

Appendix 1

A Guide to the Calculation of Relevant Statutory Entitlements on the Basis of the 12-Month Average Wages with Examples

Introduction

Provisions under the Employment (Amendment) Ordinance 2007 (“the E(A)O 2007”) relating to the calculation of statutory entitlements became effective on 13 July 2007¹.

The main objective of the E(A)O 2007 is to ensure that all components of wages² as defined under the Employment Ordinance (including commission and allowance, etc) are included in the calculation of relevant statutory entitlements.

Upon commencement of the E(A)O 2007, regardless of whether an employee is monthly, daily or piece rated, his relevant statutory entitlements shall be calculated on the basis of his 12-month average wages; and in computing his average wages, any periods and wages that fall under the “disregarding provisions” shall be excluded.

¹ Application of the E(A)O 2007:

- Applicable to employment contracts entered into on or after 13 July 2007.
- For employment contracts entered into before the commencement date, the E(A)O 2007 is applicable under the following situations:
 - If maternity leave pay, paternity 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.
 - 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.
 - If the relevant statutory entitlements are payable upon termination of contract and the date of termination falls on or after the commencement date.

² See the part on definition of wages in Chapter 3.

(I) Relevant Statutory Entitlements:

1. Holiday pay
2. Annual leave pay
3. Sickness allowance and related provisions³
4. Maternity leave pay and related provisions⁴
5. Paternity leave pay
6. End of year payment
7. Payment in lieu of notice
8. Further sum for non-compliance of an order of reinstatement or re-engagement for unreasonable and unlawful dismissal⁵

(II) The Revised Mode of Calculation:

Calculating relevant statutory entitlements on the basis of the 12-month average wages

- ⇒ The relevant statutory entitlements shall be calculated on the basis of the average daily (or monthly) wages earned by an employee in the 12-month⁶ period preceding the specified dates as stipulated by the E(A)O 2007. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period⁷.

³ Including the compensation payable by an employer for wrongfully dismissing an employee on sick leave.

⁴ Including the compensation payable by an employer for wrongfully dismissing a pregnant employee.

⁵ If the employer eventually does not reinstate or re-engage the employee as required by the order, the employer shall pay to the employee a further sum, amounting to three times the employee's average monthly wages and subject to a ceiling of \$72,500, on top of the monetary remedies payable to the employee as ordered by the Labour Tribunal.

⁶ "Month" refers to "calendar month".

⁷ Suppose an employee commenced employment on 5 July 2007, his period of employment will be less than 12 calendar months before 4 April 2008 (i.e. Ching Ming Festival). His holiday pay for 4 April 2008 shall therefore be calculated on the basis of his average daily wages earned in the period 5 July 2007 and 31 March 2008.

⇒ The specified dates of the relevant statutory entitlements are:

Statutory Entitlements	Day(s) of Leave	Specified Dates
Holiday Pay	1 day	Day of the statutory holiday
	More than 1 consecutive day	First day of the statutory holidays
Annual Leave Pay	1 day	Day of the annual leave
	More than 1 consecutive day	First day of the annual leave
	Day(s) of untaken leave upon termination of contract	Date of termination of contract
Sickness Allowance ⁸	1 day	The sickness day
	More than 1 consecutive day	The first sickness day
Maternity Leave Pay ⁹	More than 1 consecutive day	First day of the maternity leave
Paternity Leave Pay	1 day	Day of the paternity leave
	More than 1 consecutive day	First day of the paternity leave
End of Year Payment ¹⁰	-	Due day of the payment
Payment in lieu of Notice	-	The day when a notice of termination of contract is given (in case a notice has not been given, the day when the contract is terminated)
Further Sum	-	Date of termination of contract

