



Working in the COVID era – issues and challenges for employers

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Agenda

- 1. Remote working:**
Issues & considerations
- 2. Vaccination & the Work Place:**
Issues & considerations
- 3. Mandatory testing orders & quarantine orders:**
Issues & considerations
- 4. Hiring in the COVID era**
- 5. Q&A**



Remote Working: Issues & considerations

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Can employers require staff to work remotely or at the office?

Contractual terms

- Does the employment contract contain a clause stipulating the location of work?
- Does the employment contract contain a mobility clause?

Is the request lawful and reasonable?

- Can the employer fulfil its duties (statutory and common law duties) to provide a safe working environment?

Can employees refuse the request?

- Employees must generally obey reasonable orders and co-operate with health & safety measures
- Right to resign without notice if they reasonably fear contracting COVID-19

Employer's duty to ensure the health and safety of employees: statutory duties

- ▶ Section 6 of Occupational Safety and Health Ordinance (OSHO, Cap 509)
 - ▶ Every employer must, so far as **reasonably practicable**, ensure the safety and health at work of all its employees: s.6(1) OSHO.
 - ▶ Examples of non-compliance: s.6(2) OSHO
 - ▶ failure to provide information, instruction, training and supervision;
 - ▶ (if workplace under the employer's control), failure to maintain the workplace in a condition that is safe and without risks to health; and
 - ▶ failure to provide or maintain a working environment for the employees that is safe and without risks to health.
 - ▶ Given the **relatively low** "reasonably *practicable*" threshold, employers will generally be able to discharge their statutory responsibility so long as they have reasonable infrastructure in place to ensure the health & safety of its work force.

Employer's duty to ensure the health and safety of employees: common law duties

- ▶ **Common law (non-delegable) duty of reasonable care** means...
 - ▶ Provision of safe co-workers, a safe place of work, safe equipment, a safe system of work, proper instructions and supervision and (where called for) adequate training.
- ▶ **Test** in *Yeung Lai Ping v. Secretary for Justice* [2021] HKCA 256:
 - ▶ “... the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the **light of what he knows or ought to know**; ... where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must **balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve**. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is **negligent**”.

Consequences of breaches of statutory and common law duties

▶ Criminal Sanctions

- ▶ Failure to comply with s.6(1) OSHO – fine of \$200,000: s.6(3) OSHO.
- ▶ Failure to comply with s.6(1) OSHO **intentionally, knowingly or recklessly** – fine of \$200,000 and imprisonment for 6 months: s.6(4) OSHO.
- ▶ **Directors or senior officers** can also be held liable: s.33 OSHO.

▶ Civil Liabilities

- ▶ Damages may be awarded for **negligence**.

Employers' liability is insurable

- ▶ Employers are under a statutory duty to pay compensation if an employee sustains an injury or dies as a result of an accident arising out of and in the course of his/her employment: s.5(1) Employees' Compensation Ordinance (ECO, Cap 282).
- ▶ Mandatory legal requirement for employers to purchase **employees' compensation insurance** to cover all employees: s.40(1) ECO
- ▶ Insurance may cover **all compensation and related costs** up to the limit of indemnity.

No. of Employees	Amount of Insurance Cover per Event
not more than 200	not less than \$100 million
more than 200	not less than \$200 million

Employees' compensation insurance

What does the insurance cover?

Medical expenses

Common Law damages

Loss of earnings

- ▶ Yes, **all are insurable**: s.40(1F) ECO provides that “*liability*” means “*liability of the person under this Ordinance and independently of this Ordinance for any injury to his employee by accident arising out of and in the course of the employee’s employment*”.

