

Hotel and Tourism Industries



Statutory Minimum Wage: Industry-specific Reference Guidelines



Labour Department



法定最低工資
Statutory Minimum Wage

Hotel and Tourism Industries
Statutory Minimum Wage : Industry-specific Reference Guidelines

- The revised Statutory Minimum Wage (SMW) rate of **\$32.5 per hour** is in effect from **1 May 2015**.
- Wages payable to an employee in respect of any wage period, when **averaged** over the total number of hours worked in the wage period, should be no less than the SMW rate.
- To address the characteristics and particular mode of operation of the hotel and tourism industries, the Labour Department has drawn up this *Statutory Minimum Wage : Industry-specific Reference Guidelines* in consultation with employer and employee groups in the industries. Some common examples under different situations and employment terms in the industries are included in the *Guidelines*. Employers and employees in the industries may refer to and apply the *Guidelines* flexibly according to their actual circumstances and needs.
- For more details on the provisions of the Minimum Wage Ordinance, please refer to the *Statutory Minimum Wage : Reference Guidelines for Employers and Employees* published by the Labour Department. The *Guidelines* explain the general application of the Ordinance under different scenarios for the reference of employers and employees in different industries. The interpretation of the Minimum Wage Ordinance (Cap. 608) should be based on its original text.

Revised 2015

Table of Contents

<u>Subject</u>	<u>Question Number</u>
(a) Basic principles in computing minimum wage	1, 2, 26, 36
(b) Wage payment mode and arrangement	3, 4, 5, 38
(c) No contracting out to reduce employees' statutory entitlement to SMW	6
(d) Hours worked and basic computation principles	7, 8
(e) Time for "leaving the field"	9
(f) Meal break	10, 11, 12
(g) Travelling time	13, 16
(h) Waiting time	14, 15
(i) Rest time and time for other activities	17, 18
(j) Overtime work	19
(k) Arrangement of substituted rest days and duty roster	20
(l) Wage items and wages payable	21, 22
(m) Rest day pay arrangement	23
(n) "Additional remuneration"	24, 29
(o) Wage period	25
(p) Reckoning and payment arrangement of commission	27, 28
(q) Examples of computing minimum wage	30, 31, 32, 33
(r) Keeping record of total number of hours worked	34, 35
(s) Variation of terms of employment contract	37, 40
(t) Interns	39

Note: For illustration purpose, figures are rounded to one decimal place in examples involving non-integer calculations.

Q 1 : How is minimum wage computed?

A 1 : Wages payable to an employee by an employer in respect of any wage period shall not be less than the amount of minimum wage calculated as follows¹:

$$\text{Minimum wage} = \frac{\text{Total number of hours worked by the employee in the wage period}}{\text{SMW rate (i.e. \$32.5 per hour with effect from 1 May 2015)}} \times$$

Q 2 : Do employers need to pay wages for each and every hour worked by employees? Must wages for each hour meet the SMW rate?

A 2 : According to the Minimum Wage Ordinance, minimum wage for an employee for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate. The employee should be paid wages of not less than this amount in respect of the wage period.

Hence, the basic principle is that wages payable to an employee in respect of any wage period, when **averaged** over the total number of hours worked in the wage period, should be no less than the SMW rate. The Ordinance does not prescribe that payment must be accorded for each and every hour worked or wages for each hour must meet the SMW rate.

Q 3 : SMW rate is expressed as an hourly rate, do employers and employees need to change their employment and wage payment mode from monthly/daily-rated plus commission to hourly-rated?

A 3 : The implementation of SMW does not change the employment and wage payment mode (i.e. employed and remunerated at monthly-rated, weekly-rated, daily-rated, hourly-rated, piece-rated, commission-based, etc.) formulated

¹ If 1 May 2015 falls within a wage period, the SMW rate of \$32.5 per hour applies to any hour worked on or after 1 May 2015 in calculating minimum wage for that wage period.

between employers and employees in accordance with their employment contracts and the Employment Ordinance (Cap. 57).

The Minimum Wage Ordinance provides a wage floor for employees. In essence, wages payable to an employee in respect of any wage period, when **averaged** over the total number of hours worked in the wage period, should be no less than the SMW rate. As long as the amount of wages payable is not less than the minimum wage, it does not matter which employment and wage payment mode is adopted. Therefore, it is not necessary for employers and employees to change their employment and wage payment mode.

Q 4 : Can employees' basic salary be less than the minimum wage (if the total wages including other wage items do not fall below the minimum wage)?

A 4 : The definition of wages for SMW is aligned closely with that under the Employment Ordinance. Unless otherwise specified in the Employment Ordinance, "wages" means all remuneration, earnings, allowances (including travelling allowances, attendance allowances, commission, overtime pay), tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done, subject to certain exclusions².

