



Productivity Assessment for Persons with Disabilities under the Statutory Minimum Wage Regime

Rights and benefits of Employees with Disabilities under the Statutory Minimum Wage Regime

The Minimum Wage Ordinance ("MWO") comes into force on 1 May 2011 and the initial statutory minimum wage ("SMW") rate is \$28 per hour. Employees with disabilities enjoy the same SMW protection and are entitled to wages at no less than \$28 per hour on the average. Nevertheless, taking account of the possible employment difficulties encountered by some persons with disabilities, the MWO also provides for a special arrangement so that persons with disabilities whose productivity may be impaired by their disabilities will have the right to choose to have their productivity assessed to determine whether they should be remunerated at not lower than the SMW level or at a rate commensurate with their productivity.

To forestall abuse, the right to invoke the productivity assessment ("the assessment") is vested in the persons with disabilities rather than the employers. For persons with disabilities who do not elect to undergo the assessment, their employers must pay them at not lower than the SMW rate in accordance with the MWO.

Criteria and procedures for invoking the assessment

Persons with disabilities must hold a valid "Registration Card for People with Disabilities" issued by the Central Registry for Rehabilitation of the Labour and Welfare Bureau in order to exercise the right to opt for the assessment. The application form for the "Registration Card for People with Disabilities" can be obtained from the Central Registry for Rehabilitation of the Labour and Welfare Bureau, relevant non-governmental organisations on rehabilitation or District Offices of the Home Affairs Department. It can also be downloaded from the Labour and Welfare Bureau's homepage (www.lwb.gov.hk/eng/forms/). No fee is charged for issue and renewal of the "Registration Card for People with Disabilities". Enquiries on matters relating to the application of the "Registration Card for People with Disabilities" can be made by phone at 2810 3859, 2810 3861 or 2810 3841.

After the implementation of the MWO on 1 May 2011, newly employed persons with disabilities may before commencing employment agree with their employers to undergo a trial period of employment ("the trial period")^{Note}. The purpose of the trial period is to allow persons with disabilities to acclimatise themselves to the actual working environment and settle into their job before undergoing the assessment. The length of the trial period is 4 weeks or up to the day on which the assessment of the person with disabilities is completed, whichever period is the shorter. During the trial period, the person with disabilities is an employee engaged by the employer in accordance with the contract of employment, and should be remunerated at not lower than 50% of the SMW rate. If the person with disabilities and the employer jointly make an application for extension of the length of trial period of employment before the end of trial period, the Labour Department may, in exceptional circumstances, extend the length of the trial period. For details, please call the Labour Department enquiry hotline at 2717 1771.

Note: After the implementation of the MWO on 1 May 2011, persons with disabilities already in employment may also opt for invoking the assessment. If there is no variation in the terms of the contract of employment as to the kind of work to be done under that contract when invoking the

assessment, the persons with disabilities will undergo the assessment directly without going through the trial period. However, should the terms of the contract of employment be varied as to the kind of work to be done under that contract when they invoke the assessment, the persons with disabilities may, before the variation is due to take effect, agree with their employers to undergo a trial period.

Undergoing the assessment

As the purpose of the assessment is to determine whether or not and the degree to which the productivity of the person with disabilities in performing the work required under the contract of employment is affected by his/her disability, the assessment must be conducted in the actual workplace of the person with disabilities.

The assessment shall be conducted by an approved assessor ("the assessor"). A person with disabilities may select any assessor to conduct the assessment. An assessor should not conduct productivity assessment for a person with disabilities who works in the same organisation (or its subsidiary) or the recommending organisation (or its subsidiary) of the assessor.

Information on the assessors is set out in a register of approved assessors. **Persons with disabilities can browse and find an approved assessor through the Labour Department's homepage (www.labour.gov.hk);** or browse the register available at the following offices of the Labour Department during office hours (9 am to 1 pm and 2 pm to 6:15 pm from Mondays to Fridays except Public Holidays):

Statutory Minimum Wage Division

1/F, Harbour Building, 38 Pier Road, Central, Hong Kong

Selective Placement Division

Hong Kong office: G/F, East Wing, Harbour Building, 38 Pier Road, Central, HK

Kowloon office: G/F, Ngau Tau Kok Government Offices, 21 On Wah Street,
Ngau Tau Kok, Kowloon

New Territories office: 2/F, Tsuen Wan Government Offices, 38 Sai Lau Kok Road,
Tsuen Wan, New Territories

The assessment will be conducted on a date agreed by the person with disabilities, the employer and the assessor. If the person with disabilities chooses to undergo a trial period in accordance with the MWO, the assessment should in principle be made during the trial period.

The Government will bear the fees of the assessors. The person with disabilities and the employer should not pay any fee to the assessors or any other person for the assessment.

Criteria for approved assessors

Approved assessors include the following categories of persons:

- registered occupational therapist/registered physiotherapist/ registered social worker who, in that capacity, possesses not less than 3 years' experience in the provision of vocational rehabilitation or other services in relation to the employment of persons with disabilities during the immediately preceding 7 years
- vocational rehabilitation practitioner being currently engaged or had been engaged by the organisation(s) recognized by the Labour Department for not less than 5 years in total in the provision of vocational rehabilitation or other services in relation to the

employment of persons with a disability during the immediately preceding 10 years; and with the recommendation of the recognized organisation(s) to become an approved assessor

All eligible persons should complete satisfactorily training arranged by the Labour Department in order to become approved assessors.

