

# SAFEGUARDING EMPLOYEES' RIGHTS AND BENEFITS UNDER LABOUR LAWS

## Executive Summary

1. "Employees' rights and benefits" is one of the programme areas of the Labour Department (LD). Its aim is to safeguard the rights and benefits of employees under labour laws. LD achieves the aim by: (a) administering the Protection of Wages on Insolvency Fund (PWIF), which was established under the Protection of Wages on Insolvency Ordinance (Cap. 380) to provide timely relief in the form of ex gratia payment to employees affected by their insolvent employers; (b) conducting inspections to workplaces and taking enforcement actions against breaches of the provisions of labour laws; (c) processing employees' compensation claims; and (d) organising publicity activities to assist employers and employees in understanding their respective rights and obligations.

2. Labour laws that safeguard the rights and benefits of employees include the Employment Ordinance (Cap. 57), the Employment of Children Regulations (Cap. 57B), the Employment of Young Persons (Industry) Regulations (Cap. 57C), Part IV of the Employees' Compensation Ordinance (Cap. 282), Part IVB of the Immigration Ordinance (Cap. 115), the Minimum Wage Ordinance (Cap. 608) and the Protection of Wages on Insolvency Ordinance. In the period from 2016-17 to 2020-21, the expenditure on the programme area "Employees' rights and benefits" increased by 31 % from \$384 million to \$504 million. The Audit Commission (Audit) has recently conducted a review of LD's work in safeguarding employees' rights and benefits under labour laws.

### **Administration of the Protection of Wages on Insolvency Fund**

3. *Need to speed up processing of applications.* The Wage Security Division (WSD) of LD is responsible for processing applications for ex gratia payments for PWIF. LD sets a performance target on processing of PWIF applications that payment would be effected within 10 weeks upon receipt of all relevant information and documents required for processing the applications (paras. 2.2 and 2.4). Audit noted that:

## Executive Summary

---

- (a) ***Long time elapsed from submission of applications to effecting of ex gratia payments.*** Audit analysed the time elapsed from the dates of receipt of applications by WSD up to the dates payment was effected for applications approved in the period from 1 January 2018 to 30 June 2021 and found that the time elapsed for some applications was long:
- (i) the percentage of applications with time elapsed of more than 1 year increased from 5% (83 of 1,690) in 2018 to 21% (325 of 1,604) in the first six months of 2021; and
  - (ii) the average time elapsed for applications approved in each year ranged from 6.5 months to 7.7 months (para. 2.5); and
- (b) ***Need to take timely actions to collect required information and documents.*** Audit examination of 30 applications approved in the period from 2018 to 2020 found that on some occasions, LD staff could have taken earlier actions to avoid unnecessary delays in processing the applications. For example, in one application, LD staff did not contact the applicant to chase up the missing documents until 10.8 months after receipt of the application (para. 2.7).
4. ***Need to improve spot checks on approved cases.*** LD selected 75 cases with applications approved in the period from 2018 to 2020 for spot checks. The 75 cases comprised 63 cases and 12 cases for spot checks by the Senior Labour Officer (SLO) and the Assistant Commissioner respectively. Audit found that:
- (a) of the 63 selected cases, 13 (21%) cases were checked in the period from more than 1 month to 2 months after being selected; and 6 (10%) cases were checked in the period from more than 2 months to 3 months after being selected;
  - (b) of the 12 selected cases, 1 (8%) case and 6 (50%) cases were checked 1.7 month and in the period from 16 months to 30 months after being selected respectively. The spot checks on 5 (42%) cases (5 to 35 months after being selected) were still outstanding as at 30 June 2021; and
  - (c) LD had not promulgated guidelines on the procedures and basis for selection of approved cases for spot checks (paras. 2.10 and 2.11).