Hence, regardless of the composition of the wage items (e.g. respective amount of basic salary and other wage items), it will be acceptable if the minimum wage level is met in

² According to the Employment Ordinance, the following items are not wages:

- the value of any accommodation, education, food, fuel, water, light or medical care provided by the employer;
- employer's contribution to any retirement scheme;
- commission, attendance allowance or attendance bonus which is of a gratuitous nature or is payable only at the discretion of the employer;
- non-recurrent travelling allowance or the value of any travelling concession or travelling allowance for actual expenses incurred by the employment;
- any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;
- end of year payment, or annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer; and
- gratuity payable on completion or termination of a contract of employment.

accordance with the Minimum Wage Ordinance.

Q 5 : Does it mean that employers only need to pay minimum wage to employees to comply with the law?

A 5 : SMW only provides a wage floor for employees. This does not mean that employers only need to pay employees minimum wage. Employers still have to comply with the Employment Ordinance and terms in employment contracts (e.g. salary, arrangement of meal break and rest day) in dealing with employees' statutory and contractual entitlements.

Q 6 : Can an employer and an employee agree between themselves that the employee is to be paid less than the minimum wage?

A 6 : Any provision of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Minimum Wage Ordinance shall be void. In other words, an employer and an employee cannot by agreement reduce the employee's entitlement to SMW.

Q 7 : What should be counted as hours worked for computing minimum wage?

A 7 : According to the Minimum Wage Ordinance, for the purpose of computing minimum wage, hours worked (including any part of an hour) include any time when the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer:

- in attendance at a place of employment, irrespective of whether he is provided with work or training at that time; or
- travelling in connection with his employment, excluding travelling (in either direction) between his place of residence and his place of employment (other than a place of employment that is outside Hong Kong and is not his usual place of employment).

A place of employment means any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving

training.

Apart from the Minimum Wage Ordinance, if the time in question is regarded as hours worked by the employee under the employment contract or agreement with the employer, such time should be included in computing minimum wage.

Q 8 : Is it required that any part of an hour be rounded up to one whole hour in counting hours worked for computing minimum wage?

A 8 : The Minimum Wage Ordinance does not require that any part of an hour be rounded up to one whole hour in counting hours worked for computing minimum wage. The Ordinance only provides that any part of an hour should be included in the hours worked for SMW computation. Therefore, if the hour worked is less than one whole hour, the minimum wage should be computed based on the **actual** period of time worked.

Example:

The total number of hours worked by an employee in a wage period, including overtime of eight hours and 45 minutes, is 208 hours and 45 minutes (i.e. 208.75 hours). The SMW rate is \$32.5 per hour. The minimum wage of the employee according to the total number of hours worked for that wage period shall be:

$$208.75 \text{ hours (total number of hours worked)} \times \$32.5 \text{ (SMW rate)} = \$6,784.4 \text{ (minimum wage)}$$

Q 9 : Food and beverage departments in the hotel industry usually grant employees off-duty time known as “leaving the field” period. Is such time counted as hours worked in computing minimum wage?

A 9 : When an employee during the “leaving the field” period also falls under the circumstances of hours worked as specified in the Minimum Wage Ordinance, such time **is** hours worked for computing minimum wage. For example, if he is, during the “leaving the field” period, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at his post for the purpose of doing work (irrespective of whether he is provided with work

or not), such time is included in the hours worked for computing minimum wage.

On the contrary, if the “leaving the field” period falls outside the provisions on hours worked in the Minimum Wage Ordinance, it is **not** hours worked for computing minimum wage. For example, if the employee, during the “leaving the field” period, need not remain in attendance at his post and is free to go out to attend to personal matters or take a rest, he is not, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at his post for the purpose of doing work, and such time is not hours worked for computing minimum wage.

If the time for the “leaving the field” period is regarded as hours worked by the employee according to his employment contract or agreement with the employer, it **must** be taken into account in computing minimum wage. For example, if an employer and his employee reckon the time for the “leaving the field” period as hours worked by the employee in accordance with their employment contract or agreement, such time should be included in the total number of hours worked in each wage period in computing minimum wage.

Q 10 : A ticketing assistant is on duty from 10:00 a.m. to 8:00 p.m.. During this period, he is provided with 2 hours of meal breaks. Are the meal breaks counted as hours worked for computing minimum wage?

A 10 : When this employee during his meal break also falls under the circumstances of hours worked as specified in the Minimum Wage Ordinance, such meal break **is** hours worked for computing minimum wage. For example, if he is, during his meal break, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at his post for the purpose of doing work (irrespective of whether he is provided with work or not), such meal break is included in the hours worked for computing minimum wage.

