

Client Alert

January 2020

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Employer obligations and precautions to take during the coronavirus outbreak

The World Health Organization has now declared the coronavirus outbreak a Public Health Emergency of International Concern. As a result, employers are taking stock of their duties and considering how this might affect their businesses. We set out below the responses to some frequently asked questions:

What are an employer's general obligations to its employees in relation to providing a safe working environment?

Generally speaking, employers have a common law duty to take reasonable care of its employees' safety in all the circumstances and not to expose them to any unnecessary risk. An employer is also under a duty to take reasonable care to provide and maintain a reasonably safe place of work for its employees.

Under the Occupational Safety and Health Ordinance, an employer must ensure the safety and health at work of its employees so far as it is reasonably practicable, including maintaining a workplace in a condition that is, so far as reasonably practicable, safe and without risks to health. Failure to comply with this obligation is a criminal offence and an employer may be liable on conviction to a fine of up to HKD 200,000. If that failure is intentional, knowing or reckless, the employer may also be liable to imprisonment for up to six months.

In late January, due to the coronavirus outbreak, the Hong Kong government announced that except for staff of the departments providing emergency services and essential public services, all other employees of the Hong Kong government would work from home until early February. The Hong Kong government also asked the private sector to adopt the same approach as far as practicable. Although this is not mandatory in the private sector, many employers in the private sector have since adopted the same approach. Employers should monitor announcements and directions made by the Hong Kong government. Such directions are likely to be reasonably practicable measures employers should implement to ensure the health and safety of employees.

Can an employer require its employees to have their temperature tested?

It is generally lawful for an employer to ask its employees to undergo a temperature testing on a voluntary basis if there is a reasonable basis for doing so. The request would likely be reasonable to detect any case or symptoms of the coronavirus (such as fever) to prevent the spreading of the virus and to ensure the health and safety of employees. The employer should bear the costs of the temperature testing, and the testing should be limited to testing whether the employee has the symptoms of coronavirus.

Medical examinations/ temperature testing raise issues of data privacy. Accordingly, employers should be mindful of the data protection principles in the Personal Data (Privacy) Ordinance (PDPO), including Data Protection





Principle 1 (“**DPP 1**”) relating to the purpose and manner of collection of personal data. The primary risk is that requiring employees to be tested may be considered an unfair or unlawful collection of personal data in breach of the PDPO.

Under the PDPO, personal data must be collected by means which are lawful and fair in the circumstances of the case. Since temperature testing involves the collection of employees' personal data, employers should comply with DPP1 by explicitly informing the employees, among other things, the purpose for which the data is to be used and the classes of person to whom the data may be transferred.

Legal risks may arise for employers who subject any employees who refuse to undergo medical / temperature testing to disciplinary action, but an employer may reasonably deny access to the office for employees who do not comply with such requirement.

Can an employer require an employee to stay out of the office?

The general position is that employees have an implied right to work and employers therefore cannot suspend employees (even with pay) in the absence of a contractual or statutory right to do so. In our view, the legal risks associated with requiring employees to stay home (or work from home) is low in these circumstances so long as the suspension / work from home duration is reasonable having regard to the safety and health of the employees. This is particularly so given the Hong Kong government's announcement as outlined above.

In order to mitigate any claims for constructive dismissal and/or disability discrimination, employees who are required by the employer to remain out of the office as a precaution due to the coronavirus outbreak should continue to receive their normal pay and benefits. Employers may consider other interim measures to the extent reasonably practicable, such as remote working or working from home.

What are an employer's obligations if an employee contracts the coronavirus?

An employee who contracts the coronavirus and is placed in quarantine or isolation should be entitled to sickness allowance in accordance with the Employment Ordinance.

As mentioned above, as the employer has a common law duty to take reasonable care of its employees' safety in all the circumstances and not to expose them to any unnecessary risk, it is prudent for the employer to prevent the employee who contracts the coronavirus from entering the workplace so as to prevent the spreading of the coronavirus to other employees.

If the employer provides private medical or disability insurance, the benefits should be checked with the specific provider. Note that employees who receive statutory sickness allowance are protected from termination of their employment, unless the termination is by way of summary dismissal. Any such termination may also amount to disability discrimination contrary to the Disability Discrimination Ordinance depending on the actual circumstances.



What are the potential consequences if an employer does not comply with its obligations?

An employer that breaches its common law duty of care to an employee may be liable to the employee under the law of contract or tort. If it is found that an employee has contracted coronavirus in the course of his/her employment, the employee may also be able to receive compensation under the Employees' Compensation Ordinance. Additional penalties may be imposed under the Prevention and Control of Disease Ordinance. For example, there are criminal penalties if a person obstructs a health officer, police officer or other person appointed under the Prevention and Control of Disease Ordinance in the exercise of their powers under the Ordinance. As mentioned above, an employer may also be criminally liable for failing to comply with the obligation under the Occupational Safety and Health Ordinance.

What should employers be doing now?

Employers are advised to ensure compliance with current legal obligations by:

- undertaking required measures to prevent and control the spread of the virus, and immediately report cases of the virus to health authorities if necessary;
- providing a safe working environment to help protect employees from communicable diseases in the workplace (for example, disseminating face masks or hand sanitizer); and
- enquiring whether employees have been in contact with any persons contracted with the coronavirus and whether they have visited China (particularly, Wuhan / Hubei); and
- complying with health advice and instructions issued by the Hong Kong government or World Health Organization.

In addition, businesses can prepare a contingency plan to:

- assess how the business could be disrupted by coronavirus;
- evaluate existing contracts with suppliers, customers, and other parties and consider force majeure provisions;
- consider temporary closure of office, work from home policies and/or possible leave for employees; and
- institute contingency travel plans.

Because of the unpredictable nature of any contagious disease, companies must maintain flexibility throughout an emergency. Understanding the legal obligations in the jurisdictions where a company operates is imperative to respond to such global emergencies. This means proactively taking appropriate action within legal boundaries to keep the workforce healthy and productive, and to sustain key operations so that recovery time is minimal. To the extent possible, the employer should publicize its efforts to its workforce and its business customers and contributors. Mutual support between businesses, and between employers and their workforces, is essential in minimizing disruption and maximizing the chance of a full and complete recovery.

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