## Executive Summary

---

5. ***Need to conduct random inspection on reconsideration cases.*** Applicants who are not satisfied with the outcome of their PWIF applications may request LD to reconsider their applications. Since 2006, a list of cases reconsidered and approved by Labour Officers (LOs) has been compiled every month for SLO's random inspection to ensure consistent and fair practice. However, LD had not selected any cases from the lists for SLO's inspection (para. 2.12).

6. ***Need to improve customer opinion surveys.*** Audit analysed the response rates of the three customer opinion surveys conducted in the period from 2015 to 2020 to collect feedback from PWIF applicants. Audit found that: (a) the survey periods ranged from 4 to 7 months; (b) about 800 applicants were surveyed in each survey; and (c) the response rates of the surveys were on the low side (averaging 15%). There was room for improving the surveys so as to cover more applicants and increase the number of respondents (paras. 2.15 and 2.16).

7. ***Need to give timely notice in the Gazette.*** It is stipulated in LD's guidelines that the Gazette notice should be issued as soon as possible after the cheques for discretionary ex gratia payments have been cashed. In the period from 1 January 2018 to 31 March 2021, there were 996 discretionary ex gratia payment cases with first ex gratia payment cheques cashed. Audit noted that of the 996 cases: (a) up to 30 June 2021, no Gazette notices were given in 19 (2%) cases. The time elapsed since the cashing of the first cheque ranged from 96 to 573 days, averaging 218 days; and (b) in the remaining 977 (98%) cases, the average time taken to give notice in the Gazette was 85 days after the cheques were cashed. Moreover, in 230 (23%) of the 996 cases, Gazette notices were given more than 90 days after the cheques were cashed (paras. 2.20 and 2.21).

8. ***Need to improve the enforcement of subrogation rights against employers.*** Where an ex gratia payment has been made to an applicant in respect of wages in arrears, wages in lieu of notice, severance payment, pay for untaken annual leave and/or pay for untaken statutory holidays, the applicant's rights and remedies to the extent of the amount of the ex gratia payment shall be transferred to and vested in PWIF Board (i.e. subrogation rights). Audit noted that for cases without the issue of a winding-up or bankruptcy order against the employer and no liquidator/provisional liquidator was involved, no proof of debt could be filed. Audit further noted that LD did not enforce the subrogation rights against the employers concerned direct, for example, through issuing demand letters to the employers (paras. 2.23 to 2.25).

## Executive Summary

---

9. *Review of rate of levy on business registration certificates (BRCs) and ceilings of payment items of PWIF.* Audit noted the following issues:

- (a) *Review of rate of levy on BRCs.* In 2008, PWIF Board decided that the rate of levy on BRCs would be reviewed whenever the accumulated surplus of PWIF exceeded \$1,200 million by 20% or more for 4 consecutive quarters. Since 31 March 2009, the accumulated surplus of PWIF had all along exceeded \$1,200 million by 20% or more. As at 31 March 2021, the accumulated surplus increased to \$6,298 million, exceeding \$1,200 million by 425%. The rate of levy on BRCs was last revised in July 2013 from \$450 to \$250 per annum (paras. 2.29 and 2.30); and
- (b) *Review of ceilings of payment items of PWIF.* According to a paper submitted by LD to PWIF Board in October 2013, major considerations taken into account by PWIF Board in its previous reviews of the ceilings of payment items of PWIF were: (i) change in wage level; (ii) percentage of applications with approved amount meeting the amount applied for in full; and (iii) the impact on PWIF's financial position. The current ceilings of respective payment items of PWIF had been in effect since a long time ago in the period from 1996 to 2012. Subsequently, the considerations pertinent to the ceilings of payment items of PWIF had changed significantly. For example, the current ceiling of \$36,000 for the ex gratia payment on arrears of wages was set in 1996, using the median monthly earning of \$9,000 in the fourth quarter of 1995 and the first quarter of 1996 as reference. The median monthly earning increased by 100% to \$18,000 in the second quarter of 2021 (paras. 2.32 and 2.33).

