

Employment and Retirement Schemes Legislation (Offsetting Arrangement) (Amendment) Bill 2022 gazetted today

The Government published the Employment and Retirement Schemes Legislation (Offsetting Arrangement) (Amendment) Bill 2022 in the Gazette today (February 11) to abolish the use of the accrued benefits of employers' mandatory contributions (ERMC) under the Mandatory Provident Fund (MPF) System to offset severance payment (SP) and long service payment (LSP) (the offsetting arrangement).

A spokesman for the Labour Department said, "Abolishing the offsetting arrangement will help improve employees' retirement protection, and strengthen the retirement protection function of the MPF as an important pillar of Hong Kong's retirement protection system. Given the far-reaching consequences of the abolition and the diverse opinions of employers, employees and different sectors in the community, various proposals were put up by the Government throughout the years to explore feasible and practical options to abolish the offsetting arrangement. After years of extensive consultation and major revisions to proposals, the Chief Executive announced in the 2018 Policy Address an enhanced package for abolishing the offsetting arrangement. The Government has completed drafting the Bill and will introduce it into the Legislative Council for scrutiny on February 23."

The Bill amends eight pieces of ordinance/subsidiary legislation that currently provide for the offsetting arrangement or contain provisions that need to be consequentially amended upon abolition of the offsetting arrangement, including the Employment Ordinance (Cap. 57), the Mandatory Provident Fund Schemes Ordinance (Cap. 485), etc. The offsetting arrangement will be abolished starting from a date to be appointed (the transition date). After the transition date, employers can no longer use ERMC to offset employees' SP/LSP. Employers can continue to use their voluntary contributions and the returns derived therefrom and gratuities based on employees' length of service to offset SP/LSP from before or after the transition date.

The Bill proposes that abolition of the offsetting arrangement has no retrospective effect. If an employee's employment commenced before the transition date, the employer can continue to use the accrued benefits of the MPF contributions (irrespective of whether the contributions are made before, on or after the transition date, and irrespective of whether the contributions are mandatory or voluntary) to offset the employee's SP/LSP in respect of the employment before the transition date (pre-transition portion of SP/LSP). This arrangement helps reduce the risk of large-scale dismissals before the transition date, or else some employers may dismiss employees (particularly those with long years of service) before the abolition takes effect in order to use ERMC to offset SP/LSP.

The current rate for calculating SP/LSP is two-thirds of the last monthly wages, subject to a maximum of \$22,500, for each year of service; and the maximum payment of SP/LSP is \$390,000. The Bill will not change the rate and maximum payment of SP/LSP. The pre-transition portion of SP/LSP would be calculated on the basis of the monthly wages immediately preceding the transition date and the years of service before the transition date, whereas the post-transition portion of SP/LSP would be calculated on the basis of the last monthly wages before the termination of employment and the years of service at that time. In comparison with using the last monthly wages before the termination of employment for calculating the total amount of SP/LSP, the aforementioned arrangement can guard against the risk of deliberate dismissals of employees by employers before the abolition takes effect. Under the rare individual circumstances where an employee ends up worse off after abolition of the offsetting arrangement, the Government will make up the difference through administrative means so that the employee will not receive less than what he or she would have been entitled to at present.

Abolition of the offsetting arrangement will also be applicable to occupational retirement schemes under the Occupational Retirement Schemes Ordinance (Cap. 426), the two school provident funds under the Grant Schools Provident Fund Rules (Cap. 279C) and Subsidized Schools Provident Fund Rules (Cap. 279D) and overseas occupational retirement schemes of employees from outside Hong Kong which are exempted from the MPF System. Abolition of the offsetting arrangement will not be applicable to employees who are currently not covered by the MPF System or other statutory retirement schemes because such employees are not affected by the offsetting arrangement. Their SP/LSP, if eligible, will continue to be calculated on the basis of the last monthly wages before the termination of employment in accordance with the existing practice.

The Bill also amends the Inland Revenue Ordinance (Cap. 112) to make it clear that SP and LSP paid in accordance with the Employment Ordinance is not chargeable to salaries tax; and makes consequential technical amendments to the Protection of Wages on Insolvency Ordinance (Cap. 380) in respect of provisions on the subrogation rights of the Protection of Wages on Insolvency Fund and calculation of ex-gratia payment for SP in cases involving wage reduction.