Employer's duty in the context of remote working

- ▶ Duty is equally applicable but **does not** extend to eliminating **all risks in a home environment**, the test is whether the conduct is that of a “*reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know*” *Cheung Kin Kwok Alen v Lau Kam Chee* [2004] 3 HKC 227.
- ▶ In determining the **standard of care** and whether the employer acted **reasonably**, the Court will weigh the following factors:
 - ▶ the likelihood of injury occurring and the potential consequences if it does;
 - ▶ the probable effectiveness of the precautions that can be taken to meet it; and
 - ▶ the expense and inconvenience they involve.
- ▶ Whether or not an employer has taken reasonable precautions to ensure a safe workplace is a **question of fact**, what is reasonable involves a **balancing exercise between the quantum of risks and the sacrifices**: *HKSAR v Gold Ram Engineering & Development Ltd* [2002] 2 HKC 600.

Employers' duty to safeguard the mental health of its work force

Are employers under any duty to safeguard the mental health of its employees, particularly if they are working remotely?

- ▶ There is a common law duty for an employer to provide its employees with a “**safe system of work**”. This includes a duty to **avoid psychiatric damage** to the employees by the quantity or character of the job for which the employees were hired. Breach of such duty may give rise to a claim for negligence.
- ▶ In order to establish a cause of action for mental illness induced by occupational stress, an employee must communicate such stress to the employer: **foreseeability of mental illness depends on the knowledge that the employer has about an affected employee** and when signs of mental instability begin to arise: *Barber v Somerset County Council* [2002] 2 All ER 1.

Employers liability for compensation arising from mental health issues



- ▶ However, the tort of negligence does not allow damages for mental distress, such as anxiety or depression, falling short of a **medically diagnosable psychiatric illness**: see *Lam Ching Sheung v Official Receiver* [2009] 5 HKLRD 278 quoting *Wainwright v Home Office* [2004] 2 AC 406 and *Mbasogo v Logo Ltd* [2007] QB 846.
- ▶ Furthermore, **mental illness is not considered an occupational disease** in the ECO because it is generally considered to not be triggered by an accident in the workplace, so to claim compensation under the ECO, an employee must prove that he/ she suffered from a mental condition **triggered by an accident at work**.

Is COVID-19 an “Occupational Disease” for purposes of the ECO?

- ▶ Once a disease is prescribed as an “**occupational disease**” under the ECO, workers suffering from the disease could claim compensation under the ECO if they are engaged in the designated occupations (See *Guide to Occupational Diseases Prescribed for Compensation Purposes* issued by the Labour Department).
- ▶ The employee would need to prove that he/she contracted the disease **whilst at work**, if their occupation is one of the **designated occupations**.



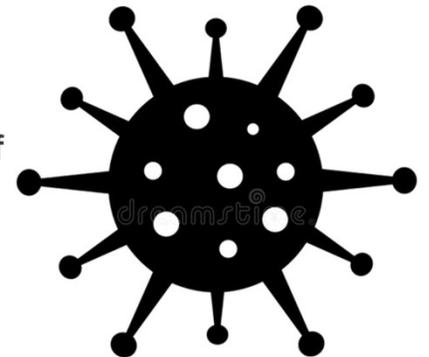
Employer's liability towards employees who contract COVID-19 at work

What happened with **Severe Acute Respiratory Syndrome (SARS)**?

- ▶ SARS was categorised as an “**occupational disease**” under Schedule 2 of the ECO in Feb 2005, **more than two years after the outbreak of SARS**.
- ▶ In the case of SARS, the employee must be working in any occupation involving close and frequent contacts with a source or sources of SARS infection by reason of employment in the **medical care and research space**, and for a period of at least 1 month.

COVID-19 has not yet been classified as an “occupational disease”

- ▶ BUT there has been **ongoing discussions** as to whether an employee suffering from COVID-19 should be entitled to make a claim under the ECO: see the latest discussion paper of LegCo dated 18 May 2021 exploring the possibility of including COVID-19 as an “occupational disease”.
- ▶ If COVID-19 is added to Schedule 2 of the ECO as an “occupational disease”, it is likely that it will apply to **certain occupations** involving close and frequent contacts with a source or sources of COVID-19 infection by reason or employment.



