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Employment Spotlight: Compulsory Testing and Lockdowns - What do Employers Need to Know?

The Hong Kong Government has lowered the threshold for compulsory COVID-19 testing to identify and curb the transmission chain of COVID-19 by implementing new measures under the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (Cap. 599J) ("Regulation"). In this article, we consider the implications for employers and how to minimise the impact to their businesses.

What is the new compulsory testing threshold?

As announced on 1 February 2021, a compulsory testing notice will be applicable:

- In the case of residential building: 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
- In the case of a workplace: if two or more confirmed COVID-19 cases are found in a workplace.

What happens if a residential building or a workplace is subject to a compulsory testing notice?

Upon being included in a compulsory testing notice, all the residents / persons in the workplace (as the case may be) are subject to compulsory COVID-19 testing. Furthermore, all persons who have been present at the relevant premises for more than 2 hours in the period specified by the Government (such as visitors, part time employees etc) are also subject to the compulsory testing.

Once the Government delineates a restricted area and makes a "restriction-testing declaration" (popularly known as a "lockdown"), all the individuals are required to stay within the restricted area, follow the Government's arrangements for undergoing compulsory testing, and are only permitted to leave once the

GALL

appropriate test results are obtained. During such lockdowns of workplaces, workplace operations must be suspended and the relevant residential building and/or workplace must be disinfected.

Are there any penalties for not following the directions of the Government?

Yes. A person who fails to comply with a compulsory testing notice is liable to a fixed penalty of HK\$5,000. In addition, the relevant person will also be subject to a compulsory testing order (“Order”) for undergoing testing within a specified time frame. Failure to comply with such an Order is an offence liable to a fine at level 4 (HK\$25,000) and imprisonment for six months.

Is there any obligation to provide information to the Government?

The Regulation empowers Government officials to seek information and assistance from any individual when necessary. Accordingly, there may be circumstances where either employers or specific employees may be subject to such requests. A failure to comply with such a request constitutes an offence and is subject to a fine at level 3 (HK\$10,000).

Key Takeaways for Employers

The Government appears to be ramping up compulsory testing in its latest initiative to curb the pandemic before moving towards a gradual “re-opening”. However, the compulsory testing and, in particular, the broad right of the government to designate specific areas in so called “ambush lockdowns” presents a risk of significant disruption and uncertainty for employers. Work sites may be sealed off and operations suspended if the work premises are affected, and employees may be unable to come to work or perform their functions if subject to compulsory testing where they live.

Against this background, employers should remain alert to this evolving and fluid situation, and consider the following actions in order to avoid or minimise any such disruption:

- **Remain alert and seek frequent updates:** This is a fast-moving and changing situation. Lockdowns may be announced without any warning. It is therefore essential for employers to remain up to date with Government measures (including press releases) and be aware of compulsory testing notices which may affect them. In particular, employers should communicate with building management contacts regarding detection and reporting of potential cases. This will allow more time to organise or adapt operations and employee movements, to notify customers and clients (if necessary), to implement work from home arrangements or other alternative working protocols, and to communicate generally with employee and other stakeholders.
- **Review business continuity and alternative working protocols:** Employers should continue to review, update, and revise internal policies and arrangements to minimise business disruption to take account of the latest requirements, circumstances and risks which emerge. This will vary from company to company, but it is worth considering a return to increased work-from-home and other flexible arrangements to reduce travel and checking or re-organising work teams and rosters to ensure that there is adequate coverage of key functions at any given

GALL

time. On a practical level, employers should check that they have adequate supplies of essential items such as water and basic snacks in case employees are confined in the work premises for any significant period during a lockdown and compulsory testing process.

- **Communication with employees:** Employers should maintain regular and clear communication with employees to react to any new situation and address any concerns relating to COVID-19. The employer's HR team is likely to be at the forefront of this. As a starting point, this means ensuring that employees' contact details and addresses are up to date. This will help employers in detecting employees who may be affected by lockdowns or at risk of infection. Employees should be reminded of the importance of communication, both for themselves and the business, and that it is critical they promptly inform the employer in the event that they are subject to a compulsory testing notice or other related situation. This will also allow employers to provide support and assistance to employees where relevant, such as if they are prevented from coming to work or confined to their homes.

- **Maintaining records:** Employers could also encourage employees to use the "LeaveHomeSafe" app for ease of tracking. It may be useful to put in place registers or other digitised systems for recording entry and exit at the workplace. This will help to identify relevant employees who are or have been in the workplace during the relevant period and must be tested under a compulsory testing notice.

- **Other issues:** Other employment related issues may also arise in the context of lockdowns or compulsory testing. Employers should be prepared for questions from employees regarding whether the situation affects their obligation to come to work, contractual entitlements or annual leave. Employers may also consider whether they can or should take disciplinary action (up to and including termination) if an employee breaches and is penalised under the Regulation. In such cases, it is advisable for employers to seek legal advice prior to making unilateral decisions.

Contacts



Nick Dealy
Partner
+852 3405 7656
ndealy@gallhk.com



Matthew Durham
Registered Foreign Lawyer
+852 3405 7688
matthewdurham@gallhk.com



Kritika Sethia
Legal Analyst
+852 3405 7654
kritikasethia@gallhk.com