

Guidance for Hong Kong employers during the Coronavirus crisis

The rapid spread of the coronavirus has topped the world news for more than two weeks. The World Health Organization has declared the epidemic to be a public health emergency of international concern. The aim of this Newsletter is to give an overview of the rights and obligations of Hong Kong employers with respect to their employees during a major health crisis such as the present coronavirus epidemic.

Employers must ensure the safety and health of their employees in the workplace

Under the Occupational Safety and Health Ordinance, every employer has an obligation to ensure the safety and health of all employees at work. This includes providing a safe and healthy work environment to the extent reasonably practicable. Employers who fail to do so commit an offence and expose themselves to a fine of up to HKD 200,000, and, if their failure was intentional, knowing or reckless, imprisonment for up to six months.

Since the coronavirus outbreak the Hong Kong Government has published various recommendations on dealing with the epidemic. In order to comply with their legal obligations, employers are advised to follow these recommendations as far as reasonably practicable. This includes adopting the preventive measures recommended by the Government such as allowing employees to work from home, providing staff with masks and alcohol wipes, limiting business travel, reducing meetings with external parties and adopting flexible working hours. Employers should monitor the Government's further guidance and adapt their preventive actions accordingly to the extent practicable. A general overview of the preventive measures that employers can adopt are set out in the "Health Advice on Prevention of Severe Respiratory Disease associated with a Novel Infectious Agent in Workplace (interim)" issued by the Centre for Health Protection of the Department of Health of Hong Kong.

Employers should be aware of the rights of employees in case they do not provide a safe and healthy work environment. Under the Employment Ordinance (EO) employees may terminate their employment immediately if they reasonably fear physical danger by a disease which was not contemplated by their employment contract, either expressly or by necessary implication. For example, if an employer requires employees to come to work at their workplace but the employer has not taken the necessary preventive measures against the coronavirus, its employees may form the reasonable belief that their workplace is not safe. In that case, the employees are entitled to terminate their employment contract with immediate effect.

In addition, should an employee contract the coronavirus in the course of their work they could potentially be able to claim compensation from the employer. Under the Employee Compensation Ordinance (ECO) an employee is entitled to receive compensation from the employer in respect of injuries sustained as a result of an occupational accident or in respect of certain occupational diseases specified in the ECO. Even though the coronavirus is not included in the list of specified occupational diseases, employees may still be able to claim compensation under the ECO. In order to do so they must show that they contracted the disease as a personal injury by an accident in the course of their employment. It would therefore be necessary to prove that the coronavirus was contracted by the employee, at least to some extent, through an accident. There is no clear definition of what qualifies as an accident under the ECO. For this reason employers are advised to comply at all times with all health and safety regulations and to implement such preventive measures as are reasonably practicable in order to safeguard their employees from contracting the coronavirus.

Employees also have certain duties with respect to the safety of their workplace. They must take care of the safety of all other employees at their workplace and comply with the safety measures implemented by the employer. An employee who fails to comply with these obligations commits an offence. If the employee's actions amount to wilfully disobeying a lawful and reasonable order, engaging

in misconduct, or habitually neglect of duties, the employer is entitled to dismiss the employee.

Employers should continue to pay wages, even if employees work from home

Some employers may feel that the coronavirus is a case of force majeure and that it is only fair not to pay or to partially reduce the salaries of employees who have been asked to remain at home. Nevertheless, the EO only allows employers to modify the terms of an employment contract in limited situations and the occurrence of an epidemic is not one of them. As a result, employers have a legal obligation to continue to perform the employment contracts without any variation. That also means that they must pay the usual wages and benefits, even if employees work under different conditions such as from home.

Employers must provide health benefits to infected employees

Under the EO, an employee is entitled to sickness allowance provided the sick leave is taken for at least four consecutive days, is supported by a medical certificate and the employee has accumulated a sufficient number of paid sickness days. Employee accumulate paid sickness days only after they have been employed under a contract for at least four weeks, with at least 18 hours worked in each week. The sickness allowance per day is lower than the regular daily salary of the employee. It is equal to four-fifths of the average daily wages earned by the employee in the 12-month period preceding the first sickness day.

With effect from 8 February 2020, the Hong Kong Government has put in place new rules imposing a mandatory quarantine on persons returning to Hong Kong from Mainland China and on those who have visited Mainland China in the 14 days prior to their entry into Hong Kong. When any employee is placed in quarantine or

under medical surveillance, either because he is suspected of being infected by the coronavirus or following his return from Mainland China, he will be issued with a medical certificate. Such an employee will be entitled to take sick leave. If the period of sick leave granted under the medical certificate is four days or more and if the employee has accumulated sufficient paid sickness days, the employer must also pay the sickness allowance to the employee.

Employers are not permitted to terminate any employees who are on paid sick leave, except if the employee is guilty of serious misconduct.

Employers should not discriminate against employees with coronavirus

The Disability Discrimination Ordinance (DDO) prohibits discrimination against a person with a disability. For the purposes of the DDO, a person who has contracted the coronavirus is considered to be a person with a disability.

An employer discriminates against an employee with a disability if he treats him or her less favourably than other employees by reason of that disability. Thus, in dealing with a person who has contracted the coronavirus, an employer must strike a fair balance between maintaining the safety of its other employees and avoiding discriminatory action. Thus, requiring an employee with signs of an infection or who has recently returned from Mainland China to stay home is not a discriminatory measure since it aims to safeguard the safety of all other employees and prevent the spread of the virus. Conversely, it would be discriminatory for an employer to dismiss an employee because he or she is potentially more susceptible to the coronavirus because of some other medical condition. Similarly, dismissing an employee because he is infected is a discriminatory measure.



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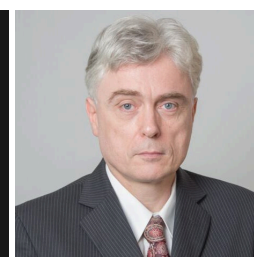
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