

CHINA

BEITEN BURKHARDT

百达律师事务所

Statutory minimum wage to be proposed in Hong Kong



By Sandy Sung

The Provisional Minimum Wage Commission is planning to propose a minimum wage rate to the Hong Kong Government. This may take place as early as July 2010, before the Legislative Council – which has the authority to accept or reject the proposal – takes its summer recess.

The current draft of the Minimum Wage Bill (the Bill) would require all employers in Hong Kong to pay their employees no less than the statutory minimum wage in respect of any wage period, which would be one month unless a different basis is demonstrated. The formula will be:

$$\begin{aligned} \text{minimum wage} \\ = \text{minimum hourly wage rate} \times \text{number of hours worked} \end{aligned}$$

The Bill states that the number of hours worked by an employee will include any time when the employee is “in attendance at a place of employment, irrespective of whether he or she is provided with work or training at that time.” Such description is purely factual and makes no reference to any agreed contractual terms relating to working hours.

As a result, it is likely that a stricter method of monitoring working hours will be important for those who will be paying or earning at the statutory minimum wage rate. The reason is that employees earning the minimum wage will be entitled to additional pay for any actual overtime work, or simply overtime attendance for work.

Not surprisingly, the Bill voids any provision that purports to undermine or eliminate through contract any right, benefit or protection conferred by the law on the employee. As such, it will alter the present position that employers may contractually bar overtime pay, at least for this particular group of employees. These employees will always be entitled to the “minimum wage”, as calculated by the recorded number of hours worked according to the formula set out above, over any wage period. Any fixed wages which employers may attempt to set regardless of the

working hours or the level of workload for this group of employees will no longer be legally feasible.

The hours worked by an employee in a wage period will include any employment related travel time (except for travel to or from home). Mealtime is excluded, unless the employee is doing work in accordance with the employment contract or with the agreement or at the direction of the employer.

The Minimum Wage Commission, which will make recommendations to the Hong Kong Government, is responsible for setting the minimum hourly wage as well as arranging the timing and frequency of rate reviews. Legislators may either accept or reject the proposed minimum wage level; they have no power to amend it.

It is foreseeable that whatever wage rate is proposed, employers and unionists will make their voices heard over what they think is justified and that the already heated debate on the topic will get more intense in Hong Kong. Currently, major labour unions tend to demand HK\$33 (approx US\$4.24) per hour, while employers generally call for HK\$24-\$25 (approx US\$3.08-\$3.21).

The Bill will not be applicable to the following:

- persons to whom the Employment Ordinance (Chapter 57, Laws of Hong Kong) does not apply;
- student interns;
- domestic household workers who dwell in that household free of charge.

The application of the law (if passed, based on the current version) to persons with disabilities, who have validly registered with the relevant authority in Hong Kong, will vary on an individual basis by way of an adjustment to their minimum hourly wage rate after a productivity assessment by an “approved assessor”.

According to the Secretary for Labour and Welfare, the aim is to implement the new law in 2011. Meanwhile, the Legislative Council will further scrutinise the draft Bill, and how the proposed law will develop remains to be seen.

BEITEN BURKHARDT

3rd Floor, 8 Queen’s Road Central
Hong Kong

Tel: (852) 2524 6468 Fax: (852) 2524 7028

E-Mail: Sandy.Sung@bblaw.com

www.beitenburkhardt.com