THE
LAW SOCIETY
OF HONG KONG
香 港 律 師 會

MINIMUM WAGES ORDINANCE

Law Society's Comments on the Draft Guidelines

The Labour Department ("**Department**") released the Draft Guidelines through the Legislative Council Panel on Manpower on 16 December 2010. The Law Society wishes to provide some comments so that it has insight as to what issues legal practitioners are considering, both in their capacity as legal advisers to their clients (as employers or employees) and as employers.

The Draft Guidelines are welcomed as a step in communicating to the public the impact of this legislation. Accordingly, the Law Society's intended purpose in providing these comments is to help ensure that (a) the Guidelines are relevant and practical for the day-to-day reference of employees and employers; and (b) the implementation of the statutory minimum wage be as smooth as possible. The first point we wish to make is that where two possible interpretations attach to a provision, the Department should prefer the interpretation of the provision that causes the least amount of upheaval for the majority of Hong Kong employers. The second is that given the political, criminal liability posed by a breach, a working interpretation of the Minimum Wage Ordinance ("**MWO**") that does not cause employers and employees to revisit the foundation of their employment relationship or any fundamental terms of their contracts should be adopted. We note that these concerns are consistent with the stated objective of the MWO as stated by Mr Matthew Cheung Kin-Chung during the second reading speech for the MWO:

> *"MWO is to set an appropriate statutory minimum wage, forestalling excessively low wages, minimising the loss of low-paid jobs, safeguarding the interests of the vulnerable and grassroots workers, enhancing social harmony, while sustaining Hong Kong's economic growth, competitiveness and favourable business environment as a whole."*

This paper sets out some key thematic issues for the Department to consider, it then includes two appendices: **Appendix A** refers to a few specific items in the Draft Guidelines, which we submit with the greatest respect are not legally accurate. We suggest these are important, because they may cause unnecessary tension between employers and employees. **Appendix B** sets out some possible examples or fact situations which the Department may wish to consider as it refines the examples provided in the Draft Guidelines.

1. Structure and content of the Draft Guidelines – Focusing on the norms in Hong Kong, rather than the exceptional

The majority of Hong Kong's employees are monthly rated employees. The Draft Guidelines ought to focus on the commercial norms rather than hypothetical situations where an employer and employee can be assumed to have agreed to certain matters. Most Hong Kong employers and employees find one or all of the following circumstances to be applicable:

- a monthly wage period;
- a monthly salary of less than HK$11,500 is ordinarily payable at least in some cases; and

- contracts may be wholly unwritten, or silent on issues such as payment for meal breaks and rest days.

Many employers and most employees do not have the resources to undertake complex calculations for the purposes of determining compliance with the Employment Ordinance ("**EO**") or the MWO. Hong Kong employers and employees should be allowed to look for the most common sense way of understanding how the MWO applies to them.

It follows that the examples in the Draft Guidelines ought to bear these issues in mind. We suggest that two important issues for the Draft Guidelines to address are the recordkeeping requirements and situations where the employer and employee may not have specifically agreed as to the matters which the Draft Guidelines assume that the parties have agreed.

2. Treatment of rest days and impact on formula (page 19 of the Draft Guidelines)

The Department suggests that some contracts express that rest days are paid. Our experience, however, is that most contracts are silent on this point. If rest days are treated as paid, a person who works one ten-hour day a month for HK$1,000 (i.e. HK$100 per hour) would earn less than HK$28 per "hour worked" if 96.8% (30/31ths) of pay is allocated to rest days.

Carving out "rest day pay" for all monthly rated employees would significantly increase the entitlements of certain employees. This does not accord with practice, and could increase employer costs to an extent that was probably not envisaged by the legislators.

The Draft Guidelines impose two unreasonable expectations on employers and employees: first, that the parties will be in a position to determine whether their contracts provide for "rest day pay"; and second, that they will be in a position to dissect their wage payments and attribute certain components to rest day payments and non-rest day payments.

We agree that section 6(2) of the MWO states that payments for any time that is not "hours worked" will not be counted as "wages" which offset the statutory minimum wage: i.e. payments for annual leave, statutory holidays or maternity leave are not "wages" in the relevant sense under the MWO. "Rest day pay", however, is not a recognised concept, under the EO or in practice. We respectfully submit that it is not appropriate to create "rest day pay" as a form of leave pay excluded from "wages" as defined under the MWO. It is open to the Labour Department to adopt the view that all payments made to an employee as "wages" (as opposed to special payments such as annual leave payments) can and should be assumed to be made for "hours worked".

