

Employment (Amendment) Ordinance 2007 (“Amendment Ordinance”)

Frequently Asked Questions with Answers

Major Amendments in the Amendment Ordinance – Mode of Calculating Statutory Entitlements under the Employment Ordinance

Q1: What are the major amendments in the Amendment Ordinance?

A1: The Amendment Ordinance modifies the mode of calculating certain statutory entitlements under the Employment Ordinance, including mainly:

- (a) Statutory holiday pay;
- (b) Annual leave pay;
- (c) Sickness allowance;
- (d) Maternity leave pay;
- (e) End of year payment; and
- (f) Wages in lieu of notice.

Under the revised mode, the above statutory entitlements are calculated by reference to the average daily wages or average monthly wages earned by an employee during the 12 months (or such shorter period when the employee is under the employment of the concerned employer) immediately preceding the statutory holiday, first day of the annual leave or other specified dates.

Q2: Why should reference be made to a 12-month period in calculating the concerned statutory entitlements?

A2: The use of a longer reference period of 12 months would avoid over-reliance on recent achievements at the expense of performance over time. This addresses the concerns of both employers and employees about the fluctuating nature of certain components of wages (e.g. commission). This provides a more stable, predictable and equitable basis for the calculation of statutory entitlements for employees.

Wages for the Calculation of the Average Wages

Q3: *Statutory entitlements under the Amendment Ordinance are calculated on the basis of the average wages earned in the past 12 months. What is the meaning of “month” as mentioned in the 12-month period?*

A3: “Month” refers to “calendar month”. For example, the holiday pay for the statutory holiday of Ching Ming Festival on 4 April 2008 is equivalent to the average daily wages earned by the employee in the 12 calendar months immediately preceding 4 April 2008 (i.e. 1 April 2007 to 31 March 2008).

Q4: *The Amendment Ordinance provides for the calculation of the concerned statutory entitlements by reference to the shorter period when the employee is under the employment of the employer for less than 12 calendar months. What is meant by “shorter period”?*

A4: This refers to the period counting back from the calendar month immediately preceding the specified date to the date on which the employee commenced employment with the concerned employer.

For example, an employee commenced employment on 5 July 2007. His period of employment will be less than 12 calendar months before the Ching Ming Festival on 4 April 2008. His holiday pay for 4 April 2008 shall be calculated on the basis of his average daily wages earned in the period 5 July 2007 to 31 March 2008.

Q5: *An employee’s share of MPF contribution is deducted each month from his wages for depositing into his MPF account. In calculating the average wages of the employee, should the amount of wages before making any deduction for MPF contribution be used?*

A5: Yes. The sum deducted from the employee’s wages for MPF contribution each month is wages earned by him and should therefore be included in the calculation of his average wages.

Disregarding Provisions in the Calculation of the Average Wages

Q6: What are the “disregarding provisions” under the Amendment Ordinance?

A6: The “disregarding provisions” aim to avoid reducing the average wages and hence the amount of statutory entitlements. According to the Amendment Ordinance, in calculating the daily average or monthly average of the wages earned by an employee during the 12-month period (or the shorter period), any period therein for which the employee was not paid his wages or full wages by reasons stipulated below together with any amount paid for such period are to be disregarded:

(a) The employee taking the following leave -

- Leave as provided under the Employment Ordinance (i.e. rest day, statutory holiday, annual leave, sick leave or maternity leave);
- Sick leave due to work-related injuries as provided under the Employees’ Compensation Ordinance; or
- Leave as agreed with the employer.

(b) The employee not being provided by the employer with work on any normal working day.

Q7: Why is the scope of wages extended under the Amendment Ordinance?

A7: “Wages” is defined as remuneration for services rendered under the Employment Ordinance. As such, it does not cover payments not for services rendered (these would mainly be the leave pay). In calculating the average wages earned by an employee in the past 12 months, all payments for statutory/contractual leave or period of non-provision of work by the employer together with the concerned periods need to be disregarded. However, for full-pay leave, the inclusion of the leave period and payments for the leave in the calculation should not depress the average wages.

To reduce the number of items to be disregarded and hence simplify the calculation, the Amendment Ordinance makes technical amendments to extend the scope of wages: in calculating the concerned statutory

entitlements on the basis of the 12-month average wages, any sum paid in respect of any specified period of leave taken by the employee or normal working day on which the employee is not provided with work by his employer is deemed to be wages. By so doing, the wages earned by an employee in the past 12 months (or such shorter period of employment) would include wages for services rendered as defined under the Employment Ordinance as well as payments for the periods specified. It is from this extended wages that the disregarding sums are to be deducted in calculating the daily or monthly average wages. As a result, the employer needs only to identify the exceptional circumstances of not paying the employee wages or full wages in respect of any period of say no-pay leave, maternity leave, sick leave, etc. In other words, periods of leave with full pay such as statutory holidays and annual leave (which are of more recurrent nature) together with the amount paid for the leave need not be disregarded.

Q8: Are there any changes to the existing definition of wages under the Employment Ordinance?

A8: The Amendment Ordinance does not vary in any way the existing definition of wages under the Employment Ordinance. As explained in Q&A7, the scope of wages is extended only for the purpose of calculating the affected statutory entitlements under the mode of 12-month average. It is only a technical amendment made to simplify the administrative work in calculating the average wages earned by an employee in the past 12 months.

Other Amendment in the Amendment Ordinance: Period for Keeping Wage and Employment Records

Q9: What changes are made in the Amendment Ordinance to the requirement of record keeping under the Employment Ordinance?

A9: At present, the Employment Ordinance requires the employer to keep the wage and employment records (please refer to Q&A10 for the particulars of the records to be kept) of his employees for 6 months. The Amendment Ordinance extends the period required for 6 more months to 12 months.

Q10: What are the particulars of the records to be kept?

A10: It is an existing requirement under the Employment Ordinance that employers should keep employment and wage records to include the following information of the employee:

- (a) Name and identity card number;
- (b) Date of commencement of employment;
- (c) Job title;
- (d) Wages paid in respect of each wage period;
- (e) Wage period;
- (f) Periods of annual leave, sick leave, maternity leave and holidays entitled and taken, together with details of payments made in respect of such periods;
- (g) Amount of end of year payment and the period to which it relates;
- (h) Period of notice required for termination of contract;
- (i) Date of termination of employment.

Commencement of the Amendment Ordinance

Q11: When will the Amendment Ordinance come into operation?

A11: The Government has announced by notice published in the Gazette that the Amendment Ordinance will commence by 2 stages:

- (a) The amended provisions regarding the new mode of calculating the concerned statutory entitlements (i.e. using the average wages earned in the past 12 months) to come into operation on 13 July 2007; and
- (b) The amendment of extending the record-keeping period (i.e. from 6 months to 12 months) to come into operation on 13 January 2008.

Q12: Does the Amendment Ordinance provide for any transitional arrangements?

A12: The Amendment Ordinance applies to employment contracts entered into on or after the commencement date (i.e. 13 July 2007).

For employment contracts entered into before the commencement date, the Amendment Ordinance is applicable under the following situations:

- (a) If maternity leave pay, sickness allowance, holiday pay or annual leave pay is payable by an employer to an employee in respect of a wage period, and the last day of the wage period falls on or after the commencement date.
- (b) If the due date of the end of year payment (or proportion of it) payable by an employer to an employee falls on or after the commencement date.
- (c) If the relevant statutory entitlements are payable upon termination of contract and the date of termination falls on or after the commencement date.