

Reading the Minimum Wage Guidelines

解讀最低工資參考指引



The implementation of the Minimum Wage Ordinance (MWO) on 1 May 2011 certainly had an abundance of both supporters and detractors. Demonstrations by trade union activists and full-page advertisements from employer associations filled our popular consciousness.

In response to calls from Legislative Council members and other unspecified “stakeholders” for practical guidelines, the Labour Department issued draft guidelines and sought feedback from the community. Following a four-month consultation, the Guidelines were released in their final form in April.

The result is a document unlike any publication that has ever been produced by the Labour Department. In the past, the Labour Department has gone to some considerable length to avoid giving any definitive written interpretation or reading of employment law. Most likely, this policy was adopted in order to avoid seeming to usurp the role of the courts. However, given the politicised circumstances surrounding the introduction of the minimum wage, it is not surprising that the government appears to have delegated the Labour Department the job of issuing detailed guidelines explaining how the minimum wage rules are to be implemented.

The Labour Department does not appear entirely at ease with its new role. Noticeably, the Guidelines repeatedly restrict their own applicability, asserting again and again that matters which are not otherwise provided for within the minimum wage rules should be settled by employers and employees. Repeatedly appealing to employers and employees to settle their own issues seems odd given that the minimum wage rules have been introduced in order to redress an apparent inequality of bargaining power between employees and employers. The curious issues with the Guidelines do not end there.



relevant
whether any
hour that is worked is
paid or unpaid. The term “hours worked” is defined under the MWO as including periods when no employment duties are actually undertaken such as when:

an employee attends the workplace without actually undertaking or being provided any work or training (e.g. a truck driver is required to remain on stand-by on an unpaid basis at the truck depot waiting instructions), or when an employee undertakes certain types of work-related travel outside Hong Kong (e.g. time spent travelling by an employee whilst flying between Hong Kong and New York)

Who receives the minimum wage?

The Guidelines identify four categories of employees to whom the minimum wage rules do not apply: self-employed individuals, live-in domestic workers, student interns and work experience students, and employees to whom the Employment Ordinance (EO) does not apply. Oddly, the Guidelines make no mention of the fact that civil servants working for the Hong Kong Government also have no statutory entitlement to be paid a minimum wage. Employees on contract with another organisation, however, do.

What counts as work?

The Guidelines make it clear that every hour “worked” by an employee during a wage period is to be counted for the purposes of determining whether or not an employee has been paid a minimum wage. As discussed elsewhere, it is not at all

The Guidelines provide numerous useful examples of hours which are regarded as hours worked (e.g. employee travelling from the office to a training centre) and hours which are not regarded as worked (e.g. employee arrives at the office early in order to avoid rush-hour traffic). Unfortunately, the Guidelines do not present every aspect of “hour worked” so clearly.

The treatment of paid lunch breaks is one area that the Guidelines fail to provide clear guidance. As it stands, the Guidelines appear to define a paid lunch break as being a period in which work has been undertaken. In the past, it has been widely upheld that such time spent does not qualify as work. For example, the fact that an employee is permitted to claim an overtime payment whilst travelling back to his home does not necessarily mean that such travelling time is to be regarded as time “worked”. There is no shortage of court decisions in Hong Kong that have held that an employee was not to be regarded as working whilst travelling to and from his place of residence.

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The Guidelines also lack clear, practical guidance on the varying duration of wage periods. It is not at all uncommon for employees to be paid remuneration by reference to different wage periods. For example, employees who are paid a base salary at the end of each month may only be entitled to bonuses on a quarterly basis. It is regrettable that the Guidelines, while acknowledging that employees may be paid by reference to different wage periods, provide virtually no guidance as how these different wage periods are to be treated as hours worked for the purposes of the minimum wage rules. As a result, bonus payments remain in a grey zone even after the law has taken effect.

Which payments count as “wages”?

The Guidelines devote considerable attention to illustrating which payments are or are not to be regarded as “wages payable” to an employee during a wage period. The MWO takes its definition of wages from the EO. As a result, payments such as monthly salary, overtime payments, housing allowances and commissions are all to be taken into account to determine whether an employee has been paid the minimum wage.

Certain deductions that are permitted under the EO are also regarded as wages paid to an employee. For example, an employer deducts \$370 in Mandatory Provident Fund (MPF) contributions from the wages paid to an employee during the month of June. The MPF contribution that has been deducted is treated as part of the wages that are payable to the employee during the June wage period.

While it is quite common for employers (even with the consent of their employees) to make deductions from employees’ wages that are expressly forbidden by the EO, the Guidelines fail to make clear whether such deductions should or should not be included for the purposes of the minimum wage rules.

For the purposes of the minimum wage rules, payments that have been paid in any wage period for hours not worked are not to be counted as “wages”. The Guidelines cite a number of obvious examples such as paid rest days, paid holidays, paid annual leave, sickness allowance and maternity leave pay. It would have been useful if the Guidelines had illustrated some other less obvious examples of payments such as signing bonuses, wedding allowances, voluntary retirement scheme contributions and severance packages—all of which are for hours not worked.

The Guidelines devote just one example to illustrate the rule that wages that are paid in “arrears” are not to be regarded as wages for the purposes of the minimum wage rules. The Guidelines give no other guidance concerning when wages are to be regarded as having been paid in “arrears”. This seems to be a significant

omission, as payment in arrears is common and extremely variable. Take for example the following scenario:

An employer requires that overtime worked during one month (e.g. May) will only be become payable at the end of the following month (e.g. 30 June) so long as the overtime records have been approved and submitted by the employee concerned no later 10th of the following month (e.g. 10 June). For the purposes of the minimum wage rules, is such an overtime payment to be regarded as wages for the month of May or June?

While deferred payment arrangements are very common in Hong Kong, the Guidelines provide no practical guidance whatsoever as to how such deferred payments should be treated for the purposes of the minimum wage rules. This is a notable omission and is regrettable, as the Guidelines fail to address what is a very common practice in Hong Kong.

In *Ng Chiu Kow & Anor v Chan Sau Lin (trading as Pang Lee Transportation Co)*, Court of First Instance, Labour Tribunal Appeal No 65/2003, the court examined deferred payments at considerable length and concluded that there was nothing under the provisions of the EO to prevent deferred payment arrangements being legally agreed between an employer and its employees.

How should we keep records?

Under the minimum wage rules it is necessary for employers to record the working hours of employees earning less than \$11,500 per month. The Guidelines provide a number of useful illustrations to explain the manner in which such records should be kept.

Conclusion

There can be no doubt that the Minimum Wage Guidelines are one of the most useful items of information that have ever been produced by the Labour Department. While the Guidelines have a number of significant shortcomings, they are to be welcomed nonetheless. In the meantime, members of the HR profession can hopefully look forward to the Labour Department issuing revised Guidelines in order to take account of the feedback that it will no doubt receive in abundance over the coming months.

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