The Department ought to advocate for a calculation methodology that was intended by the Legislature and that can easily understood by the general public. The view advanced in the Draft Guidelines may result in individuals receiving windfall pay increases based on a technical interpretation of their contracts of employment, rather than interpretation based on a plain understanding of their "hours worked"; we submit that this result would not be consistent with creating a single "wage floor" as described during the preparatory stages of this legislation.

3. Recordkeeping

We understand the recordkeeping obligations to be a process imposed on employers in order to assist the Department and the employee (and employer) to monitor compliance. We remind the Department that these provisions are of utmost importance because the recordkeeping provisions of the EO are subject to a strict liability, and there is no defence of reasonable excuse for non-compliance (section 63D of the EO).

In light of the serious consequences of breach (even inadvertent breach), the present text of the legislation on the threshold of HK$11,500 poses challenges (this part was not seen by practitioners or the public before 2 July 2010 as it was not in the original Minimum Wage Bill). An amendment to the present legislation would be ideal, but, absent that, we urge the Department to adopt an interpretation that accords closest with a common sense way of interpreting and implementing the relevant provisions.

HK$11,500 threshold requires clarification: Amounts of individual "wages payable" can fluctuate on a month to month basis, which could mean that employers may inadvertently not comply with the recordkeeping requirements: this would happen if, for example, an employee unexpectedly takes sick leave, annual leave or other leave in a particular month. Monthly rated employees who earn **ordinarily** a base wage of HK$11,500 per month or more, technically, may well come in and out of the "net"; even a conscientious employer will not always be in a position to know in advance whether record needs to be kept in relation to that individual for that month.

We respectfully submit that it is open to the Department to take a more user-friendly interpretation that the HK$11,500 level refers to employees who would in the ordinary performance of their contract (i.e. in a month of no leave or any other unusual arrangements) receive "wages" of HK$11,500 or more.

As a policy position, we submit that it is also open to the Department to state that it would usually expect that hours worked records are kept in relation to piece rated employees unless their monthly "wages" are genuinely HK$11,500 or above. We anticipate that the Department would expect hours worked records to be kept in relation to commission-earning employees whose base rate of pay is below HK$11,500 per month.

HK$11,500 threshold and pro-rating of non-month wage periods: The Draft Guidelines confirm that the HK$11,500 per month threshold can be reduced for wage periods **both** longer and shorter than one month. When the employment contract is silent as to whether payments are only in respect of hours worked, will the Department permit employers to progress the pro-rating arrangement on the basis of working days only?

4. Definition of Work and the Contract of Employment (see pages 12 and 16 of the Draft Guidelines)

The definition of "hours worked" in section 4 of the MWO is not exhaustive. The Draft Guidelines express a view that if time is regarded as "hours worked" under a contract, it will be "hours worked" for MWO purposes.

To an extent, this is correct; however, what amounts to "work" under a contract is highly fact specific, particularly in the context of on-call and standby time. We urge the Department to acknowledge the inherent complexity in this. Whether on-call and standby time would count as "work" in the relevant sense would depend, amongst other things, on whether the individual is free to pursue their leisure activities during the relevant time. These issues were the subject of a lengthy dispute which reached the Court of Final Appeal in 2009 in *Leung Ka Lau v Hospital Authority*.

The same principle will also apply to meal breaks. In example 13, the Draft Guidelines rightly highlight that for security guards, the employer and employee have an understanding as to the system of work, which comprehends that the security guard may be interrupted during the lunch break in order to attend to his duties.

We argue that this is a clear and appropriate depiction of what is intended by the Department's explanations about meal breaks and on-call/standby time.

We suggest that, unless there is evidence of an arrangement that the employee is to be "ready, willing and able" to work during their meal break, that meal break time should not be regarded as working time.

We also submit that it could be worth suggesting that the Draft Guidelines expressly state that no minimum wage requirement arises if the employee is at the workplace during a meal break with the agreement/acquiescence of the employer, in circumstances where the employee is only at that location in order to eat or relax (not in order to perform work or be available to perform work).

Finally, examples 5, 6, 7 and 10 rely on the concept of "personal time". This concept is not referred to in the MWO, nor has it been the subject of substantive judicial consideration. If this concept is material in terms of how the Department wishes to enforce the MWO, we suggest that the concept would have to be clarified. A starting point then might be to consider the judgments in the *Hospital Authority* case.