LD saw the need to review BRC levy rate and ceilings of payment items of PWIF. However, the review was held up due to various reasons. At its meeting held in July 2021, PWIF Board decided to resume the review of the coverage of ex gratia payment under PWIF and BRC levy rate (para. 2.34).

### Enforcement work

10. *Room for improvement in conducting inspections.* Labour Inspectors (LIs) conduct inspections to workplaces to ensure employers' compliance with the labour laws and combat illegal employment. During the outbreak of coronavirus disease (COVID-19) in 2020, there was a loss of more than 30% of working days. Routine inspections to workplaces were either suspended or conducted on a limited

## Executive Summary

---

scale to avoid spreading the disease. Audit noted that in 2020, LD only conducted 104,138 inspections (i.e. 26% below LD's performance target of 140,000 a year). The suspension of inspection and reduction in the number of workplace inspections might inevitably compromise the overall effectiveness of LD's workplace inspections for the protection of employees' rights and benefits (paras. 3.2 to 3.5).

11. ***Need to improve handling of public complaints.*** In the period from 2016-17 to 2020-21, LD reported in the Controlling Officer's Reports that it met the performance target of "Starting investigation of complaints by LI within 1 week upon receipt". Audit examined 30 of the 698 complaints received by LD's Labour Inspection Division (LID) in 2020 and found that in 3 (10%) of the 30 complaints, LIs did not start investigation within 1 week upon receipt by LD. According to LD, the target was meant to refer to the time elapsed between the dates of LIs' investigation and the dates LIs received the complaints (instead of the dates LD received the complaints). There is a need for LD to consider revising the wording of the target (paras. 3.6 to 3.8).

12. ***Need to enhance the workplace database.*** LID maintains a workplace database from which workplaces are selected for routine inspections. As at 31 December 2020, the number of workplaces included in the workplace database was 296,357. Audit checked the information of 78 companies with LID's database. Audit found that 33 (42%) of the 78 companies were not included in LID's workplace database and therefore, would not be covered in the routine inspections by LD (paras. 3.10 and 3.11).

13. ***Need to promulgate guidelines on the selection of government contractors for inspection.*** According to the government service contract information kept by LD, in the period from 2016 to 2020, 60 bureaux/departments (B/Ds) signed about 3,000 contracts with 244 government contractors employing non-skilled workers. Audit noted that LD did not conduct inspections to the workplaces of the government contractors engaged by 5 of the 60 B/Ds, involving 7 contractors and 9 contracts. According to LD, workplaces of government contractors are selected for inspection based on broad guidelines for selecting offence-prone contractors and workplaces. In Audit's view, guidelines detailing the selection criteria will greatly facilitate the efficient selection of workplaces for inspection (paras. 3.14 and 3.15).

## Executive Summary

---

14. ***Need to enhance the comprehensiveness of information on workplace of government contractors.*** According to LD, before launching inspection campaigns targeting contractors of specific B/D(s), it would send requests to B/D(s) concerned to collect information on contracts with government outsourcing contractors employing non-skilled workers. LD sent 285 requests to 61 B/Ds to collect information on contracts starting in the period from 2016 to 2020. Audit noted that:

- (a) no reply was received for 31 requests, involving 23 B/Ds;
- (b) 15 contracts engaged by 5 of the 20 B/Ds examined by Audit were not reported to LD. The total contract value amounted to \$141 million, ranging from \$2.5 million to \$37.3 million. As all these 15 contracts not reported to LD were cleansing services and facility management services contracts, non-skilled workers were very likely involved; and
- (c) 2 B/Ds, other than the 61 B/Ds, had 2 cleansing services and facility management services contracts. The contracts might have employed non-skilled workers (paras. 3.13, 3.16 and 3.17).

