

Frequently Asked Questions about the Employees Compensation Assistance Ordinance

1. What is the Employees Compensation Assistance Fund (“the Fund”)?

The Fund is established under the Employees Compensation Assistance Ordinance (“ECAO”) to provide payments to injured employees or eligible family members of deceased employees (“eligible persons”) who are unable to receive their entitlements of employees’ compensation and damages for work injuries from employers after exhausting legal and financially viable means of recovery. The Fund is administered by the Employees Compensation Assistance Fund Board (“the Board”).

2. What kinds of payment are provided from the Fund?

The scope of the Fund covers payments in relation to unpaid employees’ compensation for work injuries or fatalities adjudged by the court to be payable by the employers pursuant to the Employees’ Compensation Ordinance (“ECO”) and the related interests, legal costs incurred in legal proceedings for employees’ compensation and unpaid common law damages awarded for such injuries or fatalities.

3. Under what circumstances can application be made for payment from the Fund?

The primary liability to pay employees’ compensation under the ECO and/or common law damages for work injuries rests with employers. Injured employees or eligible persons should first make claims against their employers. Those who are unable to recover from the employers payment of employees’ compensation and/or damages for which the employers are liable after exhausting all legal and financially viable means of recovery may apply for payment of the unpaid amount from the Fund. In other words, the Fund acts as a last resort for those injured employees and eligible persons who have established liability and quantum of claims against the employers but are unable to recover their entitlement from the employers.

4. How to make an application?

Applications should be made in writing to the Board in the prescribed form and manner. Separate applications for payment in relation to the unpaid employees' compensation and relief payment¹ in relation to the unpaid damages would need to be made. After determining an applicant's eligibility to apply and entitlement to payment from the Fund, the Board will inform the applicant and any interested person of its determination in writing.

5. What documents are required for making an application?

For the application for unpaid employees' compensation under section 16 of the ECAO, an applicant shall provide copies of the following: -

- (a) a judgment or order of a court or tribunal of competent jurisdiction in Hong Kong; or
- (b) a Certificate of Compensation Assessment (Form 5) or Certificate of Review of Compensation Assessment (Form 6) issued by the Commissioner for Labour ("the Commissioner"); or
- (c) a Certificate of Compensation Assessment for Fatal Case (Form 21) or Review Certificate of Compensation Assessment for Fatal Case (Form 22A) issued by the Commissioner; or
- (d) in the case of an application for medical expenses, a certificate issued by the Commissioner under section 10B(1) or (2) of the ECO; or
- (e) in the case of reimbursement of the expenses of the funeral of the deceased employee and expenses of the medical attendance on the deceased employee, a Certificate for Funeral and Medical Attendance Expenses (Form 25) or Review Certificate for Funeral and Medical Attendance Expenses (Form 26A) issued by the Commissioner; and
- (f) other documents which may assist the Board in its investigation.

¹ A relief payment is payable in lieu of common law damages under the ECAO. The relief payment shall not exceed the aggregate sum of damages awarded by the court and shall not cover any interest on such damages and costs arising from proceedings in respect of damages. Where the amount does not exceed \$1.5 million, the relief payment shall be paid in full in a lump sum. If it exceeds \$1.5 million, an initial payment of \$1.5 million shall be paid and then followed by monthly payments calculated at the rate of the monthly earnings of the employee at the time of the accident or \$10,000, whichever is the higher, until the total amount of award is paid off.

For the application for relief payment in relation to unpaid common law damages under section 20A of the ECAO, an applicant shall provide copies of the following: -

- (a) a judgment or order of a court of competent jurisdiction in Hong Kong; and
- (b) other documents which may assist the Board in its investigation.

6. What will the Board do upon receipt of an application?

Upon receipt of an application, the Board shall carry out such inquiries it considers necessary to make a determination. It is the duty of every applicant to assist the Board in carrying out inquiries and to provide such information within a specified period as required by the Board. Failing that, the Board may determine that an applicant shall not be entitled to any payment from the Fund. In addition, the Board may also make such inquiries or seek such information from the employer, insurer and any other persons connected with the application as the Board considers necessary.

