

Note on the Implications of the Employment (Amendment) Ordinance 2007

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EMPLOYMENT (AMENDMENT) BILL

1. Maternity Leave, Sickness Allowance, Holiday Pay and Annual Leave Pay (the "Statutory Benefits")

(a) General

Each of the Statutory Benefits will need to be determined by reference to the "*daily average of the wages earned by the employee*" over the preceding 12 months.

In determining the "*daily average of the wages earned by an employee*" the following periods and earnings during such periods shall be ignored:-

"any period therein for which the employee was not paid his wages or full wages by reason of

- *any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee,*
- *any leave taken by the employee with the agreement of his employer,*
- *his not being provided by his employer with work on any normal working day, or*
- *his absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap.282)."*
(emphasis added)

(b) The meaning of "full wages"

The Labour Department has confirmed that:-

"Whether an employee is paid his 'full wages' hinges on the terms of his employment contract and the definition of wages under the EO, and is a matter to be decided having regard to the circumstances of individual cases."

(c) Manner of calculation of "daily average wages" ("**DAW**")

The determination of DAW for an employee is a 2 step process.

Step 1 : Identify for the employee : -

- the "wages earned by the employee in the preceding 12 months" ("**W**")
- the relevant periods of leave described in (a) above on which "full wages" were not paid ("**L**") and

- the amount of "wages" paid on those "L" days ("**L Wages**").

Step 2 :

$$\text{DAW} = (W - L \text{ Wages}) \div (365 - L)$$

2. Wages in lieu of notice ("**WILN**")

WILN differs slightly from the Statutory Benefits referred to in 1 above. The amended section 7(1) distinguishes between notice periods expressed in **days or weeks** and notice periods expressed in **months**.

Where a notice period is expressed in **days or weeks** then the amount payable as wages in lieu of notice will be the number of days in the notice period multiplied by the DAW (see 1(c) above).

Where a notice period is expressed in **months** then the amount payable as wages in lieu of notice will be the number of months in the notice period multiplied by the "monthly average of the wages earned by the employee" during the preceding 12 months ("**MAW**").

There is no special formula for calculating the MAW. However the same periods of "leave" (and wages) are excluded as for the calculation of DAW (see 1(a) above). So, the formula should be:-

$$(W - L \text{ Wages}) \div 12 \text{ months less } L$$

3. Other issues

(a) *The "impractical provision"*

Each of the relevant statutory provisions states that where it is "impracticable" to calculate the DAW or MAW of an employee then the "amount may be calculated by reference to the wages earned by a person who was employed in the same trade or occupation and at the same work in the same district" during the relevant 12 month period.

This is sufficiently unclear as to make it a very dangerous provision to rely upon.

(b) *Deduction for other payments*

Each of the Statutory Benefits (see paragraph 1 above) can be reduced by amounts paid by the employer to the employee in respect of the period of maternity leave, sickness allowance, holiday pay or annual leave pay "pursuant to his contract of employment or any other agreement or for any other reason".

(c) *Periods of less than 12 months*

Where an employee has been employed for a period of less than 12 months then the DAW or MAW is determined by reference to that shorter period.

(d) *Information for employees*

It is worth noting that whilst employers will inevitably have the information necessary to calculate the DAW and MAW in their systems it is unlikely that an employee will have such information. This could make it tricky for employees to buy out their notice periods.

(e) *Ordinary wages defence (S.42)*

Section 42 will be repealed. This section provided a defence to employers who paid employees their "ordinary wages". This has been replaced by the set off referred to in 3(b) above.

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