On the contrary, meal break falling outside the provisions on hours worked in the Minimum Wage Ordinance is **not** hours worked for computing minimum wage. For example, if he, during his meal break, need not remain in attendance at his

post and is free to go out for lunch or to have rest, such time is not hours worked for computing minimum wage as he is not, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at his post for the purpose of doing work.

If meal break belongs to hours worked by the employee according to his employment contract or agreement with the employer, such time **must** be taken into account in computing minimum wage. For example, if an employer and his employee regard meal break as hours worked by the employee in accordance with their employment contract or agreement, such time should be included in the total number of hours worked in each wage period for SMW calculation.

Q 11 : Staff canteens providing free meals to employees are available in some hotels. Are the concerned meal breaks counted as hours worked for computing minimum wage?

A 11 : Whether meal break is hours worked for computing minimum wage depends on whether such time falls under the circumstances of hours worked as specified in the Minimum Wage Ordinance, as well as the employment contract or agreement between employers and employees.

Applying the principle illustrated in Q 10 to this example, if the employee need not remain in attendance at his post and can decide whether to have meal at the staff canteen or not, then such time is not hours worked for computing minimum wage because he is not, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at his post for the purpose of doing work. However, if meal break is regarded as hours worked by the employee according to his employment contract or agreement with the employer, such time must be taken into account in computing minimum wage.

Q 12 : A tour escort, while taking his meal, needs to attend to the tour group and their meal arrangements. Is the concerned meal break counted as hours worked for computing minimum wage?

A 12 : In this example, when the tour group take their meals, the tour

escort is in attendance in the restaurant in accordance with the contract of employment, or with the agreement or at the direction of the employer, for the purpose of doing work, such as overseeing the meal arrangements, acting as interpreter for the tour group or helping them in ordering refreshments as necessary. Although the tour escort is also taking his meal, he is at the same time in attendance in the restaurant during the period in accordance with the contract of employment or with the agreement or at the direction of the employer. Therefore, such meal time is hours worked for computing minimum wage.

Q 13 : An escort guide sets off from home and meets the tour group at the airport / train station / pier to help tour group members with check-in arrangements and conduct the itinerary briefing. Is the travelling time from his residence to the airport / train station / pier counted as hours worked for computing minimum wage?

A 13 : According to the Minimum Wage Ordinance, for the purpose of computing minimum wage, hours worked include any time when the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, travelling in connection with his employment, **excluding** travelling (in either direction) between his place of residence and his place of employment (other than a place of employment that is outside Hong Kong and is not his usual place of employment).

A place of employment means any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training.

In this example, the airport / train station / pier is the place of employment of the escort guide. Hence, the travelling time from his place of residence to such places are not hours worked under the Minimum Wage Ordinance in computing minimum wage.

Q 14 : A travel agency requires its escort guide to arrive at the assembly point 45 minutes before the specified assembly time to wait for tour group members. Is this 45-minute waiting

time included in the hours worked for computing minimum wage?

A 14 : In this example, if the escort guide, in accordance with the employment contract or with the agreement or at the direction of the employer, arrives at the assembly point 45 minutes in advance for the purpose of doing work, i.e. to wait for tour group members, irrespective of whether he is provided with work or not, this 45-minute period is included in the hours worked for computing minimum wage.

Q 15 : According to the contract of employment, a tour guide needs to receive visitors at the airport according to the scheduled flight arrival time. One day, the visitors' flight is delayed unexpectedly owing to weather conditions. Is the waiting time spent by this tour guide at the airport counted as hours worked in computing minimum wage?

A 15 : In this example, if the tour guide is, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at the airport for the purpose of doing work, irrespective of whether he is provided with work or not, such time is counted as hours worked for computing minimum wage.

Q 16 : A tour escort accompanies an outbound tour group travelling by air. Is the flight time counted as hours worked in computing minimum wage?

A 16 : Since the tour escort is, in accordance with the employment contract or with the agreement or at the direction of the employer, accompanying the tour group during the air trip, such flight time from Hong Kong to the destination in connection with his employment must be taken into account in computing minimum wage.

Q 17 : A tour guide returns to his room for rest after the tour group members settle in the hotel at the end of the day's visit programme. Is the rest time of the tour guide counted as hours worked in computing minimum wage?

A 17 : In this example, whether the time at issue is counted as hours

worked for computing minimum wage is a question of fact and must be determined by reference to the facts and circumstances of individual case.

When the tour guide during this period of time also falls under the circumstances of hours worked as specified in the Minimum Wage Ordinance, such time **is** hours worked for computing minimum wage. For example, if he is, during this period of time, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at the hotel for the purpose of doing work so that immediate assistance can be rendered to the clients when necessary, irrespective of whether he is provided with work or not, such time is included in the hours worked for computing minimum wage.

