Statutory Minimum Wage:
Reference Guidelines for Employers and Employees (Draft Version)
Comments from the Hong Kong General Chamber of Commerce

19 January 2010

A. General Comments

The Labour Department should be congratulated for producing a substantial document, but much work remains to be done to clarify issues related to the implementation of the statutory minimum wage.

First and foremost, we strongly urge that **the same calculation approach for wages used in the Wage Protection Movement (WPM) be adopted for the Minimum Wage Ordinance to minimise the impact to the business community.**

The Government launched the WPM in 2006 with a view to protecting the wage level of cleaning workers and security guards through voluntary and non-legislative means. Under the WPM, participating corporations were encouraged to offer cleaning workers and security guards wages not lower than the *relevant average market rates* as stipulated in the *Census and Statistics Department (C&SD)'s Quarterly Report of Wage and Payroll Statistics* (Quarterly Report). The average wage rate was based on the concept of normal working hours per day *(refer to the hours of work excluding meal time and rest time)* and the actual standard working days per month *(use 26 days if working 6 days a week or if 4 rest days granted per month)*.

Those companies which voluntarily participated in the WPM followed the WPM's calculation approach. The draft guideline for Minimum Wage Ordinance however imposes significant additional financial and administrative burden on employers by applying another formula (which includes paid meal break and paid rest days). Unlike some other countries where hourly wage rate is a common practice, it is normal practice in Hong Kong that employee wages are calculated on a monthly basis. It is highly uncommon to require payment for rest day and meal breaks. The Minimum Wage Ordinance is new to the community. Any drastic change that deviates from past practices may trigger disputes between employers and employees.

Apart from paid meal breaks and paid rest days, there are a number of general and recurring issues in the document:

1. The document fails to give guidance on what changes should be made to employment contracts in order to comply with the Minimum Wage Ordinance.

2. Some of the concepts used in the draft guidelines are not very useful in providing practical guidance, and in some cases create confusion. Examples include "personal time" and "personal reason".

3. The draft guidelines do not mention overtime pay anywhere. This is a common provision amongst lower paid employees and it would be reasonable to expect the guidelines to explain their impact.

4. The document does not provide much practical guidance on important matters like "leaving the field" and "on-call or standby time". The relevant parts in the draft guidelines only repeat the law, without giving more detail in form of guideline or example.

5. It is important to provide guidelines for employers on tracking hours worked, which is lacking in the present draft.

B. Specific Comments

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Page 5	**4th bullet point:** ***"When employers and employees seek to clarify unclear terms in their existing employment contracts, there should be thorough staff consultation with a view to reaching consensus on lawful, sensible and reasonable grounds through labour-management communication and negotiation. Unilateral variation of employment terms and conditions by employers is not allowed under the Employment Ordinance."***	It errs on being too simplistic to state that a unilateral variation is not permitted under the EO. Only certain types of variation are a breach of the EO (s.32A(1)(b)). The greater protection for employees is general contract law.
Page 10	**"Hours worked for the purpose of computing minimum wage"** **Example 2**	It is possible that the act of allowing employee to access the shop before work hours by the employer or supervisor on site can be deemed as agreement to commence work irrespective of whether it is for work or personal reasons. Some examples from Labour Department on how to deal with this in a fair manner is needed.
Page 10	**Example 3**	Same point as for Example 2. The employer may well agree that he can stay at the office for this extended time. But the definition of "personal reasons" may give rise to difficulties and disputes. For example, how about for situation when there is a typhoon or rainstorm which prevent the employees from leaving the place of work due to weather conditions. If the "personal reasons" (e.g. to catch upon something in preparation for a meeting the following day) include work then this could be "hours worked". It would be clearer to say "not undertaking work or training".
	Example 4	We do not see the need to define "Place of Employment" in this example. The person is carrying out work outside of the usual Place of Employment at the direction of the employer, so all travelling & waiting time should be included in the Hours Worked already, by defining Place of Employment in here would cause unnecessary confusion.
	Example 5	The statement "*If an employee ... is not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the contract of employment or with the agreement or at the direction of the employer, such ... time is not hours worked*" is simply a