CORONA VIRUS

Employees' duty to obey reasonable and lawful directions & right to resign without notice

- ▶ Under common law, employees are obliged to comply with a **lawful and reasonable command** of their employer that **relates to the subject matter of their employment** R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan (1938) 60 CLR 601.
- ▶ Employees must, so far as **reasonably practicable, take care for the safety and health** of persons (including other employees) while at work and **co-operate with the employer**: s.8(1) OSHO.
- ▶ **Willful disobedience** of a lawful and reasonable direction will justify **summary dismissal** (i.e. termination without notice or payment in lieu): s.9 Employment Ordinance (EO, Cap 57).
- ▶ An employee has the statutory right to **resign without notice or payment in lieu** if he “**reasonably fears physical danger by violence or disease such as was not contemplated by his contract of employment** expressly or by necessary implication”, if he has been employed for not less than 5 years: s.10 EO.

Remote working: employer's obligations for out-of-pocket expenses

- ▶ Does the employer have any duty to provide work equipment?
 - ▶ No, an employer does not have a duty to provide work equipment unless stipulated in the contract.
 - ▶ However, providing necessary work equipment (e.g. work laptop) is good practice for data security reasons.

Lam Suk Han v Ng Suk Han [2010] HKEC 957:

- ▶ Employer has an **implied contractual duty to indemnify the employee for out-of-pocket expenses** incurred from employment.
- ▶ This duty extends only to where expenses are incurred either
 - ▶ (a) in consequence of obedience to **employer's orders**; or
 - ▶ (b) in the **execution of the employee's authority**; or
 - ▶ (c) in the **reasonable performance** of the duties of his employment, provided that such expenses and liabilities are in fact **occasioned by his employment**.



Remote working & data privacy

The pandemic has seen an unusual rise of cyber attacks and security breaches. The Privacy Commissioner for Personal Data has:

- ▶ Recommended organisations to **assess the specific risks on data security and personal data** and to **review and update existing policies and practices**: See *Guidance notes on Protecting Personal Data under Work-from-Home Arrangements* issued on 30 Nov 2020.
- ▶ Reminded organisations to **issue statements in relation to data collection** (e.g. purpose statement, transferee statement, right to access and make corrections, etc.) and observe the relevant **restriction in data retention**: See *Code of Practice on Human Resource Management* revised in April 2016.
- ▶ Employers may be held **vicariously liable** for employees' failure to safeguard data unless it can show it has taken reasonable steps to prevent data breaches.



Remote working: tax and visa considerations when working remotely

- ▶ Employees must possess the **appropriate visa** to have the **right to work** in a specific jurisdiction.
- ▶ Employees may become **personally** exposed to **overseas tax**.
- ▶ Employer's **corporate tax presence** in overseas jurisdictions depends on the laws of the overseas jurisdiction.



- ▶ E.g., PRC tax
 - ▶ A Hong Kong employer may become exposed to PRC corporate income tax if the employee's nature of work in the PRC constitutes a tax presence or "*permanent establishment*" under PRC tax rules.
- ▶ Employees' salary tax withholding
 - ▶ Depending on whether employee's salary tax is payable in an overseas jurisdiction, employer might need to withhold taxes for overseas tax authorities.

Best practice recommendations

- ▶ In the COVID era, employers are well advised to:
 - ▶ have **specific policies** dealing with **remote working arrangements**, including policies on what happens if there is a COVID-19 infection in the office;
 - ▶ follow the reasonable recommendations of landlords on **temporary closure of offices** and **deep cleaning**, if there is a positive case in the office or building; and
 - ▶ maintain **clear communication** with staff on measures taken to ensure the health and safety of its workforce to provide comfort to staff.



What to include in a remote working policy?



The problem with blanket policies

- ▶ **Blanket policies** enforced **without consideration of individual circumstances** may well constitute discrimination in certain circumstances.
- ▶ **Discrimination** on the grounds of sex, pregnancy, marital status, disability, family status and race is prohibited in employment, education, provision of goods, selling of facilities, participation in clubs and sporting activities etc.
 - ▶ **Direct discrimination:** when a person is treated less favourably because of their protected characteristic in comparison to a hypothetical comparator.
 - ▶ **Indirect discrimination:** when the same requirement or condition is applied to a person with a protected characteristic and a persons without such characteristic, but has a disproportionate effect on those with the characteristic.



