

**Four Thematic Seminars on the
“Implementation of the Statutory Minimum Wage”**

Date: 14 and 15 April 2011

Time: 1:30 pm to 3:30 pm / 4:00 pm to 6:00 pm

Venue: The Church of Christ in China Ming Yin College [Address: 1 Wai Chi Street, Shek Kip Mei, Kowloon] /
Hong Kong & Kowloon Chiu Chow Public Association Secondary School [Address: 150 Sai Yee Street, Mongkok, Kowloon]

Questions and Answers

Coverage

Q1: Does the statutory minimum wage (SMW) apply to an employee not employed under a “continuous contract” as defined in the Employment Ordinance (an employee engaged under a “continuous contract” is one who has been employed under a contract of employment by the same employer for four weeks or more and has worked for 18 hours or more each week)?

A1: Apart from persons to whom the Minimum Wage Ordinance does not apply, the SMW applies to all employees, whether they are full-time, part-time, casual or other employees, and regardless of whether or not they are employed under a “continuous contract” as defined in the Employment Ordinance.

Q2: Does the Minimum Wage Ordinance apply to the trainees of the IT Seeds Project and the Youth Pre-employment Training Programme?

A2: The SMW applies to an employee, his employer and the contract of employment under which he is engaged. The “IT Seeds Project” is one of the on-the-job training programmes of the “Campus Series” under the “Youth Pre-employment Training Programme and Youth Work Experience and Training Scheme” (YPTP&YWETS). YPTP&YWETS trainees receiving paid on-the-job training under the IT Seeds Project are having employment relationship with the schools offering the position, thereby the Minimum Wage Ordinance is also applicable to them.

In September 2009, the Youth Pre-employment Training Programme (YPTP) and the Youth Work Experience and Training Scheme (YWETS)

were integrated into a “through-train” programme – “YPTP&YWETS”. If a trainee takes part in the on-the-job training of 6 to 12 months under YPTP&YWETS as an employee, an employment relationship will exist between the trainee and the organisation offering the on-the-job training during the training period. Therefore, generally speaking, the SMW also applies to these trainees. As for a trainee taking part in the one-month workplace attachment training under YPTP&YWETS, there is no employment relationship between the trainee and the organisation offering the workplace attachment training. In this regard, the SMW does not apply to the trainees undergoing workplace attachment training.

Minimum Wage Requirement

Q3: If a school has agreed with an employee on his wage payment terms prior to the implementation of the Minimum Wage Ordinance, can the school pay him the minimum wage only after the expiry of the present contract?

A3: Employees to whom the Minimum Wage Ordinance applies are entitled to statutory minimum wage protection with effect from 1 May 2011. Any provision of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Minimum Wage Ordinance shall be void. In other words, an employer cannot reduce the employee’s entitlement to SMW by any agreed terms of contract of employment.

According to the Minimum Wage Ordinance, if the wages payable to the employee in respect of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. additional remuneration). The contract of employment of the employee must be taken to provide that the employee is entitled to additional remuneration in respect of that wage period. Therefore, if the wages payable to an employee under the wage payment terms previously agreed is less than the minimum wage, the school shall pay the balance to its employee.

Q4: According to the Employment Ordinance, a school must keep records of the total number of hours worked by the employee whose wages payable are less than \$11,500 per month. If an employee’s wages payable are less than \$11,500 only in certain months but not in other months, will the school still need to keep records of the total number

of hours worked by the employee for the months when his wages payable are less than \$11,500?

A4: At present, the Employment Ordinance requires employers to keep records on the wages and employment history of each employee covering the period of his employment during the preceding 12 months and to keep the records for another 6 months after the employee ceases to be employed. Effective from 1 May 2011, when wages payable to the employee in respect of a wage period are less than \$11,500, the wage and employment records kept by the employer shall include the total number of hours worked by the employee in that wage period. In other words, if the employee's wages payable in respect of a certain month are less than \$11,500, the school must keep records of the total number of hours worked by the employee in that month.

Q5: Is it required by law that meal breaks and rest days should be with pay and remunerated at the SMW rate?

A5: Neither the Minimum Wage Ordinance nor the Employment Ordinance prescribes that meal breaks or rest days should be paid. Whether meal breaks and rest days are with or without pay, and the calculation method of meal break pay and rest day pay (including whether they are remunerated at the SMW rate), are matters to be agreed between employers and employees.

If existing employment terms in these respects need to be clarified because they are unclear, there should be thorough staff consultation with a view to reaching consensus on lawful, sensible and reasonable grounds through labour-management communication and negotiation.