On the contrary, the time falling outside the provisions on hours worked in the Minimum Wage Ordinance is **not** hours worked for computing minimum wage. For example, if he, during this period of time, need not remain in attendance in the hotel and can go out for leisure or other activities, he is not, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at his post for the purpose of doing work, and such time is not hours worked for computing minimum wage. However, when the tour guide works because, for instance, a client in the tour group falls sick at midnight and seeks his assistance, the time spent in attending to and assisting the client is hours worked in computing minimum wage.

Q 18 : A tour guide, upon the tour group members' request, arranges additional activities for them or accompanies them in such activities after the itinerary of the day. Is the time spent in these additional activities counted as hours worked in computing minimum wage?

A 18 : In this example, whether the time at issue is counted as hours worked for computing minimum wage is a question of fact and must be determined by reference to the facts and circumstances of individual case.

When the tour guide during this period of time also falls under the circumstances of hours worked as specified in the Minimum Wage Ordinance, such time **is** hours worked for

computing minimum wage. For example, if he is required, in accordance with the employment contract or with the agreement or at the direction of the employer, to arrange additional activities for the tour group or to accompany them in such activities upon their request after the day's itinerary, such time is hours worked for computing minimum wage.

On the contrary, the time falling outside the provisions on hours worked in the Minimum Wage Ordinance is **not** hours worked for computing minimum wage. For example, if according to the direction of the employer, the tour guide is not required to arrange additional activities requested by the tour group or attend to activities other than the original itinerary, such time is not hours worked for computing minimum wage.

Should the employer and the employee have different understanding on whether or not the tour guide is required to arrange additional activities for the tour group members or accompany them in such activities upon their request, and whether such time is counted as hours worked, they should clarify between themselves as soon as practicable in order to avoid dispute.

Q 19 : The wage period of a ticketing officer is a calendar month. He performs 20 hours' overtime work in May at the direction of his employer. Such overtime work is compensated by time-off-in-lieu in subsequent months. Should his overtime work be included in the hours worked for computing minimum wage for May?

A 19 : In this example, since the period of overtime work is hours worked under the Minimum Wage Ordinance, such hours should be included in computing minimum wage of this employee for May. If the wages payable to the employee in respect of May fall below the minimum wage because of the additional number of hours worked, the employer has to pay the difference (i.e. "additional remuneration").

In computing minimum wage, wages payable to an employee in respect of any wage period, when **averaged** over the total number of hours worked in the wage period, should be no less than the SMW rate. The Ordinance does not prescribe that payment should be accorded for each and every hour worked

or wages for each hour must meet the SMW rate.

Q 20 : If a monthly-rated employee takes extra or fewer rest days in a wage period because of substituted rest days or duty roster arrangement, how should the employer count the total number of hours worked in computing minimum wage?

A 20 : Minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate.

Therefore, the total number of hours worked by an employee in a wage period is based on the **actual** hours worked. If the number of rest days is less than normal in a wage period, his total number of hours worked, and correspondingly his minimum wage, in the wage period will increase. If the wages payable in respect of the wage period are less than the minimum wage owing to the increase in the total number of hours worked, the employer has to pay the difference (i.e. “additional remuneration”) to the employee in respect of that wage period.

Q 21 : In determining whether wages meet the minimum wage requirement, which items are included? What are wages payable to an employee?

A 21 : The definition of wages for SMW is aligned closely with that under the Employment Ordinance. Unless otherwise specified in the Employment Ordinance, “wages” means all remuneration, earnings, allowances (including travelling allowances, attendance allowances, commission, overtime pay), tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done, subject to certain exclusions². For example, contractual bonus (not of a gratuitous nature or payable at the discretion of the employer) payable to an employee when certain conditions are met (e.g. sales amount) is part of wages. For detailed definition of wages under the Employment Ordinance, please refer to *A Concise Guide to the Employment Ordinance* published by the Labour Department.

According to the Minimum Wage Ordinance, since the

calculation of minimum wage excludes the time that is not hours worked, payment made to the employee for any time that is not hours worked (e.g. rest day pay, holiday pay, annual leave pay, maternity leave pay, paternity leave pay, sickness allowance, etc.) must **not** be counted as part of the wages payable to the employee in the calculation of minimum wage. The Minimum Wage Ordinance also sets out whether certain sums should be counted as wages payable to an employee in respect of a wage period in specific situations in order to determine whether the wages meet the minimum wage requirement.

If the wages payable to the employee in respect of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. “additional remuneration”). The contract of employment of the employee must be taken to provide that the employee is entitled to additional remuneration in respect of that wage period. This additional remuneration also applies in calculating entitlements under other relevant legislation.

Q 22 : In determining whether wages meet the minimum wage requirement, is end of year payment included?

