

Operating in the New Normal – Our 10-Minute Read for Hong Kong Employment Updates

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Hong Kong's battle against COVID continues and employers are facing challenges presented by the unclearly defined laws for the unprecedented situations – e.g. whether employers may dismiss employees on the ground of COVID infection? Whether employees are entitled to sick leave and sick leave allowance if they are subject to compulsory quarantine, isolation or testing? Whether employers may dismiss unvaccinated employees?

To address the issues, the government had in February 2022 proposed amendments to the Employment Ordinance. The Employment (Amendment) Bill 2022 had been passed by the Legislative Council on 9 June 2022 and is due to come into force. Legal proceedings issued by the Equal Opportunities Commission in April and May 2022 may also be taken as references on how the relevant laws will be enforced in relation to COVID-related employment discrimination cases. This article gives you a quick overview on these updates and answers employer's most frequently asked questions at this challenging time.

IN THE CONTEXT OF COVID-19, WHAT CONSTITUTES DISABILITY DISCRIMINATION?

The Disability Discrimination Ordinance (Cap. 487) (the "DDO") protects persons with disability against discrimination, harassment and vilification. COVID infection may be regarded as "disability" under the DDO. Indeed, the Equal Opportunities Commission (the "ECO") has recently brought proceedings against disability discrimination based on COVID infection:-

Dismissal on grounds of COVID infection – On 21 April 2022, the ECO issued legal proceedings on behalf of a person who was given a job offer, but whose offer was withdrawn after being diagnosed with COVID, despite his treating doctor having confirmed his recovery and informing the employer that he was ready to report duty.

Refusal or deliberate omission to offer employment position – On 23 May 2022, the ECO issued legal proceedings on behalf of an employee who received a WhatsApp message that he was dismissed during his hospitalization due to COVID infection.

WHEN IS AN EMPLOYEE ENTITLED TO SICK LEAVE?

Current Law

Under the Employment Ordinance (Cap. 57) (the "EO"), a sickness day is a day on which an employee is absent from work due his unfitness on account of injury or sickness, and an employee under a continuous contract is entitled to sick leave and sickness allowance if (1) the sick leave is supported by an appropriate medical certificate; (2) the sick leave taken is not less than four consecutive days and (3) the employee has accumulated sufficient number of paid sickness days.

The Amendments

The definition of "sickness day" is broadened to the effect that if an employee's absence from work is due to compliance with requirements under the Prevention and Control of Disease Ordinance (Cap. 599), he/she will be deemed to be on sick leave and employer shall pay sickness allowances in accordance with the EO. Dismissal of any employee by reason of him/her being subject to compulsory quarantine, isolation, testing or otherwise compliance with the Prevention and Control of Disease Ordinance constitutes unreasonable dismissal.

CAN EMPLOYERS DISMISS UNVACCINATED EMPLOYEES?

Current Law

There is no hard and fast rule providing for employer's right to dismiss unvaccinated employees. Generally, employers are entitled to terminate an employment by giving notice or payment in lieu. Valid reasons for dismissal include (1) conduct of the employee, (2) capability or qualification to perform work, (3) redundancy or other genuine requirements of

the business; (4) statutory requirements and (5) other substantial reasons. Further, employees have to obey lawful and reasonable orders from employers, and failure to do so is a ground for summary dismissal, as a consequence of which the employees will not be entitled to any long service payment or severance payment.

Whether the employee's refusal to get vaccinated will entitle the employer to dismiss him or her will depend on the facts and circumstances of the case, such as the employee's suitability for vaccination, job nature and work environment of the employee, and the impact on the employer's business if the employee refuses to get vaccinated. For instance, employers of client-facing restaurants and hotels may more readily justify their dismissal decisions based on the employees' refusal to get vaccinated.

The Amendments

One of the valid reasons for dismissal include the capability or qualifications of the employee for performing work of the kind which he/she is employed to do, and employee's failure to comply with a legitimate vaccination request is now made a valid reason for dismissal under the Employment (Amendment) Bill 2022. The amendment provides that an employee who fails to comply with a "legitimate vaccination request" of the employer is regarded as being incapable of performing work of the kind that the employee was employed to do.

Legitimate Vaccination Request – the requirements

A legitimate vaccination request is one that:-

1. Is in writing;
2. Requests the employee to produce to the employer, within 56 days of the request

- (a) Where the place of work is a public transport carrier or any premises subject to Vaccine Pass requirement – a record, document or information showing that the employee has complied with the vaccine pass requirements (except where the employee is exempted therefrom);
 - (b) Where there are any other requirements or recommendations by the government that persons performing a particular type of work are to be or should be vaccinated (other than requirements under the Vaccine Pass) – a record, document or information showing that the employee has complied with such requirement or recommendation (except where the employee is exempted from the Vaccine Pass requirement);
 - (c) Where there are no requirements within (a) or (b) above, a record, document or information showing that the employee has received at least one dose of vaccine, except where the employee is (i) pregnant, (ii) breastfeeding or (iii) has been issued an exemption certificate as being unsuitable for vaccination within 56 days of request; or
 - (d) Has proof of discharge or recovery issued by an authorized person certifying that the employee has contracted COVID within 6 months before the request;
- 3. When making the request, the employer reasonably believes that having regard to the nature of the employee's work and the related operational requirements, if the employee contracts COVID, persons whom the employee may come into face-to-face contact with will be exposed to risk of infection; and
 - 4. The request is made to all other employees of the employer who performs the same or similar work

The amendment therefore provides more clarity as to when an employer may dismiss an employee for his/her refusal to get vaccinated.

A PRACTICAL NOTE

Employers are advised to handle dismissal decisions with sensitivity and prudence, converse with employees and take due account of their individual circumstances. Even if legal proceedings are not eventually brought or the dismissal is ultimately ruled lawful, a hastily made decision may translate into unnecessary costs and expenses, and reputational damage in the worst case. Employers should also keep an eye on developments and adjust their COVID policies from time to time.