According to the Employment Ordinance, employers should not unilaterally vary the employment terms and conditions of employees. The Labour Department stands ready to assist employers and employees to resolve their problems and reach consensus. If employees suspect that their employment rights have been undermined, they could seek help from the Labour Department. The Labour Department will actively follow up such cases.

Q6: Are employers obliged to pay employees with disabilities at the SMW rate?

A6: Employees with disabilities enjoy the same SMW protection.

Nevertheless, taking account of the possible employment difficulties encountered by some persons with disabilities, the Minimum Wage Ordinance also provides for a special arrangement so that persons with disabilities whose productivity may be impaired by their disabilities will have the right to choose to have their productivity assessed to determine whether they should be remunerated at not lower than the SMW level or at a rate commensurate with their productivity. To forestall abuse, the right to invoke the productivity assessment (“the assessment”) is vested in the persons with disabilities rather than the employers. For persons with disabilities who do not elect to undergo the assessment, their employers must pay them at the SMW rate in accordance with the Minimum Wage Ordinance.

An optional transitional arrangement is provided under the Minimum Wage Ordinance for persons with disabilities already in employment prior to 1 May 2011 and earning below \$28 per hour (i.e. the initial SMW rate) on the average. They may elect before 1 May 2011 either to :

- (a) receive wages not less than the SMW rate after the implementation of the Minimum Wage Ordinance on 1 May 2011; or
- (b) undergo the assessment and, before completion of the assessment, retain the existing wage level which is below the initial SMW rate.

Serving employees with disabilities who opt for the assessment under the transitional arrangement (i.e. option (b) above) must complete the following procedures before 1 May 2011:

- (a) obtaining a valid “Registration Card for People with Disabilities” issued by the Central Registry for Rehabilitation of the Labour and Welfare Bureau; and
- (b) completing and signing jointly with their employers the Option Form specified by the Labour Department.

Serving employees with disabilities who meet the above requirements may at any time after the SMW implementation on 1 May 2011 invoke the assessment. There is no time limit for the assessment. It can be conducted anytime as long as they are employed by their existing employers to perform the work concerned. Before the assessment, such serving employees with disabilities are entitled to wages no less than their existing contractual wage level. Adjustment of the SMW rate, if any, in the interim would also be applicable to them. On completion of the

assessment and from the first day after the countersigning of the certificate of assessment (“the certificate”) by the employee and the employer, the minimum wage of the employee should be determined according to the degree of productivity as stated in the certificate.

After the implementation of the Minimum Wage Ordinance on 1 May 2011, newly employed persons with disabilities may before commencing employment agree with their employers to undergo a trial period of employment (“the trial period”). The purpose of the trial period is to allow persons with disabilities to acclimatise themselves to the actual working environment and settle into their job before undergoing the assessment. The length of the trial period is 4 weeks or up to the day on which the assessment of the person with disabilities is completed, whichever period is the shorter. During the trial period, the person with disabilities is an employee engaged by the employer in accordance with the contract of employment, and should be remunerated at not lower than 50% of the SMW rate.

Counting of Hours Worked and Wage Calculation

Q7: If an employee attends a training course during working hours, is such time hours worked in computing minimum wage?

A7: When an employee during his training time also falls under the circumstances of hours worked as specified in the Minimum Wage Ordinance, i.e., if the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance at a certain place to receive training, such time should be included in the hours worked for computing minimum wage.

On the contrary, training period falling outside the provisions on hours worked in the Minimum Wage Ordinance (e.g. training not conducted in accordance with the contract of employment or with the agreement or at the direction of the employer) is not hours worked for computing minimum wage. However, if training period is regarded as hours worked by the employee according to his employment contract or agreement with the employer, such time must also be taken into account in computing minimum wage.

Should the employer and the employee have different understanding on

whether or not training time is counted as hours worked in computing minimum wage, they should clarify between themselves as soon as practicable in order to avoid dispute.

Q8: If a school employee is required to work at school beyond his working hours specified in the employment contract, should such time be included in the total number of hours worked in computing minimum wage? If yes, should the overtime work be remunerated at the SMW rate of \$28 per hour?

A8: If an employee is required to continue working at school beyond his working hours specified in the employment contract at the direction of the school, such time is hours worked under the Minimum Wage Ordinance. In computing the minimum wage, such hours should be included.

In computing minimum wage, the basic principle is that wages payable to an employee in respect of any wage period should be no less than the SMW rate on average for the total number of hours worked in such wage period. The Ordinance does not prescribe that payment must be accorded for each and every hour worked or wages for each hour must meet the SMW rate.

Q9: Should the live-in period of a janitor at night be included in the total number of hours worked in computing minimum wage?