A 22 : The definition of wages for SMW is aligned closely with that under the Employment Ordinance. According to the Employment Ordinance, the definition of wages does **not include** end of year payment (i.e. any annual payment (including double pay, 13th month payment, end of year bonus, etc.) of a contractual nature, and the contract of employment can be made orally or in writing and can include express or implied terms) and annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer. Hence, in determining whether wages meet the minimum wage requirement, end of year payment, or annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer, is similarly **not included**.

Q 23 : Are employees’ rest days paid? Is it required that rest days be remunerated at the SMW rate of \$32.5 per hour?

A 23 : Neither the Minimum Wage Ordinance nor the Employment Ordinance prescribes that rest days should be paid. Whether

rest days are with pay or otherwise and the calculation method of rest day pay (including whether rest days are remunerated at the SMW rate) are employment terms in accordance with the employment contract or agreement between employers and employees. Where necessary, employers and employees should seek consensus on the concerned employment terms on lawful, sensible and reasonable grounds through labour-management communication and consultation.

According to the Employment Ordinance, employers should not unilaterally vary the employment terms and conditions of employees. The Labour Department stands ready to assist employers and employees to resolve their problems and reach consensus. If employees suspect that their employment rights have been undermined, they could seek help from the Labour Department. The Labour Department will actively follow up such cases.

Note: Employees are entitled to paid statutory holidays and paid annual leave if they meet the relevant requirements of the Employment Ordinance. For details, please refer to *A Concise Guide to the Employment Ordinance*.

Q 24 : Can employers deduct the amount of additional remuneration paid from employees' wages of subsequent wage periods?

A 24 : If the wages payable to the employee in respect of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. "additional remuneration"). The contract of employment of the employee must be taken to provide that the employee is entitled to additional remuneration in respect of that wage period. The additional remuneration also applies in calculating entitlements under other relevant legislation. Therefore, employers cannot deduct the amount of additional remuneration paid from employees' wages of subsequent wage periods.

Q 25 : Can wages be averaged over a year or a quarter, instead of a wage period, to determine whether an employee's wages are no less than the SMW rate?

A 25 : According to the Minimum Wage Ordinance, an employee is entitled to be paid wages in respect of **any wage period** of not

less than the minimum wage. Therefore, in determining whether his wages are not less than the SMW rate, it must be calculated on the basis of individual wage periods, and is not averaged over a year or a quarter. The definition of “wage period” in the Minimum Wage Ordinance is aligned with that under the Employment Ordinance. Specifically, a wage period is one month unless the contrary is proved.

Q 26 : If the wages of a tour guide are calculated according to the number of tour groups escorted, is it necessary for the employer to ensure that the tour guide’s income for each tour group meets the minimum wage requirement?

A 26 : Minimum wage is calculated on the basis of a wage period. In essence, an employee is entitled to be paid wages in respect of **any wage period** of not less than the minimum wage. Hence, in determining whether wages are not less than the SMW rate, it is only necessary to ensure that the amount of wages payable to the employee in respect of the wage period meets the minimum wage requirement.

Q 27 : How is commission counted under the SMW regime?

A 27 : According to the Employment Ordinance, the definition of wages includes commission (except commission which is of a gratuitous nature or which is payable only at the discretion of the employer). Hence, other than commission which is gratuitous or payable only at the discretion of the employer, commission is wages and must be paid in accordance with the provisions of the Employment Ordinance. Subject to the provisions of other legislation, employers and employees may agree on how commission is calculated and payable in their employment contracts.

Commission payable according to the contract of employment

In determining whether the wages of an employee meet the minimum wage requirement, commission payable under the contract of employment is counted as wages payable in respect of the wage period as specified in the employment contract. If commission is payable in respect of a number of wage periods according to the contract of employment, in determining whether the wages of an employee meet the

minimum wage requirement, commission is counted as wages payable in respect of the corresponding wage period as provided in the contract of employment.

Commission paid according to the Minimum Wage Ordinance

In addition, given the unique nature of commission, the Minimum Wage Ordinance sets out the following provision for employers and employees to apply in the counting of commission as wages payable:

For the purpose of computing minimum wage, any commission paid

- with the prior agreement of the employee
- at any time after the first 7 days of a wage period but before the end of the 7th day immediately after that wage period

must be counted as part of the wages payable in respect of that wage period irrespective of when the work is done or the commission is otherwise payable under the contract of employment.

Hence, in determining whether the wages of an employee meet the minimum wage requirement, if there is prior agreement of the employee, commission can be counted as part of the wages payable in respect of a wage period according to the timing when the commission is paid. Without the prior agreement of the employee, the above provision is not applicable. In applying the provision, employers have to comply with the provisions on wage payment and deductions under the Employment Ordinance. Please refer to *A Concise Guide to the Employment Ordinance* for details.