15. ***No documentary evidence showing that construction sites fulfilling the selection criteria were given priority.*** LID receives monthly and ad hoc intelligence on suspected cases of non-payment or late payment of wages involving construction contractors of government departments. According to LID's operation manual, priority should be given to construction sites according to the specified selection criteria. In the period from January 2016 to May 2021, there were 3,162 suspected cases of non-payment or late payment of wages referred to LD. Audit found that:

- (a) there was no documentary evidence showing that the cases referred to LD had been evaluated to identify construction sites fulfilling the selection criteria or LD had given priority to construction sites fulfilling the selection criteria;
- (b) 1,235 (39%) of the 3,162 cases fulfilled the selection criteria of involving late payment of wages for two or more consecutive wage periods. However, no inspection had been conducted in 514 (42%) of the 1,235 cases; and

## Executive Summary

---

- (c) 516 (16%) of the 3,162 cases fulfilled the selection criteria of involving contractors with blatant non-compliance. However, LD had not conducted inspection in 112 (22%) of the 516 cases (paras. 3.19 to 3.21).

16. *Need to conduct timely inspections to construction sites.* In the period from January 2016 to May 2021, 1,045 inspections were conducted on construction sites. For 201 (19%) of the 1,045 inspections, at the time of the inspection, the construction works had already been completed and no construction workers were present (para. 3.23).

17. *Need to continue to closely monitor case processing and seek legal advice expeditiously.* In the period from 2018 to 2020, the Prosecutions Division (PD) sought the advice of the Department of Justice (DoJ) for 452 cases. Audit found that in 37 (8%) of the 452 cases, PD sought DoJ's advice more than 180 days after receiving the cases (para. 3.29).

### Other issues

18. *Need to explore ways to shorten waiting time for medical assessment relating to employees' compensation claims.* Audit found that:

- (a) the average waiting time for the Employees' Compensation (Ordinary Assessment) Board (OAB) assessments conducted in 16 hospitals of the Hospital Authority was about 10 weeks for the period from 2016 to 2018. The average waiting time decreased to 8.7 weeks in 2019 but increased to 12.6 weeks in 2020. In 2019, the average waiting time at individual hospitals ranged from 6.5 to 11.5 weeks. In 2020, the average waiting time at individual hospitals increased, ranging from 10.4 to 18 weeks;
- (b) in the period from 2016 to 2020, the average no-show rates of OAB assessments ranged from 4.4% to 6.7%. The no-show rates at individual hospitals varied significantly. For example, in 2020, the no-show rate ranged from 1.6% to 9.6%; and

## Executive Summary

---

- (c) in 2020, 3,910 assessments were conducted without the need for the employees to be present at the hospitals, comprising 3,658 by examining employees' medical records and 252 through video conferencing. However, not all the 16 hospitals had made use of these methods to shorten the waiting time for OAB assessments (paras. 4.3 to 4.6).

19. ***Need to enhance publicity on productivity assessment.*** Employees with disabilities, whose productivity may be impaired by their disabilities, are given the right to undergo a productivity assessment and be remunerated at a rate commensurate with their productivity. Audit found that attendance at the seminar on productivity assessment organised by LD each year decreased from 97 participants in 2016 to 58 participants in 2019. In 2020, no seminar was organised due to COVID-19 epidemic. Moreover, conducting more publicity through suitable electronic means (e.g. mobile apps or websites) might help reach more people in need of the productivity assessment provided by LD (paras. 4.11 and 4.14).

20. ***Need to step up efforts in reminding employees of their rights and benefits in light of COVID-19 epidemic.*** Audit noted that COVID-19 epidemic had impact on some of the LD's publicity work especially physical activities involving gathering of people. For example, in 2020-21, planned physical exhibitions at some districts were first postponed and then cancelled because of the epidemic situation and social distancing measures implemented by the Government. LD launched a pilot online exhibition on its website for two days in March 2021. The response to the pilot online exhibition was lukewarm. The total number of page views was only 163 (para. 4.21).