A9: Live-in arrangement of a janitor and whether he is required to remain in attendance during the live-in period depend on the terms in the contract of employment or the agreement between the employer and the employee. Thus, different schools may have different arrangements with employees and job requirements on employees during the live-in period may also have great variations. If an employee is, while staying at school at night, in attendance at a place of employment in accordance with the contract of employment or with the agreement or at the direction of the employer, such time is hours worked for computing minimum wage. On the contrary, if an employee is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance at a place of employment while staying at school at night, such time is not hours worked for computing minimum wage.

Moreover, if the live-in period is regarded as hours worked by the employee according to his employment contract or agreement with the

employer, such time must be taken into account in computing minimum wage.

Should the employer and employee have different understanding on whether or not the employee is in attendance at a place of employment during a certain period of time, they should clarify between themselves as soon as practicable in order to avoid dispute when computing minimum wage. If existing employment terms in these respects need to be clarified because they are unclear, there should be thorough staff consultation with a view to reaching consensus on lawful, sensible and reasonable grounds through labour-management communication and negotiation. According to the Employment Ordinance, employers should not unilaterally vary the employment terms and conditions of employees. The Labour Department stands ready to assist employers and employees to resolve their problems and reach consensus. If employees suspect that their employment rights have been undermined, they could seek help from the Labour Department. The Labour Department will actively follow up such cases.

Q10: If a school arranges some of its employees, such as teaching assistants, to assist in leading a study tour that requires lodging, should the school count hours worked on a 24-hour basis each day for these employees during the tour for computing minimum wage?

A10: In this example, whether the entire period of the study tour is hours worked for computing minimum wage is a question of fact and must be determined by reference to the facts and circumstances of individual cases.

If an employee during the entire period concerned also falls under the circumstances of hours worked as specified in the Minimum Wage Ordinance, such period is hours worked for computing minimum wage. For example, if an employee is, at the direction of the employer, required to take care of students 24 hours a day throughout the period of a tour so as to provide immediate services to those who are in need, that entire period is hours worked for computing minimum wage.

On the contrary, if an employee during a certain period of time does not fall under the circumstances of hours worked as specified in the Minimum Wage Ordinance, such period is not hours worked for

computing minimum wage. For example, if a school does not require its employees to remain in attendance at the lodgings during a period of time (e.g. at night) so that they may go out for personal activities or for leisure, such time is not hours worked for computing minimum wage because during that period, they are not in attendance at their post for the purpose of doing work in accordance with their contract of employment or with the agreement or at the direction of the employer. However, when they are required to work because, for instance, some students feel sick at midnight and seek their assistance, the time spent in taking care of students is hours worked for computing minimum wage.

Q11: Is overtime allowance part of wages? Is double pay part of wages?

A11: The definition of wages for SMW is aligned closely with that under the Employment Ordinance. Unless otherwise specified, the term “wages” in the Employment Ordinance means all remuneration, earnings, allowances including travelling allowances, attendance allowances, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done, subject to certain exclusions. For detailed definition of wages under the Employment Ordinance, please refer to the Concise Guide to the Employment Ordinance published by the Labour Department. Overtime pay is part of wages and can be included in determining whether the wages meet the minimum wage requirement.

According to the Employment Ordinance, the definition of wages does not include end of year payment, or annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer. Therefore, in determining whether the wages payable meet the minimum wage requirement, end of year payment, or annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer, is similarly not included. [Note: End of year payment means any annual payment (including double pay, 13th month payment, end of year bonus, etc) of a contractual nature. A contract of employment can be made orally or in writing and it includes express and implied terms.]

Q12: Can an employer compensate the overtime hours of employees by leave instead of paying them SMW for every hour?

A12: Neither the Employment Ordinance nor the Minimum Wage Ordinance

prescribes the compensation arrangement of overtime work. Such arrangement should be agreed between employers and employees.

In computing minimum wage, the basic principle is that wages payable to an employee in respect of any wage period should be no less than the SMW rate ***on average*** for the total number of hours worked in such wage period. There is no requirement specifying that payment must be accorded for each and every hour worked or wages for each hour must meet the SMW rate.

Others

Q13: Does a contract of employment have to be made in writing?

A13: The SMW is aligned closely with the provisions under the Employment Ordinance. According to the Employment Ordinance, a contract of agreement can be made orally or in writing and it includes both express and implied terms.

Q14: With the implementation of the SMW, will the Education Bureau (EDB) increase the amount of Administration Grant in view that aided schools may not have sufficient funds to meet the statutory requirements?

