place of employment other than a place of employment that is outside Hong Kong and is not his or her usual place of employment (section 4 MWO).

A "place of employment" means any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training (section 2 MWO).

### **What's the problem?**

Consider the following scenarios:

*"I am an employee whose contractual hours are from 9a.m. to 6p.m. with a one-hour lunch break at 1p.m. I went out for lunch on Monday and Tuesday but I ordered take-away food to the office for the rest of the week so I could work over lunch. I stay in the office to work until about 9p.m. every day. I also had to come back to office on Saturday afternoon and worked until 4. I continued to work the next morning at home. My boss did not know about any of this."*

What are the "hours worked"? Is some of the time spent working by this employee "hours worked"? Alternatively is none of the "extra" hour "hours worked" because the employer did not agree or direct him to work during those hours?

*"I went on a business trip to Singapore last week. I flew out on Sunday. As it was a nice day and my flight was in the evening, I took my family to Disneyland and spent a day there before I continued my journey to the airport."*

## Attachment 3

So what are the "hours worked"?

The time spent on travelling from Disneyland to the airport is "in connection with [his] employment" so would be "hours worked" for the purpose of MWO. But how about the time spent travelling between home and Disneyland? At which point does it cease to be "travelling in connection with his or her employment"? Is it when he and his family left home, or is it the moment where he left Disneyland for the Airport? It is the employers' obligation to record "hours worked" and therefore to take a view on this.

### **What can employers do?**

Again, clarity is key. We suggest the following wording may be inserted into your contracts or handbooks (but again, see below in relation to changing contracts).

*"(a) Your hours of work are [ ] am to [ ] pm from [Monday to Friday] [with one hour for lunch each day] (such period of time[, excluding lunch,] shall be your "Contractual Hours"). You may on occasion be required by the Company (by means of a direction in writing) to work additional hours ("Directed Hours").*

*(b) You understand and agree that, for the purposes of the Minimum Wage Ordinance, the Company will treat the aggregate of your Contracted Hours and Directed Hours in any month as the total of your "hours worked" in that month unless you notify the Company in writing [in the specified form] of any further "hours worked" within [5] days of the date on which you performed such further "hours worked". Details of what amount to "hours worked" for the purposes of the MWO are set out in [ ]."*

### **Devil #3 - Overtime pay**

*"My employees often work overtime. So long as I pay them overtime pay which is at least equal to the statutory minimum hourly wage, I'm going to be OK aren't I?"*

Not necessarily. Read on.

Common sense dictates that, in determining whether an employer has complied with its obligations under the MWO, the hours worked in a particular period should be compared with the wages paid relating to those hours.

Unfortunately, at least in relation to many employers' overtime arrangements, this may not be possible unless they change their payroll practice - See explanation below.

Most employers who pay overtime have an arrangement (understood and consented to by their employees) that the overtime pay earned for overtime hours worked in, say, January will be paid in the February payroll. This works well as it gives time for the employers to calculate the overtime pay (including for days after the January payroll) and simplifies payroll administration generally.

Arrangements of this type are rarely questioned by employees and, provided they are genuine arrangements for a legitimate business interest, the courts have recognised and approved them. In particular, the courts have determined that such pay structure does not breach section 23 of the Employment Ordinance (EO) (which requires wages to be paid within 7 days of the end of the wage period in which they are payable). In doing this, the courts determined that these types of wages should be treated as being **payable in respect of the month in which they were paid**, rather than the month in which they were earned.

This welcome and pragmatic approach by the courts does, however, lead to problems when doing the hours worked/wages paid calculation for the MWO. The reason is that the way the MWO is structured is that it looks at the hours worked in a wage period and the wages **payable in respect of that wage period**. So, this leads to a mismatch between the wage period in which the overtime hours are included and that in which the overtime pay is included.

This may be easier to explain through an example.

An employee works 10 hours overtime in January. In accordance with established practice and with the agreement of the employee, the overtime pay is paid with the February payroll - let's say on

## Attachment 3

February 25.

In this situation, the overtime hours worked will, quite rightly, be included in the January assessment for MWO purposes. However, the overtime pay, because it is "payable in respect of February", will be included in February assessment.

### **Can an employer do anything about this?**

It may be tempting for employers to try to reclassify the overtime payment made in February as "payable in respect of" January. This would then marry up the hours and the pay. However, in order not to fall foul of section 23 of the EO, the overtime pay would need to be paid no later than 7 days after the end of the month in which the overtime was worked. This would probably mean that the employer will need to arrange a new payroll run in the first few days of each month especially for overtime pay.

### **Changing Employment Contracts**

Normally the consent of employees is necessary for any change to existing contracts. In any case, where employers are in any doubt about how to proceed, they should contact their legal advisors.

If changing contracts is too painful then employers could consider inserting appropriate wording into an Employee Handbook. Most Employee Handbooks can be amended by the employer alone (but this will not be as certain as a change agreed by the employee).

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