Q 28 : Can commission be paid in advance? Any example to illustrate how commission is counted under the SMW regime as wages payable in respect of a wage period according to the timing when it is paid?

A 28 : As explained in Q 27, according to the Minimum Wage Ordinance, in determining whether the wages of an employee meet the minimum wage requirement, an employer can, with

the prior agreement of the employee, pay the employee commission in advance so that it will be counted as wages payable in respect of the wage period when it is paid.

Example:

An employee's wage period is a calendar month. With the prior agreement of the employee, the employer pays him commission of \$1,500 and \$2,000 on 30 April and 6 June respectively. The commission is originally payable in respect of the wage period of July.

In this example, in accordance with the Minimum Wage Ordinance, with the prior agreement of the employee, commission paid in the period of 8 April to 7 May is counted as wages payable in respect of April (in this example, commission is paid on 30 April); and commission paid in the period of 8 May to 7 June is counted as wages payable in respect of May (in this example, commission is paid on 6 June).

Thus, in determining whether the wages of this employee meet the minimum wage requirement, the commission of \$1,500 is counted as wages payable in respect of April and the commission of \$2,000 is counted as wages payable in respect of May, both not being regarded as wages payable in respect of July.

Q 29 : A tour guide's income drops in a particular month because there is no tour group, which results in his total wages falling below the minimum wage. Is the employer required to pay him additional remuneration?

A 29 : An employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage. The minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate. If the wages payable to the employee in respect of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. "additional remuneration").

Therefore, if the wages payable to the tour guide in respect of a wage period are less than the minimum wage because there

is no tour group, his employer has to pay him additional remuneration in accordance with the Minimum Wage Ordinance to meet the minimum wage requirement.

Q 30 : The wage period of a salesperson in a travel agency is a calendar month and his basic salary is \$8,500. He works 10 hours per day and 6 days per week with **paid** rest day. In a 31-day wage period, he works 27 days, performs 10 hours' overtime work and takes 4 rest days. Besides, with his prior agreement, he is paid commission of \$2,000 in advance in this wage period. How much is his minimum wage for this month? Does the basic salary plus advanced commission (i.e. \$8,500 + \$2,000 = \$10,500) paid to him meet the minimum wage requirement?

A 30 : (a) Minimum wage according to the total number of hours worked for this month:
 $(27 \times 10 + 10)$ hours (total number of hours worked) \times \$32.5 (SMW rate) = \$9,100

(b) Wages payable to the employee in respect of this month:
\$9,403.2 [(\$8,500 + \$2,000) - \$1,096.8 (pay for 4 rest days)³]⁴

If (b) is not less than (a), the minimum wage requirement is met.

³ Whether rest days are with pay or otherwise and the calculation method of rest day pay (including whether rest days are remunerated at the SMW rate) are employment terms in accordance with the employment contract or agreement between employers and employees. In this example, it is assumed that rest day pay is the payment made to the employee for time that is not hours worked and rest day pay for 4 days is \$1,096.8 ($\$8,500 \div 31 \text{ days} \times 4 \text{ rest days}$). The amount of rest day pay may vary if the number of calendar days or the number of rest days in the relevant month or its calculation method as agreed between employers and employees is different from this example.

⁴ Since the calculation of minimum wage excludes the time that is not hours worked, payment made to the employee for any time that is not hours worked (e.g. rest day pay, holiday pay, annual leave pay, maternity leave pay, paternity leave pay, sickness allowance, etc) must not be counted as part of the wages payable to the employee in respect of a wage period for computing minimum wage. For rest day pay, holiday pay, annual leave pay, maternity leave pay, paternity leave pay, sickness allowance, etc., hypothetical figures are used in this set of *Industry-specific Reference Guidelines* for illustration only, and the actual amount should be calculated according to the Employment Ordinance and the contract of employment.

If (b) is less than (a), the employer has to pay additional remuneration to meet the minimum wage requirement.

In this example, since (b) is not less than (a), the basic salary plus advanced commission (i.e. \$10,500 in total) paid to him in this month has met the minimum wage requirement.

Q 31 : The wage period of a hotel room attendant is a calendar month and his monthly wage is \$10,000. He works 10 hours per day and 6 days per week with **paid** rest day. In a 30-day wage period, he works 22 days without overtime work, and takes 4 rest days and 4 days of full-paid sick leave. How much is his minimum wage for this month? Does his monthly wage meet the minimum wage requirement?

A 31 : (a) Minimum wage according to the total number of hours worked for this month:
(22×10) hours (total number of hours worked × \$32.5 (SMW rate) = \$7,150

(b) Wages payable to the employee in respect of this month:
\$7,351.6 [\$10,000 – \$1,333.3 (pay for 4 rest days)⁵ – \$1,315.1 (sickness allowance for 4 days of full-paid sick leave⁶)]⁴

In this example, since (b) is not less than (a), his monthly wage of \$10,000 has met the minimum wage requirement.