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		statement of the law. Such statement will be accurate whether it is "personal time" or any other time. The key questions (which seemingly have not been considered) are:- • What is his "place of employment" in this context? and • Is layover time part of the travel time and, if so, is it "hours worked" under section 4(b) MWO? The key in the example is how to define what is meant by Work Hours and what is not for jobs requiring travelling outside of HK. Using personal time as a concept is not particularly helpful. More clarity is needed.
Page 11	**Examples 6 and 7**	Same point as for Example 5. If the intention is to clarify that when he is having "personal time" he cannot be in a "place of employment", it is preferable to be explicit about it.
Page 11 and 12	**"Points to note" 1st bullet point**	The examples do not "illustrate" the intended point to be made. It would be more useful to provide explanations on:- • when a person is considered to be at a "place of employment", and • when a person is there with the agreement (etc) of an employer (Both of which are required for it to be an "hour worked"). See test outlined in comment on Page 19 (Example 18) below.
	"Points to note" 2nd bullet point	"Clarification" between employer and employee will not override section 15. The contract cannot be definitive.
Page 12	**Example 10 (Travelling)**	It would be helpful to clarify two key questions: - How many "usual" places of employment can an individual have? - When does a place of employment become a "usual" place of employment? The above questions are relevant in situations like these": - a real estate agent who travels from home to meet a

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		client at an apartment before going to the office. - an employee is asked to work at a client's office (as per Example 11) for one week (or one month ...etc.).
Page 13	**Meal break** **2nd bullet point –** ***"…if meal break is regarded as working hours of the employee according to his employment contract or agreement with the employer, such time must also be taken into account in computing minimum wage".*** ***"…after an employer and his employee have included meal break as hours worked by the employee in accordance with their employment contract or agreement, the employer shall not unilaterally vary or remove such contractual terms or agreement concerning working hours."***	There is no indication either in this paragraph or Example 16 that he is at a "place of employment" during lunch. If he is NOT then it is not an "hour worked". It is only "hours worked" if it is spent at a place of employment (which requires it to be "for the purpose of doing work or receiving training"). This statement perhaps over-generalizes the actual situations. Employers may have reserved the right to vary or remove such provision unilaterally
Page 15	**Example 16** **Employee in workshop for meal break but not working, and contract includes lunch break or working hours.**	A more appropriate interpretation of the law is that provided he is not working (with agreement or direction of employer) and the contract does not require him to be at the workshop for that hour then it is not a "place of employment" and so it cannot be an "hour worked".
Page 15	**"Leaving the field"** **2nd bullet point** **3rd bullet point**	The entire paragraph is simply a repetition of the law. We do not see new guidelines in it. As for comment on page 12 (point (i)). The employer may have reserved the right to vary this provision. *Note*: The key to "leaving the field" is whether the employee is required to stay at the "place of employment". It is reasonable to assert that if employees can leave, it is NOT "hours worked"
Page 16	**(a) "On-call or standby time"** **2nd bullet point** **3rd bullet point**	This simply repeats the law. We do not agree with the interpretation here. In

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		order to be an "hour worked" it must be at a "place of employment". So, if the employee is not at a place of employment (whether or not on-call) it will not be an hour worked.
Page 17	**Other situations** ***"Apart from the Minimum Wage Ordinance, if the time in question is regarded as hours worked by the employee under the employment contract or agreement with the employer, such time should be included in computing minimum wage."***	We do not agree with the interpretation here. The only hours counted as "hours worked" for the purposes of the MWO are those which fall within section 4 of the MWO, regardless of what the contract says. So, if the time is not spent at a "place of employment" (e.g. a "break") it is not an "hour worked".
Page 19	**Wages payable to employee in respect of wage period** **1st bullet point** ***"The definition of wages for SMW is aligned closely with that under the Employment Ordinance."***	As we understand it, there is no Section 6(2) deduction under the EO and overtime pay is treated very differently.
Page 20	**(a) Example 18 (and footnote 7)** • "working hours" Monday to Saturday - 9:00 a.m. to 5:00 pm including 1 hour paid lunch break". • "*as meal break is regarded as working hours of the employee in accordance with the contract of employment or agreement with the employer, it is included in computing minimum wage*".	It seems that a wrong test has been applied for "working hours". Section 6(2) requires any wages for any time that is not "hours worked" to be excluded. "Hours worked" in section 4 is any time during which the employee is, in accordance with the contract of employment [etc.] ... in attendance at a place of employment. In order to be a "place of employment" the employee must be there "for the purpose of doing work or receiving training". So, there are 2 requirements; (1) the need for the contract to specify the hours (or the agreement or direction of the employer), and (2) the need for the employee to be at a "place of employment". This example does not seem to have included part (2) of this test. The contract does not require the employee to be at a "place of employment". It is a "1-hour lunch break". The employee may, therefore, be having lunch with his wife. In this situation it is clearly not appropriate to include this as an "hour worked". To state that the wages for such lunch break should be "included" is simplistic and confusing. It is also likely to be wrong.
Page 20 and 21	**(a) Example 19** • monthly paid contract of HK$6,500 • "*same daily wages for Monday to Saturday*"	The assumptions in this example are misguided for the following reasons :-

