

Protection of Wages on Insolvency (Amendment) Ordinance 2012
(“Amendment Ordinance ”)

Frequently Asked Questions with Answers

1. What are the major contents of the Amendment Ordinance?

- The Amendment Ordinance aims to amend the Protection of Wages on Insolvency Ordinance (PWIO) to extend the scope of the Protection of Wages on Insolvency Fund (Fund) to cover pay for untaken annual leave and untaken statutory holidays, which include:
 - pay for untaken annual leave payable to an employee upon termination of employment contract under the Employment Ordinance (EO), including:
 - (i) pay for any annual leave earned in the employee’s last full leave year and not yet taken; and
 - (ii) pro rata annual leave pay for the last leave year where the employee has at least 3 but less than 12 months’ service entitled upon termination of employment contract.
 - pay for statutory holidays under the EO not yet taken by an employee within 4 months before the last day of service.
- ◆ Neither the amount of pay for untaken annual leave nor the amount of pay for untaken statutory holidays, nor the total amount of the two, may exceed \$10,500.

2. When will the Amendment Ordinance come into operation?

- The Government has published a notice in the Gazette to appoint the effective date of the Amendment Ordinance as 29 June 2012. It applies to pay for untaken annual leave and pay for untaken statutory holidays arising from employment contracts terminated on or after that date.

3. Is the Amendment Ordinance applicable to applications made to the Fund prior to the commencement of the Amendment Ordinance?

- The Amendment Ordinance is not applicable to pay for untaken annual leave and untaken statutory holidays arising from employment contracts terminated before the effective date, i.e. 29 June 2012. It does not apply to applications made to the Fund where the employment contract was terminated before 29 June 2012.

4. If the employment contract is terminated before the effective date of the Amendment Ordinance, would the Amendment Ordinance be applicable if the application is made after the effective date?

- The Amendment Ordinance is not applicable to pay for untaken annual leave and untaken statutory holidays arising from employment contracts terminated before the effective date (i.e. 29 June 2012). Even if the employee makes application for the Fund after the effective date, he or she cannot apply for such items.

5. How to determine pay for statutory holidays under the EO not yet taken by an employee within 4 months before the last day of service covered by the Amendment Ordinance?

- The EO stipulates that employees are entitled to 12 statutory holidays in a year. If the relevant statutory holiday falls within the 4 months before the last day of service and the employee has not in any way taken that statutory holiday (including on the day or alternative/substituted holiday); and the employee has been employed under a continuous contract for 3 months immediately prior to the statutory holiday and eligible for statutory holiday pay under the EO, the Fund can make ex gratia payment for such pay for untaken statutory holidays.

6. Is there any time limit for making application for the new items?

- Similar to other existing items covered by the Fund, there is time limit for making application for the new items of pay for untaken annual leave and untaken statutory holidays. Regarding pay for untaken annual leave, an employee has to make an application not later than 6 months after the termination of the contract. For pay for untaken statutory holidays, an application has to be made not later than 6 months after the last day of service.

7. Please give some examples to explain how “pay for untaken annual leave” is calculated.

- Example 1

The employee’s employment commences on 16 July 2010 and is terminated on 13 July 2012 upon company’s cessation. The employee has not taken any annual leave accumulated in the last two leave years.

(Under the EO, an employee is entitled to 7 days' annual leave in the first and second years.)

Ex gratia payment on pay for untaken annual leave payable to the applicant is 13.96 days, including:

- Last complete leave year (i.e. 16 July 2010 to 15 July 2011): 7 days
- Last leave year where the employee has at least 3 but less than 12 months' service (i.e. 16 July 2011 to 13 July 2012): 6.96 days (7 days x 364/366)

- Example 2

The employee's employment commences on 16 December 2007 and is terminated on 15 July 2012 upon company's cessation. The employee has taken 3 days' annual leave accumulated in the previous complete leave year.

(Under the EO, an employee is entitled to 9 days' annual leave in the fourth year and 10 days in the fifth year.)

Ex gratia payment on pay for untaken annual leave payable to the applicant is 11.82 days, including:

- Last complete leave year (i.e. 16 December 2010 to 15 December 2011): 6 days (i.e. 9-3 days)
- Last leave year where the employee has at least 3 but less than 12 months' service (i.e. 16 December 2011 to 15 July 2012): 5.82 days (10 days x 213/366)

8. Please give an example to explain how the “pay for untaken statutory holidays” be calculated.

- The employee's employment commences on 1 October 2011 and is terminated on 30 June 2012 upon company's cessation. There are 3 days' statutory holidays (i.e. 4 April (Ching Ming Festival); 1 May (Labour Day) and 23 June (Tuen Ng Festival)) falling within the 4 months prior to his last day of service (i.e. 1 March to 30 June 2012). The employee is not arranged to take leave on such statutory holidays or to take alternative / substituted holidays. The employee has been employed for 3 months immediately prior to the statutory holidays.

Ex gratia payment on pay for untaken statutory holidays payable by the Fund is 3 days.

[Note: The above information is provided for reference only. The Amendment Ordinance, the PWIO and the EO remain the sole authority of the provisions of the law explained. For more details of the Amendment Ordinance, please refer to “A Concise Guide to the Protection of Wages on Insolvency (Amendment) Ordinance 2012” and the full text of the Amendment Ordinance.]