Q 32 : A local tour guide’s wage period is a calendar month. In a 30-day wage period, he takes 4 **no-pay** rest days and his total number of hours worked is 260 hours. He is paid for this month basic salary of \$3,500, allowance of \$3,000 for receiving tour groups, payment of \$1,000 based on the number of tour group members, tips of \$2,000 and

⁵ Assumptions: Rest day pay is the payment made to the employee for time that is not hours worked. Rest day pay for 4 days is: \$10,000 ÷ 30 days × 4 days = \$1,333.3.

⁶ Calculating full-paid sickness allowance on the basis of the 12-month average wages assuming that the monthly salary was \$10,000 in the past 12 months without any periods or wages to be disregarded:

$$\frac{10,000 \times 12 - 0 (\$)}{365 - 0 (\text{days})} \times 4 (\text{days}) = \$1,315.1$$

For details about calculating statutory entitlements on the basis of the 12-month average wages, please refer to *A Concise Guide to the Employment Ordinance*.

commission of \$1,000. How much is his minimum wage for this month? Does his monthly wage meet the minimum wage requirement?

A 32 : (a) Minimum wage according to the total number of hours worked for this month:
 $260 \text{ hours (total number of hours worked)} \times \$32.5 \text{ (SMW rate)} = \$8,450$

(b) Wages payable to the employee in respect of this month:
 $\$10,500 [(\$3,500 + \$3,000 + \$1,000 + \$2,000 + \$1,000) - \$0 \text{ (no payment to the employee for time that is not hours worked)}]^4$

In this example, since (b) is not less than (a), his monthly wage of \$10,500 has met the minimum wage requirement.

Q 33 : Some hotel housekeeping staff are remunerated according to the number of rooms they clean. Staff with higher efficiency, for instance, may be able to clean 18 rooms in 8 hours while some take 10 hours to do so. Is the Minimum Wage Ordinance applicable to piece-rated employees?

A 33 : The Minimum Wage Ordinance, which sets a wage floor, equally applies to piece-rated employees. Minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate. If the wages payable (including wages calculated at piece-rate) to the employee in respect of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. “additional remuneration”).

Q 34 : Tour guides usually work overseas. How do employers know and record their hours worked?

A 34 : Neither the Employment Ordinance nor the Minimum Wage Ordinance specifies the ways of employers recording hours worked by employees. Employers and employees can draw up reasonable and practicable ways to record hours worked with regard to their trade characteristics, administrative measures and monitoring needs in individual establishments, nature of work of the employees, etc.

Employers and employees should keep proper records in relation to attendance, hours worked, wages, etc. to safeguard their respective rights and benefits and help avoid unnecessary disputes.

Q 35 : Is there any specified format for the record of the total number of hours worked? Does the Labour Department provide any sample form of the record to employers?

A 35 : Neither the Employment Ordinance nor the Minimum Wage Ordinance specifies the format for recording the total number of hours worked. Officers of the Labour Department may inspect the wage and employment records and require the total number of hours worked and the following particulars in the wage and employment records (which are set out in the Employment Ordinance) to be produced in a single document:

- name and identity card number of the employee
- wage period
- wages paid in respect of each wage period
- periods of annual leave, sick leave, maternity leave, paternity leave and holidays entitled and taken, together with details of payments made in respect of such periods

The Labour Department has published the booklet *Proper Keeping of Wage and Employment Records* for public reference. For details, please visit the Labour Department's homepage (www.labour.gov.hk).

Q 36 : Can one assume that the minimum wage requirement would certainly be met if employees are paid at wage level equivalent to the monthly monetary cap (i.e. \$13,300⁷) on keeping record of the total number of hours worked?

A 36 : Wages payable to an employee by an employer in respect of any wage period shall not be less than the amount of minimum wage calculated as follows:

Total number of hours worked in the wage period × SMW rate (i.e. \$32.5 per hour)

⁷ With effect from 1 May 2015, the monetary cap on the requirement of employers keeping records of the total number of hours worked by employees is increased from \$12,300 to \$13,300 per month.

The monthly monetary cap (i.e. \$13,300) is only the amount of wages payable for exempting employers from the requirement to keep record of the total number of hours worked by employees, irrespective of whether an employee's wages have met the minimum wage requirement. Minimum wage of an employee is determined by his total number of hours worked in a wage period. An employer must pay his employee wages of not less than the minimum wage, regardless of whether or not he is required to record the employee's total number of hours worked.

Q 37 : Can employers unilaterally reduce benefits to which employees are currently entitled under employment contracts?

