

**The Criminal Liability of Employers Defaulting on Awards
and
the related “Without Reasonable Excuse” Clause**

Foreword

This leaflet outlines the employers' criminal liability in failing to pay an award of the Labour Tribunal or Minor Employment Claims Adjudication Board under section 43P of the Employment Ordinance ("EO"), Cap. 57, of the Laws of Hong Kong and the clause related to "without reasonable excuse" of that provision. With the aid of some practical employment tips, it seeks to enhance the employers and employees understanding of the relevant statutory provisions and good people management practices, and in particular, to remind employers that they should observe statutory requirements.

The information in this leaflet contains the Labour Department's interpretation and practices in relation to the EO. The leaflet is provided for reference only. Its contents have no legal effect and do not constitute any legal advice. As the actual circumstances vary from case to case, in case of any queries, professional legal advice should be sought. Please note that in no way shall any statement contained in this leaflet affect or be binding on the functions, powers and enforcement actions of the Labour Department and the prosecution decision of the Department of Justice as well as the interpretation or decision of the Court.

For further details of the EO, please refer to the text of the legislation or the publications "A Concise Guide to the Employment Ordinance" and "A Concise Guide to the Employment (Amendment) Ordinance 2010" published by the Labour Department.

The Criminal Liability of Employers Defaulting on Awards

According to section 43P of the Employment Ordinance ("EO"), if an award of the Labour Tribunal or Minor Employment Claims Adjudication Board (hereafter as "tribunal") provides for the payment by an employer of any "specified entitlement" defined by the EO and the employer wilfully and without reasonable excuse fails to pay the awarded sum within 14 days after the date on which the sum is payable by the terms of the award, or in the absence of such award terms, 14 days after the date of the award, the employer is liable to prosecution and, upon conviction, to a fine of \$350,000 and imprisonment for 3 years.

"Specified entitlements" include wages and statutory entitlements underpinned by criminal sanctions under the EO, such as wages, end of year payment, maternity leave pay, severance payment, long service payment, sickness allowance, holiday pay, annual leave pay as well as terminal payments and compensation for unreasonable and unlawful dismissal awarded under the Part VIA of the EO on "Employment Protection".

The above provisions apply to an award of the tribunal made on or after 29 October 2010. The offence under section 43P of the EO also applies to the default on any part of a sum payable under the award. In the case of a sum payable by instalments, it also applies to the default on any instalment or part of an instalment. If an award of the tribunal provides for a payment to an employee by an employer, the employer should fulfil the award as ordered by the tribunal without delay.

The “Without Reasonable Excuse” Clause

- ◆ Introducing a criminal offence under the EO against the employers defaulting on awards is to target on those employers who wilfully and without reasonable excuse fail to pay the awarded sum.
- ◆ Adopting the “without reasonable excuse” clause in the offence is to ensure that the culpable offenders can be sanctioned while safeguarding those employers who have put forth a valid reason. This concept has also been widely adopted in many offence provisions of the EO involving defaults on wages and other statutory entitlements, such as end of year payment, long service payment, severance payment, holiday pay, annual leave pay and sickness allowance.
- ◆ While the EO does not elaborate on what constitutes “reasonable excuse”, it can be regarded generally as an excuse which a reasonable person applying community standards would have found it reasonable. The enforcement experience of the Labour Department on employment-related cases reveals that there is no hard and fast rule on what constitutes “reasonable excuse”. An excuse may be reasonable in one case but not in another.
- ◆ For example, there had been cases where some employers being prosecuted for wage defaults^{Note} by the Labour Department tried to explain their failure to comply with the statutory requirements on payment of wages with various defences. These included delaying wages due to administrative hiccups, using wage default as a means of punishment for an employee’s unsatisfactory performance, withholding wages of an employee who was suspected to have stolen company’s property so as to set off against the loss of the employer or failing to pay wages on time because the employee who had resigned from the post did not sign the document designated by the employer, etc. However, these excuses may not be accepted by court as reasonable excuses.
- ◆ It is worth to note that the examples given above should not be treated as legally binding precedents. In assessing whether the defendant’s excuse is reasonable,

Note : The Employment Ordinance stipulates that an employer should pay wages to his employee not later than 7 days after the end of the wage period or the day of termination of employment. An employer who wilfully and without reasonable excuse fails to pay wages when it becomes due is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for 3 years.

the Court will consider all the relevant facts and circumstances of each individual case. **As the actual circumstances vary from case to case, the final interpretation and decision shall rest with the Court.**

Responsible Employers Adopt Good Management Practices

- **Understanding labour laws:** To build mutual trust and a harmonious relationship with employees, employers should know the EO and other statutory provisions relevant to employment matters. It is also a must for employers to fulfil their legal obligations.
- **Setting out employment terms:** To avoid disagreement and labour dispute, before an employee takes up the job, the employer and the employee should clearly spell out the employment terms to safeguard the rights and benefits of both parties.
- **Using written employment contracts:** Written employment contracts help both employers and employees better understand the terms of the employment and their contractual obligations. An employer is advised to enter into a written employment contract with his employee as far as possible. After signing a written employment contract, the employer should provide a copy of the employment contract to the employee for retention and reference. Employers should consult their employees, give them sufficient time for consideration and obtain their consent before effecting any subsequent changes to the terms of the employment contract. A copy of the amendment should be provided for the employees concerned.
- **Sound management:** A good human resources management system, together with well-structured operational procedures, helps employers handle employment matters smoothly. Therefore, employers should always review and improve the respective human resources management procedures and measures of the company (including the related computer system), streamline unnecessary administrative procedures and ensure that the staff executing those procedures is familiar with the system and the legal requirements.
- **Fair and reasonable code of conduct:** Employers should lay down fair and reasonable code of conduct and the grievance and disciplinary procedures, which should be made known to all staff. It is also important to ensure that the disciplinary procedures and penalties are not contrary to the provisions of the EO. Moreover, they should not default or withhold wage payments as a means of punishment for an employee's unsatisfactory performance or misconduct.

Enquiries

- Enquiry Hotline : 2717 1771 (the hotline is handled by “1823”)
- Homepage Address: <http://www.labour.gov.hk>
- Enquiry in person to Offices of the Labour Relations Division of the Labour Department: <http://www.labour.gov.hk/eng/tele/lr1.htm>

Labour Department

September 2011