We would prefer, however, that use of the concept of personal time be avoided; it is not necessary to seek to define "hours worked" negatively in this fashion.

5. Commissions (page 24 of the Draft Guidelines)

On page 24 of the Draft Guidelines, it is stated:

> "*commission payable under the contract of employment is counted as wages payable in respect of the wage period as specified in the employment contract (no matter the employer has paid it or not when it has been due). If commission is payable in respect of a number of wage periods according to the contract of employment, in determining whether the wages of an employee meet the minimum wage requirement, commission is counted as wages payable in respect of the corresponding wage period as provided in the contract of employment.*"

The Department's statement suggests to us that commissions are regarded as payable when the work earning that commission is performed. We anticipate that a plainer reading may be to regard commissions as forming part of wages payable when the entitlement to be paid those commissions arises under the contract (which could be much later than when the work is performed), and that payment of those amounts would be due by the end of that same wage period.

In reality, commission plans can be complex and payments made in the course of employment may not be specifically referable to work performed within one specific wage period. Again, we suggest that the Department offer a non-legalistic straightforward interpretation that is consistent with the MWO, specifically, that commissions will be regarded as being payable in the wage period in which the commission is due. This interpretation will permit employers to assess adequately whether they are in compliance with the MWO.

How these provisions are to be reconciled (if at all) may need to be tested in the courts. We suggest that the Department may wish to caution employers who remunerate significantly through commissions to monitor wages payable under their contracts in case they fall short of the statutory minimum wage standard, or otherwise, they should renegotiate the contracts with the employees so that the employees' wages under the contract (base salary plus commission) consistently meet the

statutory minimum wage. The underlying policy of the MWO, after all, is to ensure that all employees are entitled absolutely to a minimum rate of pay for hours worked.

Appendix A – Inaccurate Examples/Statements

Issue	Example/Statement	Comments
Unilateral variation of contract	"*Unilateral variation of employment terms and conditions by employers is not allowed under the Employment Ordinance.*" (page 4, bullet point 4)	This statement is incorrect; the EO does not prohibit employers from unilaterally varying employment terms and conditions. The EO provides, rather, that certain potential consequences (e.g. a claim for breach of contract, and/or of constructive dismissal) will be triggered.
Meal break	"*if meal break is regarded as working hours of the employee according to his employment contract or agreement with the employer, such time must also be taken into account in computing minimum wage*" (page 12, second bullet point) Example 16 (page 14)	In our comments, we noted that it is not straightforward to determine whether a meal break is regarded as working hours where the contract is silent. It would be useful to address how employers and employees should test whether a meal break forms part of hours worked, noting the following comment. The test for whether a meal break forms part of hours worked is not whether the meal break is paid; a "paid meal break" may also amount to a payment that is not for hours worked. Employers and employees have no easy or clear way of testing whether a meal break forms part of hours worked.
On-call or standby	Page 15, third bullet point	We have noted that the issue of on-call and standby time is complex, and inevitably depends on facts specific to the case. We have suggested that this should be acknowledged in the Draft Guidelines.
Other situations	"*Apart from the Minimum Wage Ordinance, if the time in question is regarded as hours worked by the employee under the employment contract or agreement with the employer, such time should be included in computing minimum wage.*" (page 16, top paragraph)	We urge the Department to revise its highly legalistic interpretation, please see section 4 of our paper.

Issue	Example/Statement	Comments
Wages payable	Example 18 (page 19)	The wrong test has been applied in example 18 for "working hours": Section 6(2) of the MWO requires any wages for any time that is not "hours worked" to be excluded, and section 4 of the MWO defines "hours worked" as any time during which the employee is, in accordance with the contract of employment...in attendance at a place of employment. In order to be a "place of employment", the employee must be there "for the purpose of doing work or receiving training". In other words, there are two requirements: (1) the need for the contract to specify the hours (or the agreement or direction of the employer), and (2) the need for the employee to be at a "place of employment". Example 18 ignores part (2) of this test: The contract does not require the employee to be at a "place of employment" during lunch break. It is a "1-hour lunch break", and the employee is free to go out for lunch, in this situation it is wrong to specify that this is an "hour worked" if the employee is free to go out for lunch. Only if the person is required to work or be available to work should it be viewed as an hour worked.
Commission	"*commission payable under the contract of employment is counted as wages payable in respect of the wage period as specified in the employment contract (no matter the employer has paid it or not when it has been due)*" (page 24, second bullet point)	We suggest that this explanation is not consistent with section 6(5) of the MWO which provides that it is when commission is paid that dictates the wage period in which it falls, not the wage period specified in the contract of employment. Also, the "period" during which commission is paid is normally different from the standard wage period (e.g. monthly basic salary and quarterly commission). Under the MWO, an employee can only have one wage period.
	Examples 28-29 (page 25)	Section 6(5) of the MWO requires all of the commission to be counted when paid, not when accrued.
No contracting	"*Any agreement made between an employer and an employee cannot*	Whilst a provision in the contract of employment purporting to reduce a statutory right is void (section 15 of the MWO), any other agreement between the employer and employee

