

# **Employment (Amendment) Ordinance 2010 ("Amendment Ordinance")**

## **Frequently Asked Questions with Answers**

### **1. What are the major contents of the Amendment Ordinance?**

- The Amendment Ordinance introduces a new criminal offence under the Employment Ordinance, whereby an employer who wilfully and without reasonable excuse fails to pay a sum awarded by the Labour Tribunal (LT) or Minor Employment Claims Adjudication Board (MECAB) within 14 days after it becomes due is liable to prosecution. The maximum penalty is a fine of \$350,000 and imprisonment for three years. This measure serves to enhance the deterrent effect and strengthen the protection of employees' rights and benefits.

### **2. When will the Amendment Ordinance come into operation?**

- The Government has published a notice in the Gazette to appoint the effective date of the Amendment Ordinance on 29 October 2010. It applies to an award of LT or MECAB made on or after that date.

### **3. Is the new offence applicable to default on payment of LT or MECAB awards made before the commencement date of the Amendment Ordinance?**

- The new offence is only applicable to LT or MECAB awards made on or after 29 October 2010. It does not have retrospective effect on the awards made before that.
- Nevertheless, if an employer defaults payment of an award made prior to the commencement date and where there is sufficient evidence to prove that any other provisions under the Employment Ordinance (such as wages defaults) have been contravened, the Labour Department will also take out prosecution in respect of the concerned offence(s).

**4. Is the new offence under the Amendment Ordinance applicable to all sums awarded by LT or MECAB?**

- Under the Amendment Ordinance, the new offence applies to an award comprising any “specified entitlement” stipulated under the Amendment Ordinance. The “specified entitlements” refer to wages and statutory entitlements underpinned by criminal sanctions under the Employment Ordinance, such as wages, annual leave pay, statutory holiday pay, maternity leave pay, sickness allowance, end of year payment, long service payment, severance payment, terminal payments and compensation for unreasonable and unlawful dismissal awarded under the part on “Employment Protection” of the Employment Ordinance etc..

**5. Why “specified entitlements” mentioned in Q.4 should be included in the LT and MECAB awards applicable under the Amendment Ordinance?**

- While the awards made by LT and MECAB are civil in nature, the employment-related entitlements of their awards often include wages and statutory entitlements under the Employment Ordinance, the non-payment of which is already a criminal offence under the Employment Ordinance. This provides an essential basis to criminalize the default of payment of LT and MECAB awards.
- With the above justification and to avoid read-across implication to other civil judgments, the Amendment Ordinance applies to LT and MECAB awards comprising wages and statutory entitlements underpinned by criminal sanctions under the Employment Ordinance, viz the “specified entitlements”.

**6. If the LT or MECAB has ordered a principal contractor or a superior subcontractor (“superior subcontractor”) to pay wages to an employee who is employed by the subcontractor, and the**

**principal contractor or superior subcontractor fails to pay the awarded sum, is the Amendment Ordinance applicable?**

- The Amendment Ordinance applies to prosecution against employers but not “superior subcontractors”. According to Part IXA of the Employment Ordinance, the “superior subcontractor” has the vicarious liability to pay outstanding wages of the first two months owed to an employee by a subcontractor. The wages so paid will become a debt owed by the subcontractor to the “superior subcontractor”. Such vicarious liability is only of civil nature without criminal liability.
- The obligation to pay wages rests with the employer. Where there is sufficient evidence, the Labour Department will prosecute the employer (i.e. the subcontractor) for wage offences under the Employment Ordinance.

**7. How to determine the “14-day period after the awarded sum becomes due”?**

- An employer should pay the sum awarded by LT or MECAB timely. If the award specifies the date on which the sum becomes due, the employer should make payment on or before that date. If the award does not specify so, the employer should pay on the date of the award.
- According to the Amendment Ordinance, an employer who wilfully and without reasonable excuse fails to pay the awarded sum within 14 days after the abovementioned dates commits an offence.

**8. Please give an example to explain how the “14-day period after the awarded sum becomes due” is determined.**

- In a case where LT or MECAB awards in favour of an employee on 8 November 2010 and orders the employer to pay the employee a sum (with payment including “specified entitlements”) on or before 15 November 2010, if the employer wilfully and without reasonable

excuse fails to pay the awarded sum within 14 days (i.e. 16 to 29 November 2010) after it becomes due (i.e. 15 November 2010), the employer commits an offence.

- If, in the above example, the due date of the awarded sum is not stated in the LT or MECAB award made on 8 November 2010, the “14-day period after the awarded sum becomes due” will start from the date after the date of the award (i.e. 8 November 2010). If the employer wilfully and without reasonable excuse fails to pay the awarded sum within 14 days (i.e. 9 to 22 November 2010), the employer commits an offence.

**9. Where an award is applicable under the Amendment Ordinance, will the new offence still apply if the employer has made partial payment of the awarded sum?**

- It is applicable. The Amendment Ordinance stipulates that if an employer fails to pay any part of a sum payable under the award, the employer still commits an offence.

**10. Where an LT or MECAB award specifies that the sum is to be paid by instalments, will the new offence still apply if the employer has paid some of the instalments?**

- It is applicable. The Amendment Ordinance stipulates that when the awarded sum is payable by instalments, if an employer fails to pay any of the instalments or even part of an instalment, the employer still commits an offence.

**11. If the employer, being a limited company, commits the new offence under the Amendment Ordinance, will the company director or responsible person be legally liable?**

- Since businesses in Hong Kong are mostly operated by limited

companies, the Amendment Ordinance provides for similar liability as applicable to existing wage offences under the Employment Ordinance so as to achieve effective deterrence against defaults of payment of LT or MECAB awards. If the employer is a limited company and it commits the new offence for wilfully defaulting the awarded sum, where there is sufficient evidence to prove that the offence is committed with the consent or connivance of, or to be attributable to any neglect on the part of a company director or responsible person, that director or responsible person will also be liable to prosecution.

- Company directors and responsible persons should take the LT and MECAB award seriously and ensure the company's payment of the awarded sum to employee timely, so as to fulfill the obligation as a responsible employer and business operator.