A14: The amount of the Administration Grant provided to an aided school is basically determined according to its number of approved classes and number of classrooms. In the 2010/11 school year, the subsidy for janitor service under the Administration Grant is calculated on the basis of \$10,669 per month per janitor. Therefore, schools should have sufficient funds to meet the SMW requirement. As the Administration Grant has been included in the Operating Expenses Block Grant / Expanded Operating Expenses Block Grant, schools may use funds flexibly under the spirit of school-based management and deploy funds among different grants to meet their needs. Schools should also review their workflow from time to time so that human resources and funds can be utilized more effectively in accordance with the development of the society and students' needs. Schools may contact the respective Regional Education Office for advice and assistance, if necessary.

Q15: For non-skilled workers employed under service contracts of government schools with current wages below the minimum wage

requirement, will the Government provide top-up payments to cover the difference in employee's remuneration?

A15: The Government approved that for existing government service contracts relying heavily on the deployment of non-skilled workers and straddling 1 May 2011 (including those service contracts commencing on or after 1 May 2011 but with their tenders invited before 1 May 2011), as a general rule, the procuring bureaux/departments may, depending on the actual circumstances, provide top-up payments to their service contractors to meet the increase in wage costs of non-skilled workers, arising solely and directly from meeting the SMW requirement until the expiry of the service contracts concerned. Notwithstanding the general rule above, the procuring bureaux/departments have the discretion of not providing top-up in cases where it is not justifiable to do so from the perspective of ensuring prudent use of public funds.

The provision of such top-up is a one-off and highly exceptional arrangement which is made for this special situation only and cannot be taken as a precedent.

Q16: A school has signed a service agreement with an outsourcing service provider. If the service provider suffers losses as a result of the implementation of the SMW and asks for an increased service fee from the school with effect from May or the termination of the service agreement, how should the school deal with it?

A16: Generally speaking, in the spirit of the contractual agreement, the school and the service provider both should honour the agreement as signed until it expires. If the service provider is unable to continue to provide the service during the agreement period due to financial difficulties, the agreement may be terminated having regard to actual circumstances with the consent of both parties. If the agreement has to be terminated, the school may invite tenders for the provision of the service having regard to the latest development or needs. On the other hand, according to the calculation of the Administration Grant for aided schools by the EDB in the 2010/11 school year, the school should have sufficient funds to meet the SMW requirement. As the Administration Grant has been included in the Operating Expenses Block Grant / Expanded Operating Expenses Block Grant, schools may use funds flexibly to meet their needs under the spirit of school-based management and deploy funds among different

grants to meet the additional expenses arising directly from the implementation of the SMW. The school should note that this is a one-off and very special arrangement which cannot be taken as a precedent. For this special arrangement, the school should keep detailed records and obtain the endorsement of its School Management Committee / Incorporated Management Committee, etc. Schools should also review their workflow from time to time so that human resources and funds can be utilized more effectively in accordance with the development of the society and students' needs. Schools may contact the respective Regional Education Office for advice and assistance, if necessary.

Q17: If a kindergarten has already submitted an application to EDB for fee revision for the coming school year, but has not taken into account the additional expenses arising from the implementation of SMW, what remedial actions can be taken by the kindergarten to avoid possible financial deficit?

A17: If a kindergarten has already submitted an application to EDB for fee revision for the coming school year but has not taken into account the additional expenses arising from the implementation of SMW, the kindergarten may contact the respective Regional Education Office to provide the revised information.

Q18: Will EDB allocate funds to a kindergarten with financial deficit due to the implementation of SMW?

A18: All kindergartens are privately run. They may include expenditures to be incurred upon the implementation of SMW in their estimated operational expenses. EDB will vet their applications for fee increase with reference to the estimated operational expenses submitted.

Q19: If schools encounter difficulties in calculating minimum wage for their employees, how can they make enquiries?

A19: Schools might have more enquiries at the early stage of the implementation of SMW. They should make reference to the information provided on the Labour Department's website, including "Statutory Minimum Wage: Reference Guidelines for Employers and Employees" issued by the Labour Department. If they still have difficulties in calculating minimum wage, they may contact the respective Regional Education Offices of EDB, call the Labour Department's 24-hour enquiry hotline at 2717 1771 (which is handled by the "1823 Call

Centre”), or make enquiries in person at offices of the Labour Relations Division of the Labour Department.

Q20: If schools wish to have more information on SMW for reference, how can they get further information?

A20: If schools wish to have more information on SMW for reference, they may visit the Labour Department’s website <<http://www.labour.gov.hk>> and browse the section on “Statutory Minimum Wage” and other relevant information.