Effective drafting of policies

- ▶ For **effective drafting of policies**, the following should be taken into account:
 - ▶ whether a person can consistently meet the requirement given his individual characteristics;
 - ▶ the condition should bear a rational and proportionate connection to the objective; and
 - ▶ where possible, making references to case law.



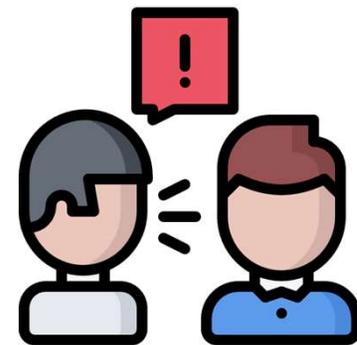
Vaccination & the work place: Issues & considerations



Can employers ask employees about whether they have been vaccinated?

- ▶ Depends on whether the collection, storage and use of such information (which constitutes employees' personal data) is **necessary, appropriate and proportionate**: Schedule 1 of the Personal Data (Privacy) Ordinance (Cap 486).
- ▶ Employers can collect an employee's personal data relating to their health condition provided that the collection is for a purpose:
 - ▶ **directly related to the assessment of the suitability** of the employee's continuance in employment; or
 - ▶ **directly related to the employer's administration** of medical or other benefits or compensation provided to the employee.

(Section 3.2.4 Code of Practice on Human Resource Management issued by the Privacy Commissioner for Personal Data, revised in April 2016)



How should vaccination information be processed by employers?

- ▶ When collecting personal data from employees, the employer should take **all practical steps** to **explicitly inform** the employee **on or before collecting the data** about the following:
 - ▶ purpose for which the data are to be used;
 - ▶ class of persons to whom the data may be transferred; and
 - ▶ whether it is obligatory or voluntary for the individual to supply the data unless this is obvious from the circumstances.
- ▶ The employer should also take **all practicable steps to ensure that personal data collected** about an employee 's health condition are **kept secure** given the sensitive nature of such data.
- ▶ The employer should also **implement a written data retention policy specifying a retention period of less than 7 years** in respect of employment-related data held about an employee from the date the employee ceases employment.

Can employers require employees to get vaccinated?

- ▶ Currently, there is no law requiring employees to be vaccinated.
- ▶ Employers can **encourage but not compel** employees to vaccinate.
- ▶ In certain sectors, employers may require staff to be vaccinated in light of:
 - ▶ the specific nature of the employer's business activities, e.g. operating hours, proximity of employees in the workplace, workplace environment; and
 - ▶ occupational risks posed to the employees and others at the work place.
- ▶ The Labour Department has recommended that if an employee is **not suitable to receive vaccination** for medical reasons (e.g., those who obtained a doctor's certificate indicating that vaccination is not suitable based on their health conditions), the employer should **show consideration by not forcing the employee to get vaccinated**.



Cathay Pacific to require COVID-19 vaccinations for HK airline crew by Aug. 31

June 24, 2021



Goldman bankers ordered to report vaccine status before office return

10 June

Bloomberg

JPMorgan Asks Some Hong Kong Staff to Get Vaccinated by June 30

June 25, 2021, 3:19 PM GMT+8

Coronavirus: Hong Kong Football Club warns staff they will forgo pay rises, bonuses, promotions for refusing vaccination

THE WALL STREET JOURNAL.

Morgan Stanley Requires Employees to Get Vaccinated Before Going to the Office

Updated June 23, 2021 8:19 pm ET

Response from the Equal Opportunity Commission

*“...if an employer requires all employees to be vaccinated against COVID-19, otherwise they will be dismissed, this requirement **may have a greater adverse impact on those people who are not suitable for vaccination**, such as people with serious illnesses or pregnant women. Unless the employer has reasonable grounds to support the requirement, **it may constitute indirect discrimination on the grounds of disability or pregnancy.**”*

*(Press Release: EOC Responds to Media Enquiries,
issued by the Equal Opportunity Commission on 14 April 2021)*