7. Under what circumstances will the Board approve payments from the Fund?

Subject to verification of applications, the Board may consider making payments to an applicant on the conditions that the employer's liability and inability to pay employees' compensation and/or damages to the applicant are both established.

8. How to establish the employer's liability and inability to pay employees' compensation and/or damages?

The injured employee or eligible person(s) can commence legal proceedings claiming employees' compensation under the ECO and/or damages at common law against the employer. The court would need to take into account all relevant circumstances of the case in considering whether the employer has the liability to pay employees' compensation and/or common law damages, and the quantum of liability, if any.

If the court awards an amount of employees' compensation and/or damages to be payable by the employer, but the employer defaults payment and does not have a valid employees' compensation insurance policy to cover his liability, the injured employee or eligible person(s) should enforce the court order to recover the awarded sum from the employer by typically applying for a bankruptcy/winding-up order against the employer.

Bringing an action for compensation and/or damages for work injury at the court may involve many complicated legal procedures. The law, together with drafting and preparation of the necessary documents, can be highly technical. To safeguard one's interest, a claimant should carefully consider whether it is desirable to instruct a solicitor at his/her own expenses or through legal aid to pursue the claim on his/her behalf or alternatively, to seek advice from the legal profession.

9. What should the injured employee or eligible person take note to preserve his/her future right to apply for payment from the Fund when commencing legal proceedings to claim employees' compensation and/or damages against the employer?

Under section 25B of the ECAO, a person who commences proceedings in respect of a claim for employees' compensation or damages shall serve on the Board and the insurer (if applicable) a notice of the proceedings in the prescribed form no later than 30 days after the date on which an employee's compensation application or a writ is filed with the court together with a copy of the employees' compensation application or the writ so that the Board may carry out the necessary inquiries and as the case may require, apply to the court to be joined as a party to the proceedings at the early stage in order to protect the interest of the Fund. As employees' compensation proceedings and damages proceedings are two legal actions, separate notices in respect of the two sets of proceedings will need to be served on the Board. A person who fails to serve the required notice on the Board within the statutory 30-day period will not be entitled to any payment from the Fund.

After obtaining judgment in his/her favour, the injured employee or eligible person(s) should enforce the court order against the employer to recover the awarded sum. Where the employer does not pay and is insolvent upon the making of a winding-up order (where the insolvent employer is a limited company) or a bankruptcy order (where the insolvent employer is an individual), the injured employee or the eligible person(s) may apply for payment from the Fund for the unpaid employees' compensation and/or common law damages.

10. Under what circumstances is an employer required to pay a surcharge to the Board?

According to section 40(1) of the ECO, all employers are required to take out insurance policies to cover their liabilities under the ECO and at common law for injuries at work in respect of all their employees. An employer who fails to comply with section 40(1) commits an offence and is liable on conviction to a maximum fine of \$100,000 and imprisonment for two years. In addition, the employer is also liable to pay a surcharge to the Board under section 36A of the ECAO.

Where a surcharge is payable, the Board will serve a notice in writing (“Demand Notice”) on the employer, advising the amount of the surcharge, the grounds therefor and the period within which the employer shall pay the surcharge to the Board, etc.

11. What is the amount of the surcharge payable by an employer who contravenes section 40(1) of the ECO?

According to section 36A of the ECAO, employers who fail to take out employees’ compensation insurance policies for their employees as required under the ECO have to pay a surcharge to the Board. The amount of surcharge payable is normally three times the levy payable to the Board under the Employees’ Compensation Insurance Levies Ordinance on the insurance premium paid. If an employer contravenes the compulsory insurance provisions under the ECO again within 24 months from the service of the Demand Notice by the Board for the first contravention (“second contravention”), the amount of surcharge payable by the employer in respect of the second contravention, shall be two times of the surcharge for the first contravention.

12. Where can I get further information?

Enquiries relating to the ECAO or the application procedures can be made to the Secretariat of the Board at:

Address : 33/F, Morrison Plaza,
9 Morrison Hill Road, Wanchai, Hong Kong
(MTR Causeway Bay Station Exit A,
walk to Tin Lok Lane via Russell Street and Wan Chai Road)

Tel : 2116 5684
Fax : 2109 0310
Email : contact@ecafb.org.hk