A 37 : According to the Employment Ordinance, employers should not unilaterally vary the employment terms and conditions of employees. For details, please refer to *A Concise Guide to the Employment Ordinance*. The Labour Department will actively follow up cases of employees suspecting their employment rights have been undermined.

In contemplating any change to the employment terms, employers should carefully assess the impact both on themselves and on the employees.

Q 38 : If an employer hires his employees at hourly rate, does it mean that he need not pay these employees other statutory entitlements (e.g. holiday pay, annual leave pay)?

A 38 : All employees covered by the Employment Ordinance, irrespective of their hours of work, are entitled to basic protection under the Ordinance including payment of wages, restrictions on wages deductions and the granting of statutory holidays, etc.

Employees who are employed under a continuous contract are entitled to additional benefits such as rest days⁸, holiday pay, paid annual leave, maternity leave pay, paternity leave pay,

⁸ Neither the Minimum Wage Ordinance nor the Employment Ordinance prescribes that rest days should be paid. Whether rest days are with pay or otherwise and how rest day pay is calculated (including whether rest days are remunerated at the SMW rate) are employment terms in accordance with the employment contract or agreement between employers and employees.

sickness allowance, severance payment and long service payment, etc.

Note: An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract.

Hence, regardless of their employment and wage payment mode (i.e. monthly-rated, weekly-rated, daily-rated, hourly-rated, piece-rated, commission-based, etc.), employers must comply with the Employment Ordinance in granting statutory entitlements to employees.

Q 39 : As part of the training in the hotel industry, students from other places may work as interns in Hong Kong hotels. Some interns have no employment relationship with the host hotel and do not receive any wages. Upon the implementation of the Minimum Wage Ordinance, do employers need to pay them SMW?

A 39 : The Minimum Wage Ordinance does not apply to persons with no employment relationship with the host organisation. If there is indeed no employer-employee relationship between these interns and the hotels, SMW does not apply to them.

Moreover, the Minimum Wage Ordinance does not apply to student interns as well as work experience students during a period of exempt student employment as specified in the Ordinance, notwithstanding that these student interns / work experience students have employment relationship with the organisations. For details, please refer to *Statutory Minimum Wage: Notes for Student Employees and Employers*.

Q 40 : Can employers unilaterally change the status of employees to self-employed persons?

A 40 : An employer should not unilaterally change the status of his employee to a self-employed person. Otherwise, the employee may claim against the employer for remedies under the Employment Ordinance and common law.

If an employee intends to change his status to a self-employed person, he must carefully assess the pros and cons involved, including the employment rights and benefits that he may lose

in such a change.

If in essence there exists an employer-employee relationship between the parties, even though the employee is called or described as a self-employed person in the contract, the employer is still required to fulfil his responsibilities under the relevant legislation by paying back statutory benefits retroactively to the employee who is falsely labelled as a self-employed person. The employer may also be liable to criminal sanctions for contravention of the relevant legislation.

For information about the differences between an “employee” and a “self-employed person”, please refer to the leaflet *Employee? Contractor / Self-employed Person?* published by the Labour Department.

Enquiries

24-hour Enquiry Hotline: 2717 1771 (handled by “1823”)

Enquiry in person to Offices of the Labour Relations Division of the Labour Department

Hong Kong

Hong Kong East

34/F, Revenue Tower,
5 Gloucester Road, Wan Chai,
Hong Kong.

Hong Kong West

3/F, Western Magistracy Building,
2A Pokfulam Road,
Hong Kong.

Kowloon

Kowloon East

UGF, Trade and Industry Tower,
3 Concorde Road, Kowloon.

Kowloon West

Room 1009, 10/F,
Cheung Sha Wan Government Offices,
303 Cheung Sha Wan Road,
Shamshuipo, Kowloon.

Kowloon South

2/F, Mongkok Government Offices,
30 Luen Wan Street,
Mongkok, Kowloon.

Kwun Tong

6/F, Kowloon East Government Offices,
12 Lei Yue Mun Road,
Kwun Tong, Kowloon.

New Territories

Tsuen Wan

5/F, Tsuen Wan Government Offices,
38 Sai Lau Kok Road,
Tsuen Wan, New Territories.

Kwai Chung

6/F, Kwai Hing Government Offices,
166 - 174 Hing Fong Road,
Kwai Chung, New Territories.

Tuen Mun

Unit 2, East Wing, 22/F,
Tuen Mun Central Square,
22 Hoi Wing Road, Tuen Mun,
New Territories.

Shatin & Tai Po

Rooms 304-313, 3/F,
Sha Tin Government Offices,
1 Sheung Wo Che Road,
Sha Tin, New Territories.

Labour Department's Homepage: www.labour.gov.hk



法定最低工資
Statutory Minimum Wage

**Set a wage floor and
protect grassroots employees**

Labour Department's Homepage : <http://www.labour.gov.hk>