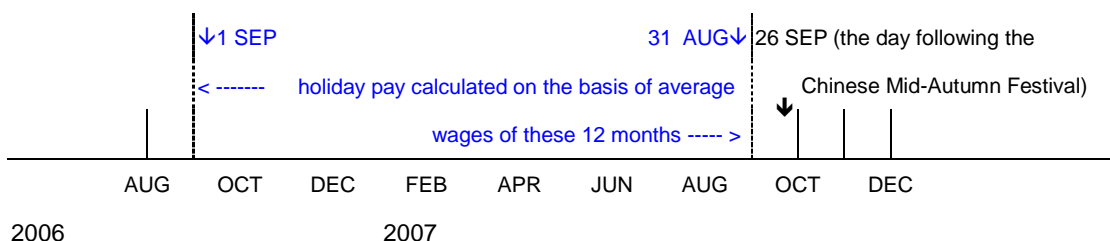
⁸ In calculating the 7 days' wages as compensation payable to an employee wrongfully dismissed on a sickness day, the employer shall adopt the date of termination of contract as the specified date.

⁹ In calculating the 1 month's wages as compensation payable to a pregnant employee wrongfully dismissed, the employer shall adopt the date of termination of contract as the specified date.

¹⁰ Applicable to situation in which the amount of end of year payment has not been specified in the contract.

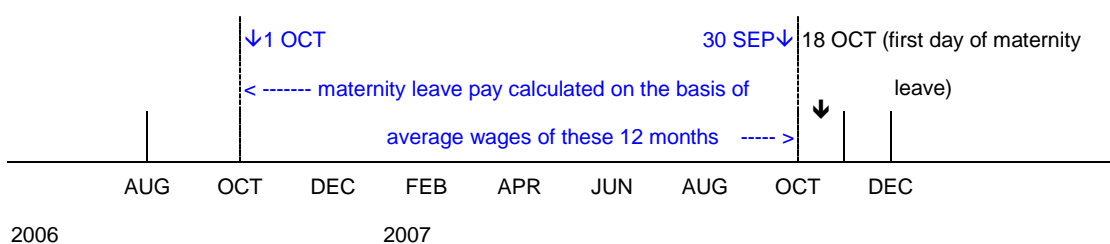
Example 1 : How to determine the specified date and the 12-month period for calculating holiday pay – in the case of “the Day Following the Chinese Mid-Autumn Festival”

- The specified date is the day of the statutory holiday, i.e. 26 September 2007
- The 12-month average wages is calculated on the basis of the wages earned in the period 1 September 2006 and 31 August 2007.



Example 2 : How to determine the specified date and the 12-month period for calculating maternity leave pay – in the case of 10-week maternity leave commencing 18 October 2007

- The specified date is the first day of the maternity leave, i.e. 18 October 2007
- The 12-month average wages is calculated on the basis of the wages earned in the period 1 October 2006 and 30 September 2007.



Periods and Wages to be Disregarded

⇒ To avoid deflating the average wages and hence reducing the amount of statutory entitlements, in calculating the 12-month average daily (or monthly) wages, one has to identify the following situations as stipulated by the E(A)O 2007 under which an employee is **not paid his wages or full wages** and then exclude the **periods together with** the **wages** paid to the

employee for such periods¹¹:

(i) The employee's taking any of the following leave:

- leave provided under the Employment Ordinance (i.e. rest day, statutory holiday, annual leave, maternity leave, paternity leave or sickness day);
- sick leave due to work injuries as provided under the Employees' Compensation Ordinance; or
- leave taken with the agreement of the employer;

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

Example 3 : How to exclude the periods and wages that fall under the “disregarding provisions” – in the case of 7-day annual leave commencing 20 November 2007

- Assuming the employee is monthly rated and she has taken 10-week maternity leave commencing 8 August 2007 with maternity leave pay at four-fifths of her wages.
- The 7-day annual leave pay shall be calculated on the basis of her average daily wages in the past 12 months (i.e. from 1 November 2006 to 31 October 2007).
- Periods and wages to be excluded in calculating the average daily wages:
 - Excluding the period of 10-week maternity leave from the 12-month period (i.e. 365 days minus 70 days)
 - Excluding the 10-week maternity leave pay from the total wages earned in the 12-month period

$$\text{Average daily wages} = \frac{\text{Total wages in the 12-month period} - \text{10-week maternity leave pay (\$)}}{365 - 70 \text{ (days)}}$$

¹¹ To simplify the administrative work involved in calculating average wages, the E(A)O 2007 has made a technical amendment to presume the sum payable for the periods under (i) and (ii) as wages. By doing so, an employer does not have to exclude his employee's full-paid leave (be it statutory holiday, annual leave, maternity leave, paternity leave or any other leave taken with agreement of the employer) as well as the sum paid correspondingly when calculating average wages. It is noteworthy that the definition of wages under the Employment Ordinance has not been changed as a result of this amendment.

