

Vaccines and the workplace

What employers need to know

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The Vaccination Programme

The Hong Kong government's vaccination programme seeks to safeguard public health and facilitate a gradual relaxing of restrictions on public activities by providing COVID vaccinations free of charge to Hong Kong residents who are aged 16 and over ("**Vaccination Programme**"). Two vaccines are available: Pfizer BioNTech and Sinovac. The government website (www.coronavirus.gov.hk) provides a wide variety of information regarding the Vaccination Programme.

Despite the government's slogan "protect yourself and others, get vaccinated", the take-up rate has been low and many people seem reluctant to get vaccinated. The percentage of the population vaccinated to date is far from the 70% threshold which the government is aiming for. This presents a dilemma for employers seeking to provide a safe working environment.

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Can employers require mandatory vaccination?

While there is nothing in the law which prevents an employer from requiring employees to get vaccinated, this may potentially present a variety of legal and practical difficulties.

As far as reasonably practicable, employers are required to ensure the safety and health of all employees pursuant to Section 6 of the Occupational Safety and Health Ordinance (Cap. 509) ("OSHO") in addition to a common law duty to take reasonable care. Employees have a corresponding statutory duty to co-operate, alongside a common law duty to obey lawful and reasonable orders of their employer.

The key question is whether mandating vaccination would amount to a 'reasonable' measure for ensuring safety and health at the workplace. This will depend on factors such as the efficacy and safety of the vaccines, the nature of the employee's role, the health and safety risks present at a specific time (such as the number of cases and deaths), and the employee's reasons for refusing vaccination, as well as whether there are available alternatives to vaccination. Mandatory vaccination may be a reasonable measure, for example, in high-risk sectors such as food and beverage, and healthcare, where there is significant interaction with the public and specific government requirements on the number of vaccinated staff apply. This would be decided on a case-by-case basis, with no certainty, and employers will need to exclude any such requirement for employees for whom the vaccine is not recommended, such as those with existing medical conditions.

Employers should also bear in the mind the possible legal consequence under the Employees' Compensation Ordinance (Cap. 282), which may entitle an employee to compensation for "personal injury by accident arising out of and in the course of the employment" if they suffer illness or other effects through mandatory vaccination.

Requiring employees to be vaccinated may also leave employers open to claims under the Disability Discrimination Ordinance (Cap. 487). The definition of "disability" is broad and includes medical conditions and the presence in the body of organisms causing, or capable of causing, illness or disease.



This is a sensitive area and there are clear legal and reputational risks for employers in making vaccination a mandatory condition of employment. As a result, there has instead been significant focus on encouraging employees to get vaccinated.

Are there ways for employers to encourage employees to get vaccinated?

Many employers have been seeking to encourage and incentivise employees to get vaccinated. This has taken a variety of forms. The starting point is often to ask employees what concerns they have and why they are reluctant. This discussion often centres on the safety of vaccines, especially given media reports that some individuals have either died or suffered severe effects after receiving the vaccine. Nevertheless, experts and the government website emphasize that the vaccines are safe and that the Vaccination Programme is the best approach to combat the virus in Hong Kong in the long term. Another point to make is that vaccination may enable individuals to travel outside Hong Kong as the world begins to open up more. So, it makes sense for employers to communicate this information to employees.

Increasingly, however, employers are also offering financial and other similar incentives as a means

of encouraging employees to get vaccinated. These incentives include bonuses and one-off payments, flights, staycations, tickets to theme parks, vouchers and coupons for shops, restaurants and films, as well as lottery tickets. A private property developer has also weighed in by offering a lottery with a chance to win a HK\$10.8 million flat for those who are fully vaccinated.

Employers are also offering employees additional leave if they get vaccinated, as well as transport allowances to get to vaccination centres. There are reports of additional leave of one to three days being offered and with guidelines that this leave may be used on receiving the vaccination or, in some cases, at a later date. Polls suggest that while individuals agree that additional leave should be offered, this is not in itself a major incentive to get vaccination.

At this stage, it appears that financial incentives have the biggest impact and employers need to consider what is likely to be most influential for their specific workforce. In devising incentives, however, employers should focus on persuasion and encouragement rather than pressure or duress. Employers should avoid removing benefits and

entitlements that employees are otherwise entitled to. Similarly, companies should be cautious about policies which provide that only vaccinated staff will be considered for promotions or pay rises. This could well be considered discriminatory and give rise to complaints and claims.

Can employers monitor which employees have been vaccinated?

Employers are not prohibited from monitoring the vaccination status of their employees provided they comply with the requirements relating to collection, use, processing, handling, storage and deletion of personal data under the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"). Accordingly, where employers provide incentives based on proof of vaccination, they must comply with PDPO.

Final thoughts

This is a complex and sensitive area which is moving with the COVID-19 situation. There is a delicate balance to strike for employers between securing business interests and safety on the one hand and employee concerns and the risk of claims on the other. Clear and consistent communications with employees play a vital part in this process. ■