21. ***Need to improve publicity work for foreign domestic helpers.*** According to LD, as foreign domestic helpers are relatively vulnerable persons, it is important to ensure that they understand their rights and benefits under the labour laws and are aware of the channels for seeking assistance. Audit found that of the 90 publicity materials shown on LD's portal on foreign domestic helpers, 36 (40%) publicity materials were available only in one (i.e. English) or two (i.e. Chinese and English) languages (paras. 4.24(c), 4.25 and 4.26).



## Executive Summary

---

### Audit recommendations

22. Audit recommendations are made in the respective sections of this Audit Report. Only the key ones are highlighted in this Executive Summary. Audit has *recommended* that the Commissioner for Labour should:

#### *Administration of the Protection of Wages on Insolvency Fund*

- (a) endeavour to shorten the time taken to collect all the required information and documents for processing PWIF applications (para. 2.17(b));
- (b) explore the feasibility of shortening the performance target of effecting ex gratia payments within 10 weeks upon receipt of all the required information and documents (para. 2.17(c));
- (c) ensure that spot checks on approved PWIF applications are conducted in a timely manner (para. 2.17(d));
- (d) promulgate guidelines on procedures and basis for the selection of approved cases for spot checks (para. 2.17(e));
- (e) select cases reconsidered and approved by LOs for SLO's inspection to ensure that consistent and fair practice is adopted in approving PWIF applications (para. 2.17(f));
- (f) improve the response rates of customer opinion surveys for PWIF applicants and consider extending the period covered by each customer opinion survey so as to cover more applicants (para. 2.17(g) and (h));
- (g) ensure that Gazette notices are given as soon as possible after discretionary ex gratia payment cheques are cashed (para. 2.27(a));
- (h) critically review the practice of not enforcing PWIF Board's subrogation rights against employers direct for discretionary ex gratia payment cases in which no proof of debt could be filed (para. 2.27(c));

## Executive Summary

---

- (i) **step up support to PWIF Board with a view to completing the review of BRC levy rate and ceilings of payment items of PWIF, and introducing the proposed amendments to the Protection of Wages on Insolvency Ordinance within 2022 (para. 2.36(b));**

### *Enforcement work*

- (j) **explore the use of innovative measures in conducting workplace inspections that can better meet the social distancing requirement (para. 3.25(b));**
- (k) **endeavour to start LIs' investigation of complaints as soon as possible and consider revising the wording of the relevant performance target reported in the Controlling Officer's Report to avoid complainants' misunderstanding (para. 3.25(c) and (d));**
- (l) **enhance the comprehensiveness of the workplace database to facilitate inspection planning (para. 3.25(e));**
- (m) **promulgate guidelines on selection of workplaces of government contractors for inspection (para. 3.25(f));**
- (n) **enhance the comprehensiveness of the information on workplace of government contractors employing non-skilled workers to facilitate inspection planning (para. 3.25(g));**
- (o) **ensure that construction sites fulfilling the selection criteria laid down in LID's operation manual are duly considered and given priority in the selection of workplaces for inspection (para. 3.25(h));**
- (p) **ensure that inspections to construction sites are conducted before completion of construction works (para. 3.25(i));**
- (q) **continue to closely monitor the processing of cases for prosecution and seek DoJ's advice expeditiously with a view to ensuring that prosecution actions may be taken before bar dates (para. 3.32);**

## Executive Summary

---

### *Other issues*

- (r) **in collaboration with the Hospital Authority, endeavour to shorten the waiting time for OAB assessments, for example by making wider use of innovative measures as appropriate (para. 4.8(a));**
- (s) **consider exploring further means to address the problem of absences at OAB by employees without good reasons (para. 4.8(b));**
- (t) **step up the publicity work on productivity assessment conducted for employees with disabilities (para. 4.16(b));**
- (u) **step up efforts in the publicity work on employees' rights and benefits under COVID-19 epidemic (para. 4.28(a)); and**
- (v) **endeavour to provide the publicity materials for foreign domestic helpers in as many languages as possible (para. 4.28(c)).**

## Response from the Government

23. The Commissioner for Labour agrees with the audit recommendations.