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	• "*lunch break which is paid*"	1. No monthly paid contract will refer to a lunch break being "paid" or "not paid". 2. No monthly paid contract will specify a "daily wage' for Monday to Saturday. 3. When a deduction is made for a partial day (e.g. Saturday) typically only a partial day's wages will be deducted. All the examples quoted in this section (from page 19 to 20) relating to monthly-rated staff are misleading as there are simply too many assumptions made which are contrary to the real practice in the market. It is normal practice at the moment that payments for rest day and meal breaks are not defined. Or the contract is silent on this. So with all the assumptions made in the examples, employers will not find these relevant. It is more important for Labour Department to provide guidance to employers on how to agree with employees on a mutually acceptable approach.
Page 21	**Example 20 (and footnote 12)** "*9-5 <u>including</u> 1 hour paid lunch break*"	Same point as for Example 18. Also, no contract setting out a daily wage would refer to the lunch break as "paid". It is therefore unclear when it the contract is silent on this (which would be the more common scenario).
Page 22	**Example 21**	There is <u>no</u> deduction under Section 6(2) as all wages are due to the work on the "pieces".
Page 23	**Examples 22, 23, 24 and 25**	These all state the same thing (other than the form of deduction, which is an EO issue not SMW issue).
Page 24 and 25	**Counting of commission** **1st paragraph** ***"Depending on their actual circumstances, employers and employees may agree ..."*** **2nd bullet point** ***"commission payable under the contract of employment is counted as wages payable in respect of the wage period as specified in the employment contract (no matter the employer has paid it or not when it has been due)".*** ***"If commission is payable in respect of a***	The meaning of "depending on their actual circumstances" is unclear. When can an employer and employee <u>not</u> agree? Section 6(5) MWO provides that it is when commission is <u>paid</u> that dictates the wage period in which it falls. Not the wage period specified in the contract of employment. Under the MWO an employee can only have <u>one</u>

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	number of wage periods according to the contract of employment, in determining whether the wages of an employee meet the minimum wage requirement, commission is counted as wages payable in respect of the corresponding wage period as provided in the contract of employment (Example 29) **3rd bullet point**	wage period. The "period" during which commission is paid is normally different from the standard, salary, wage period. So, monthly basic and quarterly commission. It seems that the provision here is for companies which do not pay commission in a single lump sum, but instalments over a few months' period as part of the commission policy (as in example 29). The beginning of this is correct, but contradicts the earlier statement on the page. Also, employees would always agree to the payment of commission.
Page 26	**Example 28**	Section 6(5) requires all of the commission to be counted when paid, not when accrued. Also, The wordings of "no matter whether the employer has paid it or not" is confusing as this is not just applicable to commission, but also basic salary & all other payments. It is confusing to highlight commission in this context.
	Example 29	We have a different view. The commission "must be counted as part of the wages payable in respect of" the wage period determined by reference to when it is paid. See Section 6(5). Again, the wordings of "no matter whether the employer has paid it or not" was misleading.
Page 26	**Example 30 & 31**	It is rare in market practice for advance payment of commission. It is however more common that commission is paid at a time after work is being done and money collected by employer, an example illustrating this will be more useful.
Page 27	**No contracting out** **1st bullet point** ***"Any agreement made between an employer and an employee cannot reduce the latters entitlement to SMW"***	Our understanding is that whilst a provision in the contract of employment purporting to reduce a statutory right is void (section 15), the employer and employee can always settle a dispute between them.
Page 28	**Record keeping**	The Guidelines should include an example demonstrating the need to track hours worked in order to determine whether the $11,500 threshold is achieved (due to Section 6(2)).
Page 29	**1st bullet point (top of the page)**	Should include rest days
	2nd bullet point + Examples 32 & 33 ***"when wages payable in respect of a wage period are at $11,500 or above per month"***	The phase "$11,500 or above per month" and the examples seem to imply that employer can simply take the monthly basic salary/wages as a reference point rather than the actual wages (having deducted

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	"While the employer is not required to keep the records of the total number of hours worked by the employee when wages payable in respect of a wage period are at $11,500 or above per month, it is pertinent to note that the employee is still entitled to be paid wages in respect of that wage period of not less than the minimum wage."	payment of hours not worked). It was also not clear as to whether payment for "hours not worked" has to be take out from the calculations or not. The situation stated in this bullet needs an example to illustrate. There are different interpretations in the market and clarity on the formula for calculating this threshold is needed.
Page 31	**Exempt students**	The Guidelines should explain that a student who has multiple short internships over, say, a summer break cannot aggregate such internships to 59 days. So, if the first internship (of, say, one month) is treated as exempt, other internships (of whatever length) in that year cannot be so treated. This is not uncommon and should be flagged.

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