The basic principles of the assessment

Prior to conducting the assessment, the assessor must explain to the person with disabilities and the employer their respective rights and responsibilities under the relevant provisions of the MWO. In particular, the right to invoke the assessment is vested in the person with disabilities, not the employer. The assessor should be objective and impartial throughout the assessment. It is incumbent on the assessor to ensure that no conflict will arise between his/her duties involved in conducting the assessment and his/her other interests.

Procedures and methods of assessment

In conducting the assessment, the assessor should collect detailed information on the work of the person with disabilities (including the nature, requirements and procedures of the work) through the employer, the person with disabilities and, if appropriate, any other relevant person(s) conducive to the understanding of the work (such as other employee(s) of the employer performing the same or similar work). Based on the detailed information on the work collected, the assessor should exercise his/her professional expertise and decide on the appropriate factor(s), namely working speed, quantity and quality of work or other requirements for performing the work, to be considered in the assessment. With reference to the factor(s) selected, the assessor should, by adopting suitable means such as observation and analysing performance data of the above factor(s), assess the degree of productivity of the person with disabilities. If the assessor, having regard to all the facts and evidence available, is of the view that the performance of the person with disabilities and degree of productivity on the day of assessment is adversely affected by any reasons that cause him/her failing to perform at full potential, the assessor may reasonably adjust upwards the degree of productivity of the person with disabilities.

Outcome of the assessment

The assessor must provide the person with disabilities and the employer a certificate of assessment ("the certificate") stating the degree of productivity of the person with disabilities as soon as practicable after conducting the assessment. An assessment is completed when the certificate is signed by the assessor. After the assessment is completed, a person with disabilities shall not have any further assessment made for the same work with the same employer.

Where the assessment is completed within the trial period or the employee with disabilities need not undergo the trial period, from the first day after the certificate is countersigned by the employee with disabilities and the employer, the minimum wage level applicable to the employee with disabilities should not be less than the assessed degree of productivity stated in the certificate, viz.:

$$\begin{array}{|c|} \hline \text{Minimum wage level of the} \\ \text{employee with disabilities after} \\ \text{the assessment} \\ \hline \end{array} = \begin{array}{|c|} \hline \text{Assessed degree of} \\ \text{productivity stated in the} \\ \text{certificate of assessment} \\ \hline \end{array} \times \begin{array}{|c|} \hline \text{SMW rate} \\ \text{(i.e. \$28 per hour)} \\ \hline \end{array}$$

Where the assessment is completed after the expiry of the trial period, upon countersigning the certificate by the employee with disabilities and the employer, the minimum wage commensurate with the degree of productivity stated in the certificate will take retrospective effect from the first day after the expiry of the trial period.

It should be noted that after the assessment, the employee with disabilities is still required to hold a valid "Registration Card for People with Disabilities" to render the minimum wage commensurate with the assessed degree of productivity stated in the certificate to continue to be valid. Any "Registration Card for People with Disabilities" with an expiry date has to be renewed as early as possible before expiration; otherwise the employer has to pay the employee not lower than the SMW when the "Registration Card for People with Disabilities" becomes invalid. Therefore, both the employer and employee should pay attention to the expiry date of the "Registration Card for People with Disabilities".

In any circumstances that either the employee with disabilities or the employer fails to sign on the certificate, the employee with disabilities should be remunerated at not lower than the SMW rate from the first day after the completion of the assessment.

Serving employees with disabilities who have opted for transitional arrangement before the implementation of the Statutory Minimum Wage

Persons with disabilities already in employment prior to the implementation of the MWO on 1 May 2011 and earning at a wage rate below the SMW rate (i.e. \$28 per hour) may opt for undergoing the assessment by completing and signing jointly before 1 May 2011 with their employers the Option Form specified by the Labour Department and invoke the assessment at any time after the SMW implementation on 1 May 2011. There is no time limit for the assessment which can be conducted anytime as long as they are employed by their existing employers to perform the work concerned and holding a valid "Registration Card for People with Disabilities". Before the assessment, they are entitled to wages no less than their current contractual wage level. Adjustment of the SMW rate, if any, in the interim would also be applicable to them. Noteworthy is that the serving employees with disabilities are still required to hold a valid "Registration Card for People with Disabilities" after 1 May 2011 to render their option valid.

Enquiries

It should be noted that the interpretation of the MWO (Chapter 608) would be based on its original text. The MWO has been uploaded to the Bilingual Laws Information System of the Department of Justice at www.legislation.gov.hk/eng/index.htm. Further enquiries can be addressed to the Labour Department through the following channels:

24-hour telephone hotline	Telephone number: 2717 1771 <i>(handled by the 1823 Call Centre)</i>
E-mail	enquiry@labour.gov.hk <i>(Your enquiry will be processed and replied within five working days. If this is not possible, an interim reply will be sent to you for information.)</i>
Fax	Fax number: 3101 4705
Post	Address: Statutory Minimum Wage Division 1/F, Harbour Building, 38 Pier Road, Central, Hong Kong