Issue	Example/Statement	Comments
out	*reduce the latter's entitlement to SMW.*" (page 26, first bullet point)	(eg. to settle a dispute) is valid. We therefore suggest inserting the words "*forming part of the contract of employment*" after "*any agreement*" in the Guidelines.

Appendix B – Areas for further consideration

Issue	Example/Statement	Comments
Hours worked	Example 2 (page 9)	Please consider how the period from 8:30am to 9:00am would be treated if the employee were preparing the store for opening, but the employer did not require this; what if it was a practice which the employee developed in order to fill in time while he waited for the shop to open?
Hours worked	Example 3 (page 9)	Please consider avoid using "personal reasons", you could for example say that he was surfing the internet; what if he was surfing the internet for the latest stock prices of his employer company? Please consider also where employees may surf the internet for non-work reasons, such as booking a vacation, in the course of a working day. In that situation, the employee will be present for the purposes of doing work, and will be there with the agreement of the employer. Is an employer required to regard these as not "hours worked", and is an employer required to regard payments made to the individual for that period as payment not for "hours worked"?
Hours worked / Personal time	Examples 5 and 6 (pages 9 and 10)	We have noted above that we would suggest that the concept of "personal time" not be created or used, because it is not referred to at all in section 4 of the MWO, and it may not be desirable to define the concept negatively. Sections 4(a) and (b) distinguish between the situations in which a person is "attending at a place of employment" and "travelling in connection with employment" (emphasis added). The Department may wish to suggest examples that distinguish between these two arms more clearly. It is not clear from the present examples how the two are different.
Travelling	Example 10 (page 11)	Please consider how many "usual places of employment" an individual could have. Could an employer and employee by contract agree that for a regional sales coordinator, all offices in the Asia-Pacific region would be a "usual place of employment" if that person travels to

Issue	Example/Statement	Comments
		those locations often (e.g. at least once or twice a month)?
Meal breaks	Example 15 (page 13)	Please consider the situation where the workshop worker answers the telephone during the lunch break, and takes an order. Would that short period of time need to be regarded as hours worked? Please provide some indication as to how an employer and employee can determine from their contract whether a meal break is regarded as working hours under the contract of employment. If the contract provides "working hours at 9am until 6:30pm with a one hour break for lunch", would the Department regard this as a meal break that is counted as working hours?
On call or standby time	Page 15	Please consider providing an insight as to the complexity of this by providing fact situations that were considered in the *Hospital Authority* case.
Paid rest days	Page 19	Please consider how an employer and employee can confirm whether rest day pay is payable under the contract. Please reconsider whether "rest day pay" should be included because it is not a specified form of leave pay under the EO. The obligation to pay rest day pay should not be implied. Unlike payment for statutory holidays, it is not a concept that exists under the EO or, indeed, the MWO. If rest days are treated as paid, a person who works one ten-hour day a month for HK$1,000 (i.e. HK$100 per hour) would earn less than HK$28 per "hour worked" if 96.8% (30/31ths) of pay is allocated to rest days.
Commissions	Example 29 (page 25)	Please consider the situation where the relevant wage period is monthly and consider naming the relevant wage periods in respect of which those commissions are payable in a particular month.
Recordkeeping	Example 32 (page 28)	Please consider providing an example of an employee who is on a weekly or fortnightly wage period.

Issue	Example/Statement	Comments
	Pages 27 to 29	Please consider inserting examples for leavers (by applying section 5(4) of the MWO) or for new joiners. Assuming a monthly wage period, for new joiners, would their first wage period be counted as starting from the beginning of the relevant calendar month or would it be regarded as commencing when the new joiner commences employment? Please provide an example of how this should be pro rated for the purposes of applying the HK$11,500 threshold.

The Law Society of Hong Kong

Employment Law Committee

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