



A Concise Guide

**to the Employment
(Amendment)
Ordinance 2007**



Labour Department



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((Foreword))

Provisions under the Employment (Amendment) Ordinance 2007 ("the Amendment Ordinance") relating to the calculation of relevant statutory entitlements become effective on 13 July 2007. The provision which extends the period of keeping wage and employment records will come into operation on 13 January 2008.

This booklet sets out in simple terms major changes to the Employment Ordinance ("the EO") made by the Amendment Ordinance. For more details of the EO, please refer to "A Concise Guide to the Employment Ordinance" published by the Labour Department at <http://www.labour.gov.hk/eng/public/ConciseGuide.htm>.

Note: The information provided in this booklet is for reference only. The Amendment Ordinance and the EO remain the sole authority for the provisions of law explained.

Summary of Amendments made under the Amendment Ordinance

The main objective of the Amendment Ordinance is to ensure that all components of wages^(Note 1) as defined under the EO (including commission and allowance, etc) are included in the calculation of relevant statutory entitlements.

Upon commencement of the Amendment Ordinance, 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.

I • Relevant Statutory Entitlements

1. Holiday pay
2. Annual leave pay
3. Sickness allowance and related provisions^(Note 2)
4. Maternity leave pay and related provisions^(Note 3)
5. End of year payment
6. Wages in lieu of notice

(Note 1) According to the EO, wages means all remuneration, earnings, allowances (including travelling allowances, attendance allowances, commission and overtime pay), tips and service charges, however designed or calculated, payable to an employee in respect of work done or to be done. However, it does not include:

- 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;
- gratuity payable on completion or termination of a contract of employment.

(Note 2) Including the compensation payable by an employer for wrongfully dismissing an employee on sick leave.

(Note 3) Including the compensation payable by an employer for wrongfully dismissing a pregnant employee.

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-month^(Note 4) period preceding the specified dates as stipulated by the Amendment Ordinance. If an employee is employed for less than 12 months, the calculation shall be based on the shorter period^(Note 5).
- ⇒ 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 ^(Note 6)	1 day	The sickness day
	More than 1 consecutive day	The first sickness day
Maternity Leave Pay ^(Note 7)	More than 1 consecutive day	First day of the maternity leave
End of Year Payment ^(Note 8)	-	Due day of the payment
Wages 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)

(Note 4) "Month" refers to "calendar month".

(Note 5) 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.

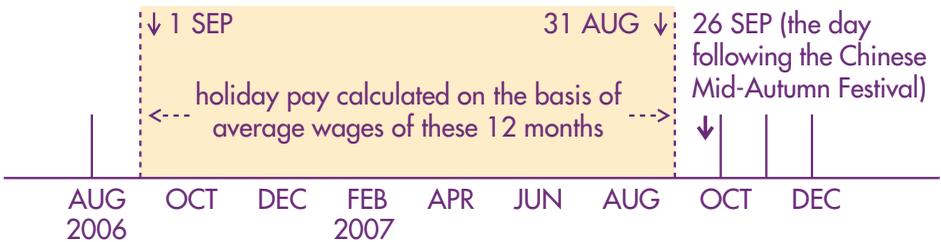
(Note 6) In calculating the 7 days' wages as compensation payable to an employee wrongfully dismissed on a sickness day, the employer shall adopt the day of termination of contract as the specified date.

(Note 7) In calculating the 1 month's wages as compensation payable to a pregnant employee wrongfully dismissed, the employer shall adopt the day of termination of contract as the specified date.

(Note 8) Applicable to situation in which the amount of end of year payment has not been specified in the contract.

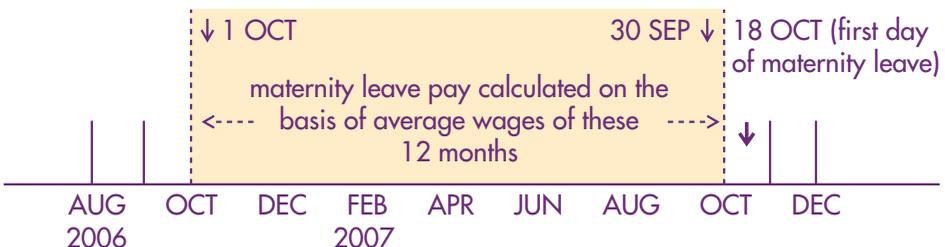
Example 1 : How to determine the specified date and the 12-month period for calculating holiday pay - in the case of "the Day Following the Chinese Mid-Autumn Festival"

- 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 Amendment Ordinance 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 periods^(Note 9):

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

- leave provided under the EO (i.e. rest day, statutory holiday, annual leave, maternity 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.

(Note 9) To simplify the administrative work involved in calculating average wages, the Amendment Ordinance 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 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 EO has not been changed as a result of this amendment.

- 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

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

⇒ For easy reference, 4 examples illustrating the calculation of relevant statutory entitlements are given in Appendix 1.

III • Related Amendment

⇒ The Amendment Ordinance extends the period of keeping wage and employment records^(Note 10) from 6 to 12 months. The requirement will be effective from 13 January 2008.

(Note 10) Under existing provisions of the EO, an employer is required to keep the following records in respect of an employee:

- name and identity card number;
- commencement date of employment;
- job title;
- wages paid in respect of each wage period;
- wage period;
- periods of annual leave, sick leave, maternity leave and holidays entitled and taken, together with details of payments made in respect of such periods;
- amount of end of year payment and the period to which it relates (if applicable);
- period of notice required for termination of contract;
- date of termination of employment (if applicable).

((Appendix 1))

Examples on Calculation of Relevant Statutory Entitlements

(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)

Example 4 Calculating 1-month wages 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 wages 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 -

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

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

Appendix 2

Application of the Amendment Ordinance

- ⇒ 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:
 - 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.
 - 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.

(((Appendix 3)))

Points to Note by Employers and Employees

- Statutory entitlements are calculated on the basis of wages, particulars of which are established by the terms of employment contracts. Employers and employees should clearly understand the wage components (for example, commission, allowance, etc), wage rate, conditions and arrangements for payment, etc.
- Employers should keep proper records in relation to employees' attendance, leave and wages, etc for the purpose of calculating statutory entitlements.
- To safeguard their own rights and benefits, employees should also keep proper records in relation to their attendance, leave and wages, etc.

Appendix 4

Enquiries

- Enquiry Hotline: 2717 1771 (the hotline is handled by “1823”)
- Homepage: <http://www.labour.gov.hk>
- The following branch offices of the Labour Relations Division
<http://www.labour.gov.hk/eng/tele/lr1.htm>

This booklet is also available at http://www.labour.gov.hk/eng/public/content2_3.htm .

