

Insights

COVID-19 AND EMPLOYER OBLIGATIONS IN HONG KONG SAR

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SUMMARY

COVID-19 outbreak has the world on high alert. As governments ramp up efforts to contain the spread of the virus, employers also need to be aware of their obligations and take necessary precautionary measures at the workplace to protect the safety and health of their employees. In this article, we discuss some frequently asked questions.

1. What are employers' key legal obligations in respect of the health and safety of their employees?

Under common law and the Occupational Safety and Health Ordinance (Cap. 509) (“**OSHO**”), employers have a duty to take reasonable care of all employees' safety and health and to provide and maintain a safe place of work in all circumstances. Failure to do so is a criminal offence under the OSHO and the employer will be liable on conviction to a fine of up to HKD200,000. Failure which is intentional, knowing or reckless attracts imprisonment of up to six months.

Employers also have legal obligations arising from the Employment Ordinance (Cap. 57) (“**EO**”), Employees' Compensation Ordinance (Cap. 282) (“**ECO**”) and Disability Discrimination Ordinance (Cap. 487) (“**DDO**”). The Personal Data (Privacy) Ordinance (Cap. 486) (“**PDPO**”) will also be relevant.

The Department of Health has also issued various guidelines for businesses and workplace. Compliance with these guidelines will demonstrate that employers have discharged their duty of care.

2. Do employers need to have in place guidelines or workplace plans to deal with COVID-19?

Although there is no legal obligation for an employer to have specific workplace guidelines in response to COVID-19, many private sector employers have adopted the Hong Kong government's

approach to implement work from home policies as far as practicable. Employers are advised to also take proactive steps to provide face masks and alcohol wipes to employees who are going into the work place where possible.

Since employers have a duty to ensure the health and safety of its employees as is reasonably practicable, it is recommended that employers prepare a business contingency plan to assess and evaluate the impact of COVID-19 on its business, consider alternatives such as working from home arrangements and implement precautionary measures to provide a safe working environment.

As part of the workplace plan, employers should review any relevant internal policies including annual leave, flexible work and overseas travel and highlight them to employees. For example, all non-essential travel abroad should be avoided. Existing medical and insurance policies, such as business interruption insurance, should also be revisited. Employers may liaise with their landlord and building management to arrange for more frequent cleaning of supplies and facilities. Counselling services can also be offered to employees during this difficult time.

Employers should ensure that its business plan is consistent with any obligations imposed by the Hong Kong government such as the mandatory self-quarantine periods applicable to those who have recently returned from various overseas countries. Employers are encouraged to continuously monitor any notices issued by the Hong Kong government as the situation develops and provide regular updates to all employees.

3. Are employees who are served a quarantine order entitled to salary and other employment-related entitlements?

Yes, employees who are serving quarantine orders are entitled to salary and benefits in accordance with their employment contract. Employees who are served a quarantine order will be issued a medical certificate with the statement “under medical surveillance”. Such employees are entitled to paid sick leave in accordance with the employment contract. Employees are also entitled to statutory sickness allowance under the EO if the period of sick leave granted under their medical certificate is four days or more and if the employee has accumulated sufficient paid sickness days. For those who have used up all paid sick leave, employers are encouraged to exercise flexibility and consider extending unpaid sick leave to the employee. Employers who refuse to pay wages may be at risk of contravening the DDO.

4. Are employees who are infected with COVID-19 entitled to salary and other employment-related entitlements?

An employee who contracts COVID-19 and is quarantined is entitled to sickness allowance under the EO. Employees who receive statutory sickness allowance are protected against termination. If medical insurance is provided to employees, the benefits should also be checked with the insurance provider.

The ECO requires an employer to pay compensation if the employee's contraction is considered to amount to personal injury by accident arising out of and in the course of employment. Employees who would like to claim compensation will need to show that it was an "accident" which is distinct from but is causally linked to the "injury". Medical records and other related evidence will be required to determine whether or not the employee is entitled to compensation.

5. What should employers with employees from Mainland China take note of?

Employers may ask, but not compel, employees to disclose details of their recent travel history. It is advisable to include with any request for disclosure of travel history a statement of purposes for the collection of information and to whom such information would be further disclosed to (e.g. it is for an assessment of risks of an outbreak and such information may be disclosed to government departments or insurers). Internal records should also be kept to keep track of employee's movements and travel history insofar all data collection is done so in line with the PDPO.

From midnight 8 February 2020 onwards, all persons who enter Hong Kong SAR from Mainland China are required to be quarantined for 14 days. Employers should consider implementing flexible work from home policies for those who have recently visited Mainland China or have come into close contact with those who have recently been to Mainland China.

6. Are there any allowances or reliefs from the government that employers can benefit from to deal with shortage of employees affected by quarantine orders?

While there is no specific relief for employers to deal with shortage of employees affected by quarantine orders, the Hong Kong government has recently proposed an "Anti-epidemic Fund" in HK\$30 billion (the "Fund") in accordance with Financial Secretary Incorporation Ordinance (Cap. 1015), and the Fund has just been approved by the Finance Committee of the Legislative Council on 21 February 2020. The Fund is created for the purpose of providing relief to enterprises and members of the public affected by the outbreak with further details to be announced on 26 February 2020. Immediate measures for implementation under the government's proposal include specific subsidy schemes targeting retail and food-related businesses.

7. Can employers screen employees before allowing them to enter the workplace?

It is generally lawful for employers to request employees to test their temperature before entering the workplace as long as this is done on a voluntary basis. Precautionary measures can be taken to demonstrate that the employer's request is reasonable by issuing written statements to employees before any screening exercises are carried out. Any testing should be limited to checking whether an employee has any symptoms of COVID-19. Employers are reminded to be mindful of the PDPO in relation to any data collected for internal purposes.

Employees are also encouraged to self-monitor their own health condition and report any symptoms to employers in light of the current situation.

8. Can employers order employees to leave the office or stay home if there is an outbreak?

Generally, it is permissible for employers to require employees to leave the office or work from home if there are reasonable concerns for doing so, such as ensuring the employee's own safety and maintaining a safe working environment for other employees. Employees should continue to receive their normal pay and benefits. In order to circumvent any possible claims of disability discrimination under the DDO, employers should also be careful when differentiating treatments against different groups of employees.

If employees are ordered to leave the office or stay home, employers should permit flexible work arrangements, for example flexible hours and allowing employees to apply for annual leave or unpaid leave.

9. Can employers demand an employee to visit the doctor?

Provided that the employer has reasonable grounds to do so, such as the employee is showing symptoms of COVID-19, the employer may demand an employee to visit the doctor. Otherwise, an employer cannot make this demand unless the employment contract expressly provides a right for the employer to do so.

However, in view of the current situation, employees are urged to be accommodating and visit the doctor on their own accord if they are showing any symptoms of COVID-19 or when requested by their employer.

10. Can an employee refuse to show up to work for fear of contracting COVID-19?

Employees may only lawfully refuse to enter the workplace if there are justifiable concerns for their health and safety. Short of that, employees are required to comply with their employer's reasonable instructions and failure to do so may amount to a breach of their employment contract. If employers have taken reasonable steps to provide a safe working environment, employers can demand an employee to attend the workplace.

If employees refuse to do so, they may consider working from home if permitted by their employer or request annual leave. Given the current climate, both employers and employees are encouraged to exercise flexibility and compassion to explore mutually agreed arrangements.

RELATED PRACTICE AREAS

- Employment & Labor
- Health & Safety

MEET THE TEAM



Marilyn M. Fish

Atlanta

marilyn.fish@bclplaw.com

+1 404 572 6632

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