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## **Employment Spotlight: Can an Employer Require its Employees to Test for Covid-19 in Hong Kong?**

The rise in Covid-19 cases has left many employers in Hong Kong contemplating whether they can lawfully require their employees to undergo testing for Covid-19. In times like these, employers find themselves trying to balance their business interests and continuity on one hand, with employees' concerns and sensitivities on the other. In this article we discuss factors that employers should consider when requesting or directing employees to undergo Covid-19 testing.

### **Do employers have a right to ask their employees to get tested for Covid-19?**

Unless an employee is subject to compulsory testing, such as under a government ambush lockdown, or is employed in a sector which is subject to compulsory testing such as catering services, there is no clear and confirmed basis for employers to lawfully require employees to undergo Covid-19 testing.

In Hong Kong, employers do not have a statutory right to mandate their employees to undergo any form of medical tests. Such a right may be derived from contractual terms, although, it is not common for contracts to have provisions that entitle an employer to require employees to undergo medical testing (including Covid-19 testing).

Equally, however, there are clear health and safety concerns. Given the contagious nature of Covid and the health risks it poses, employers could seek to lawfully direct or reasonably request employees to undergo testing in compliance with the obligations under the Occupational Safety and Health Ordinance (Cap 509) ("OSHO"). Employers have a common law duty, as well as a statutory duty under the OSHO, to take measures as far as reasonably practicable to ensure safety and health of all employees at work. Employees are also subject to a corresponding duty under the OSHO to co-operate with the employer and take reasonably practicable measures for taking care of the safety and health of other persons at the workplace.

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Ultimately, however, employees could seek to challenge the validity of this position. While many employees may feel that Covid-19 testing is a worthwhile precaution, there will be others with sensitivities. For example, individuals (and especially single parents) may be concerned that if they test positive, they will be separated from their families. For this reason, at this stage, many employers are taking the approach of requesting employees to take Covid-19 tests, offering incentives to do so (such as subsidising private tests), and emphasising the benefits of testing for the workplace as a whole.

## **Can employers ask the employees to declare if they have been in contact with anyone who has tested positive for Covid-19?**

With a view to providing a safe work environment to all employees and in consonance with the employee's corresponding duties, it will be reasonable for employers to direct employees to declare if they know they have been in contact with anyone who has tested positive for Covid-19 or if they have been at places where Covid-19 cases have been detected. Human Resources personnel and persons in managerial positions should maintain regular communication with employees to encourage transparency.

## **What can employers do if an employee refuses to undergo a regular Covid-19 test?**

If an employee refuses to comply with a lawful and reasonable direction (unlike a mere request) from the employer, it may entitle the employer to take disciplinary action against the employee. In this regard, employers should review and follow their disciplinary policies. It is recommended that any disciplinary action should be preceded by an investigation or thorough examination of the facts, to minimise the risk of arbitrary actions. Employers should weigh the reasons for refusal against the proposed sanctions, as well as consider other measures that potentially could be used, such as requiring the employee to take annual leave, unpaid leave, or requiring them to work from home.

## **Can employers direct their employees to work from home or from an alternative location?**

If employees refuse to undergo Covid-19 testing, subject to contractual terms, requiring the employees to work from home or from an alternative office may be another alternative an employer could consider. Prior to making any such direction, it is advisable for employers to review the terms of the employment contract and the applicable policies to see whether the employer can unilaterally make such directions. While such precautions seem eminently sensible and reasonable, there remains a risk that without applicable contractual terms, employees potentially could consider themselves as constructively dismissed.

## **Can employers ask their employees to provide Covid-19 test reports?**

Employers do not have a statutory right per se to ask for Covid-19 test reports. However, in compliance with the duties under the OSHO, it may be reasonable for employers to require employees to produce Covid-19 test reports. Should the employer seek to collect the Covid-19 test reports, it must be done in strict compliance with the Personal Data (Privacy) Ordinance ("PDPO"). Care should be taken to obtain only such information that is necessary and appropriate for the purpose of controlling the spread of diseases and providing a safe working environment. Any data or test report or other information should be collected, processed, and stored in a transparent manner. Care should be taken to store information only so long as it is absolutely necessary and not

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Employers are responsible to ensure that no employee is discriminated against on the basis of the medical reports.

## Could employers be required to pay for the COVID-19 testing of employees?

Generally, there is an implied duty upon employers to indemnify employees in relation to expenses reasonably incurred by their employees in carrying out their duties. Accordingly, if an employer directs its employees to undergo Covid-19 testing, they may find themselves liable to reimburse the expenses. Accordingly, employers may decide to make requests or directions for employees to undergo specific types of testing. Currently, a deep throat saliva test is available free of charge, but the test result is notified within 1 to 3 days of the test. Alternatively, community centre testing is available at a cost to the general public unless the individual is subject to compulsory testing by the government. Employers may also choose to arrange for the employees to undertake testing at private clinics that are recognised by the Department of Health.

## Key Takeaways

Covid-19 testing of employees seems to be a sensible measure, but while the aim is to benefit all personnel, it is likely that some staff will not be comfortable with this. Given the sensitivity of the situation, and without further government direction, it is recommended that employers ask and seek to persuade employees to have Covid-19 tests, as opposed to insisting. Employers should remain open to communication to get employees on board to maintain safety and health in the workplace.

As part of this process, employers should consider reviewing the applicable employment contracts and policies and seeking legal advice prior to making any requests or directions to employees to undergo Covid-19 testing.

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