Response from the Equal Opportunity Commission

With regards to the differential treatments for COVID-19 vaccinated and unvaccinated employees by employers:-

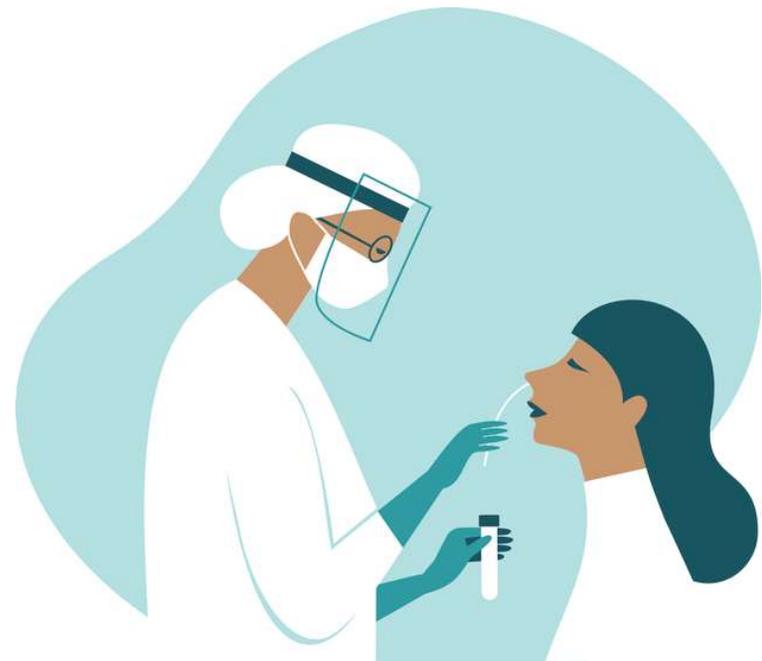
*“Since not everyone is suitable for COVID-19 vaccinations, when **imposing different treatments**, employers and service providers should take into account the policies and suggestions by the Government in monitoring the latest developments of the pandemic, consider the **needs of people who are not suitable for vaccination**, and consider **making other appropriate arrangements for them.**”*

*(Press Release: EOC Responds to Media Enquiries,
issued by the Equal Opportunity Commission on 14 April 2021)*

Can employers require employees to get tested for COVID-19?

- ▶ Probably Not
- ▶ **Unless:**
 - ▶ the Government has issued mandatory testing order
 - ▶ there is a reason to request the testing:
 - ▶ the test is still whether it is reasonable or lawful request; and
 - ▶ not unlawful to discriminate against an employee who contracted infectious disease *if* the discriminatory act is reasonably necessary to protect public health.
- ▶ E.g. during SARS, requiring employees who had been exposed to the virus to provide proof of medical clearance by the Department of Health was considered unlikely to be discriminatory: *Disability Discrimination Ordinance Code of Practice on Employment (2011)* published by the Equal Opportunities Commission.

Mandatory testing orders & quarantine orders: Issues & considerations



Mandatory testing orders & mandatory quarantine orders

- ▶ A **mandatory testing order** will be made if a single untraceable confirmed COVID-19 case is discovered in a residential building (including buildings used for both residential and commercial purposes), or detected in the sewage samples of the building, or if two or more confirmed COVID-19 cases are found at the premises.
 - ▶ If a premises is subjected to a compulsory testing order, all individuals at the premises are only permitted to leave when the test results have been obtained.
- ▶ A **mandatory quarantine order** is issued pursuant to the *Prevention and Control of Disease Regulation (Cap 599A)*, which allows health officers to issue to individuals who have confirmed diagnosis or have come in close contact with COVID-19 cases with such orders.
 - ▶ Individuals placed under a compulsory quarantine order will not be able to attend work at the workplace.
 - ▶ The quarantine period, which is specified in the quarantine order, can be up to 21 days.