Examples on Calculation

(Note: The hypothetical examples below illustrate how relevant statutory entitlements should be calculated.)

Example 1

Calculating holiday pay for 1 January 2008

Assumptions

- Remuneration: Daily- rated at \$300 with no-pay rest days

- 12-month wages earned in 2007: \$92,700 including –
 - wages of \$90,300 for working 301 days (i.e. 365 days – 52 rest days – 12 statutory holidays)
 - payments of \$2,400 for 8 statutory holidays

- Leave taken with less than full wages in 2007:
 - 52 rest days without pay
 - 4 statutory holidays without pay (falling within the first 3 months of employment)

Periods and wages to be disregarded

- 52 days of no-pay rest days
 - 4 days of no-pay statutory holidays
- (Note: as the above 56 days are no-pay leave, the amount to be excluded will be \$0)

Calculating holiday pay on the basis of the 12-month average

- Calculating the average daily wages earned in 2007

$$\frac{92,700 - 0 (\$)}{365 - 52 - 4 \text{ (days)}} = \$300$$

- Holiday pay for 1 January 2008: \$300

Example 2

Calculating sickness allowance for 4 sickness days

Assumptions

- Remuneration: Monthly-rated at \$10,000 with paid rest days
- 12-month wages earned before the first sickness day: \$120,000 including wages for services rendered and payments for leave
- Leave taken in the 12-month period: 71 days of full pay leave comprising –
 - 52 rest days
 - 12 statutory holidays
 - 7 days of annual leave

Periods and wages to be disregarded

- No period and sum have to be excluded because the employee is not paid less than his full wages for the leave taken in the 12-month period

Calculating sickness allowance on the basis of the 12-month average

- Calculating the average daily wages earned in the 12-month period:

$$\frac{120,000 - 0 (\$)}{365 - 0 (\text{days})} = \$329$$

- 4-day sickness allowance: $\$329 \times 4/5 \times 4 = \$1,053$

Example 3

Calculating 7-day annual leave pay

Assumptions

- Remuneration: Monthly-rated at \$9,000 with paid rest days
- 12-month wages earned before the first day of annual leave: \$108,000 including wages for services rendered and payments for leave
- Leave taken in the 12-month period: 71 days of full pay leave comprising –
 - 52 rest days
 - 12 statutory holidays
 - 7 days of annual leave

Periods and wages to be disregarded

- No period and sum have to be excluded because the employee is not paid less than his full wages for the leave taken in the 12-month period

Calculating annual leave pay on the basis of the 12-month average

- Calculating the average daily wages earned in the 12-month period:
$$\frac{108,000 - 0 (\$)}{365 - 0 (\text{days})} = \$296$$
- 7-day annual leave pay : $\$296 \times 7 = \$2,072$

Example 4

Calculating 1-month payment in lieu of notice

Assumptions

- Remuneration:
 - Basic pay at \$6,000 per month
 - Contractual commission accrued and calculated on a monthly basis according to a sliding scale
- 12-month wages earned before the date on which notice of termination is given: \$600,000 including basic pay and commission
- Leave taken with less than full wages in the 12-month period: 15 days of half-pay study leave (i.e. 50% of basic pay) at \$1,500

Periods and wages to be disregarded

- 15 days of study leave with half pay at \$1,500

Calculating 1-month payment in lieu of notice on the basis of the 12-month average

- Calculating the average monthly wages earned in the 12-month period:

(a) No. of months included in the calculation -

$$\frac{365 - 15 \text{ days}}{365 \text{ days}} \times 12 = 11.5 \text{ months}$$

(b) The average monthly wages -

$$\frac{600,000 - 1,500 (\$)}{11.5 \text{ (months)}} = \$52,043$$

- 1-month payment in lieu of notice: \$52,043