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**March 2021**

## **Employment Spotlight: Hong Kong's COVID-19 Vaccination Programme - Employer Considerations**

The Hong Kong government has commenced implementation of a COVID-19 vaccination programme intended to cover all Hong Kong residents across the territory. Vaccinations are offered free of charge with the stated aim of safeguarding public health and helping to allow further easing of restrictions and a gradual return to normal life and activities. At this stage, the rollout is prioritising vaccination of individuals within vulnerable and high-risk groups, such as the elderly and healthcare workers, but should extend to all groups during the course of this year.

The vaccination programme raises some important questions for employers in terms of protecting their personnel, workplaces and businesses. In particular, can an employer require an employee to have a vaccination?

For many people the rollout of vaccinations is seen as a breakthrough in the fight against the virus and a big step towards a confident return to normality, with demand for jobs outweighing immediately available stocks of the vaccine. Equally, however, some people say they are unwilling to receive the vaccine with one report suggesting that up to 40% of Hong Kong residents could refuse this opportunity. The reasons for this are diverse, including religious beliefs, concerns about how the vaccines have been made and tested, and fear of side effects or adverse impact on other medication. A recent report that a chronically ill woman who had received the Sinovac vaccine died after suffering a stroke may fuel such concerns, even though it remains unclear whether the fatality was in any way related to the COVID-19 vaccine.

### **Can you require an employee to be vaccinated?**

There is no clear and absolute right for an employer to insist that an employee is vaccinated. While employees are obliged to follow the lawful and reasonable direction of their employer, it is not clear whether such a direction would be deemed reasonable. As noted above, employees could provide a number of reasons against the vaccination programme and this is a sensitive area. This potentially could include an argument that forcing them to be vaccinated is a breach of their human right of self-determination.

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Similarly, although employers have a duty at Common Law and under the Occupational Safety and Health Ordinance to provide, as far as reasonably practicable, a safe working environment for employees, there is no guarantee that enforcing COVID vaccinations would be deemed reasonable for this purpose. This is perhaps more likely in the context of hospital and health workers, or for employees in other businesses requiring frequent and close proximity with others, but it remains highly sensitive and potentially contentious.

It is worth noting that in the UK the National Health Service (NHS) is focusing its efforts on communicating with staff members who refuse to have the vaccine. The aim is to understand the reason why individuals do not want to have the vaccine, to communicate clearly the benefits of doing so and to dispel any misconceptions. The emphasis is on persuasion. A video has even been released of Queen Elizabeth II in discussion with health officials, describing the vaccination procedure as painless and urging others to have the vaccine.

Our recommendation therefore is that while employers can encourage employees to get vaccinated and advocate the benefits of doing so for the workforce as a whole, they should also be sensitive to individual concerns and ultimately not seek to force employees to do so.

## **Risk of discrimination**

The protections under Hong Kong's anti-discrimination legislation include protection against discrimination on the basis of pregnancy and disability. The definition of "disability" is very broad, including medical conditions and the presence in the body of organisms causing, or capable of causing, illness or disease. Accordingly, employers should be cautious as to how they treat employees who refuse to be vaccinated, as well as potential hires who have not been vaccinated.

## **Data privacy considerations**

Employers will also need to take data privacy into account and comply with the requirements of the Personal Data (Privacy) Ordinance if they intend to track which employees have (and have not) been vaccinated or otherwise collect, store or process information relating to the vaccination of employees. This would include informing employees as to whether they are required to provide information and ensuring that any information provided is held securely and kept up-to-date.

## **Final thoughts**

Companies will no doubt be eager to benefit from the vaccination programme to protect their businesses and keep their personnel and workplaces safe. However, employers should consider carefully the specific legal issues and the sensitivities and concerns of individuals which may arise when deciding their own strategies in this regard. In addition, we recommend keeping a close eye on government guidance and updates as the programme is rolled out.

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