Mandatory testing orders & entitlement to sick leave pay

- ▶ If **tested positive** for COVID-19, the employee may be **entitled to receive sick leave pay** if they obtain a **medical certificate**.
- ▶ If **tested negative** but had to be absent from work, then it is **unlikely** that he/she would be entitled to receive **statutory sickness allowance**, because **sickness day** is defined under the EO to mean “a day on which an employee is **absent** from his work by reason of his **being unfit therefor on account of injury or sickness**”: s.2 EO.
- ▶ Statutory sickness allowance is accumulated at the rate of 2 paid sickness days for each completed month during the first 12 months of employment, and 4 for each month of employment thereafter, up to a maximum of 120 paid days: s.33(2) EO.
- ▶ Employers are entitled to **refuse to pay statutory sickness allowance** if the employee has **not accumulated sufficient number of paid sickness days**.



Mandatory testing orders & entitlement to sick leave pay



- ▶ However, the Labour Department has recommended that under the exceptional circumstances that a sick employee has not accumulated sufficient paid sickness days to cover the sick leave, the employer should be **compassionate** and grant the employee paid sick leave, or extend unpaid sick leave.
- ▶ In practice, employers often offer more generous sick leave entitlement to employees through **contractual sickness allowance** agreed to in the employment contract or stated in company policy.

Mandatory quarantine orders & entitlement to sick leave pay

- ▶ Upon **completion of a mandatory quarantine order**,
 - ▶ the Department of Health will issue a document, which sets out the quarantine period and whether the person was infected by COVID-19, to prove that they have stayed at a quarantine centre.
 - ▶ sick leave certificates will also be issued upon request.
 - ▶ the sick leave certificate would be considered a medical certificate sufficient to enable an employee to be paid statutory sickness allowance: s.33(5AA) EO.
- ▶ Individuals who are **under quarantine** but tests **negative** for COVID-19 **may not be** entitled to **statutory sickness allowance** because of the way **sickness day** is defined under the EO.
- ▶ However, the Labour Department has recommended that employers should be **considerate** and **show understanding** to such employees' situation and make flexible arrangements.

Can an employer terminate an employee who is serving quarantine?

- ▶ The usual laws and principles apply to termination, so an employer can terminate an employee serving quarantine unless such termination is:
 - ▶ **unlawful**: it contravenes the EO or other legislation (e.g., discrimination legislation);
 - ▶ **unreasonable**: to avoid or extinguish an employee's entitlement to statutory benefits; or
 - ▶ **wrongful**: termination without notice or payment in lieu when it is not justified.
- ▶ Termination must still be carried out in accordance with the EO and the employment contract.



Hiring in the COVID era



Can employers require candidates to disclose vaccination status?

- ▶ Depends on whether the information required is **fair, necessary and non-excessive** in the circumstances
- ▶ An employer may, **no earlier than at the time of making a conditional offer** of employment, collect personal data by way of medical examination concerning the health condition of the candidate, provided that:
 - ▶ the personal data **directly relate to the inherent requirements** of the job;
 - ▶ the employment is **conditional upon** the fulfillment of the medical examination; and
 - ▶ the personal data are collected by means that are **fair** in the circumstances and are not excessive in relation to this purpose.

(Code of Practice on Human Resource Management, issued by the Privacy Commissioner for Personal Data, revised in April 2016, at 3.2.4)

Can employers only hire vaccinated candidates?

▶ Risk of (indirect) discrimination claims

*“...if an employer requires all employees to be vaccinated against COVID-19...this requirement **may have a greater adverse impact on those people who are not suitable for vaccination**, such as people with serious illnesses or pregnant women. Unless the employer has reasonable grounds to support the requirement, **it may constitute indirect discrimination on the grounds of disability or pregnancy**. (Press Release by the Equal Opportunity Commission on 14 April 2021)*

▶ The following factors will be considered in deciding whether the requirement is nevertheless justifiable: Siu Kai Yuen v Maria College [2005] 2 HKLRD 775.

- ▶ Whether the objective was legitimate?
- ▶ Whether the means used to achieve the objective are reasonable?
- ▶ Whether the conditions are justified when balanced on the principles of proportionality between the discriminatory effect upon the affected group and the reasonable needs of those applying the condition?

Q&A



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