

Guide to the Protection of Wages on Insolvency Ordinance And Procedures for applying for ex gratia payment

An employer may become insolvent. In order to recover debts owed by an insolvent employer such as arrears of wages, wages in lieu of notice and severance payment, employees may need to present a bankruptcy or winding-up petition against their insolvent employer, usually with the assistance of the Legal Aid Department. At the same time, employees may also apply for ex gratia payment from the Protection of Wages on Insolvency Fund (the Fund) in respect of the wages, wages in lieu of notice and severance payment owed by their employer. Once a bankruptcy or winding-up order is made, the employees should also file their proof of debts with the Official Receiver's Office regarding their dividend payment as soon as possible.

The major function of the Protection of Wages on Insolvency Fund Board (the Fund Board) is to administer the Fund, and the Wage Security Division of the Labour Department is responsible for processing and verifying applications for ex gratia payment from the Fund.

Ex gratia Payment

The ex gratia payment that may be made out of the Fund covers:

- (1) arrears of wages
 - wages owed to an applicant in respect of services rendered to his insolvent employer during the period of 4 months prior to the last day of service
 - outstanding payment of annual leave or statutory holiday taken, maternity leave pay, sickness allowance
 - end of year payment
- (2) wages in lieu of notice (up to the equivalent of 1 month's wages)
- (3) severance payment

The maximum amount of ex gratia payment payable by the Fund is as follows:

Maximum Amount of Ex Gratia Payment		
Arrears of wages	Wages in lieu of notice	Severance payment
\$36,000	\$22,500	\$50,000 plus 50% of any excess entitlement

Persons who are Eligible to Apply For An Ex gratia Payment

All employees whose employer has become insolvent and who are owed wages, wages in lieu of notice and severance payment are eligible to apply.

If a person whose employer is an individual, and who is a member of the family of that employer, and who dwells in the same dwelling as that employer is not eligible to apply.

Application Deadlines

Under the Protection of Wages on Insolvency Ordinance, the Commissioner for Labour must not approve any application –

- (1) in respect of wages for services rendered more than 4 months prior to an applicant's last day of service;
- (2) in respect of wages which is made more than 6 months after the last day of service;
or
- (3) in respect of wages in lieu of notice or severance payment which is made more than 6 months after the date of termination of contract.

Making An Application

Employees should seek advice and assistance from the Labour Relations Division of the Labour Department as soon as possible if they suspect that their employer has become insolvent. Symptoms of insolvency may include the following:

- employer fails to pay his debts including wages when they fall due for payment or with reasonable promptitude;
- plant and machinery or raw materials are removed from the workplace without apparent warning or good reason;
- place of work is, for no apparent reason, shut down without prior notice;
- employer suddenly disappears and cannot be located either at his usual place of residence or of business; and
- employer's assets or goods are suddenly seized by court bailiffs.

After investigation, the Labour Relations Division will, if it considers necessary or advisable, refer employees of an apparently insolvent employer to the Legal Aid Department so that prompt legal proceedings may be commenced to protect the employees' interests.

Officers of the Labour Relations Division will assist employees who are owed wages, wages in lieu of notice and severance payment to apply for ex gratia payment from the Fund.

An applicant has to make a statutory declaration of the information provided in the application form. He is also required to produce documents such as employment contract, wage receipts and attendance records to support his application to the Fund.

Conditions For Payment

Subject to verification of applications, the Commissioner for Labour may make an ex gratia payment on condition that -

- a winding-up petition has been presented against the employer who is a company; or
- a bankruptcy petition has been presented against the employer who is an individual.

The Commissioner for Labour may waive the above requirements in case where:

- an employer employs less than 20 employees;
- sufficient evidence exists to support the presentation of a petition; and
- it is unreasonable or uneconomic to present a petition in that case.

The Commissioner for Labour may also make an ex gratia payment to an applicant who, because of a restriction imposed by the Bankruptcy Ordinance, cannot present a bankruptcy petition against his employer as the aggregate amount of wages and other benefits owed to him is less than \$10,000.

The Commissioner for Labour will verify the relevant applications, taking into consideration all relevant employment and related documents submitted by employer and applicants.

Protection of Wages on Insolvency (Amendment) Ordinance 1999

The Amendment Ordinance only applies to termination of employment contracts which takes effect on or after 10 December 1999. Under the Amendment Ordinance, the amount of ex gratia severance payment from the Fund will be calculated on the basis of an employee's wage level before wage reduction or a wage level in between the employee's reduced wages and his pre-reduction wages if his employer has undertaken to do this before the wage reduction.

To qualify for the above arrangement, the wage reduction must have taken place within 12 months immediately before the date of termination of employment.

In the case where an employee has had more than one wage reduction in the 12-month period immediately preceding termination of employment, the Fund will use the highest wage level as specified in any of the undertakings given by the employer for the purpose of calculating the ex gratia severance payment.

An applicant is required to produce evidence to the Commissioner for Labour's satisfaction that his employer has undertaken to pay severance payment on the basis of the agreed wage level. The Commissioner may refuse to accept any alleged undertaking if the applicant fails to produce evidence or if the Commissioner is not satisfied with the evidence produced.

Company Directors

In accordance with the existing policy, if an applicant is or has been a registered director of a company, his application to the Fund will generally be refused.

Arrangement For Payment

The functions of the Wage Security Division of the Labour Department include verification of applications, calculation and release of ex gratia payments. The amount of payments admitted by the Fund is usually effected via crossed cheques addressed to the applicants concerned.

Where an ex gratia payment has been made from the Fund to an applicant, his rights and remedies in respect of items of claim declared in the application will, to the extent of that payment, be transferred and vested in the Fund Board. The subrogation right of the Fund Board will not affect the rights or remedies of the applicant in respect of other debts, including accrued holiday pay, the balance of wages in lieu of notice, and the balance of severance payment.

Review By Fund Board

An applicant aggrieved by any decision of the Commissioner for Labour may request the Wage Security Division to reconsider his application. If he is still aggrieved by the result of reconsideration, the Wage Security Division can assist the applicant to forward his request for review to the Fund Board for further consideration.

Points To Note

Under the Protection of Wages on Insolvency Ordinance, any applicant who provides false information or document commits an offence and is liable to a fine of \$50,000 and to imprisonment for 3 months.

(While every care has been taken in the preparation of this guide, the Ordinance itself remains the sole authority for the provisions of the law explained.)

Appendix

Enquiries

Enquiries can be made at:

- 24-hour Telephone Enquiry Service : 2717 1771
- Homepage Address: <http://www.labour.gov.hk>
- Enquiry in person to Offices of the Labour Relations Division:
<http://www.labour.gov.hk/eng/tele/lr1.htm>

Labour Department (Wage Security Division)

16/F, Overseas Trust Bank Building,
160 Gloucester Road,
Wan Chai, Hong Kong
Tel.: 2923 5299

Legal Aid Department

30/F, Revenue Tower,
5 Gloucester Road,
Wan Chai, Hong Kong
Tel.: 2594 7909

Official Receiver's Office

12/F, Queensway Government Offices
66 Queensway, Hong Kong
Tel.: 2867 2448