

Employers' and Employees' obligations in respect of COVID-19 testing and the Workplace

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The Hong Kong Government allowed certain businesses to provide services so long as they comply with additional measures including their staff undergoing regular COVID-19 testing every 14 days. This article discusses three workplace related issues, namely, employees' obligation to undergo the COVID-19 testing, employers' rights to collect test results and employers' responsibility to pay the fees for testing (where applicable).

Conditions for relaxing social distancing measures in Hong Kong

Social distancing measures in Hong Kong for catering and some other businesses have been relaxed gradually as infection rate fell in late February 2021. Catering business, amusement game centers, fitness centers, places of amusement, places of public entertainment, beauty parlours, clubhouses, massage establishments, sports premises, hotels and guesthouses were allowed to provide services so long as the owners and management comply with two additional measures, namely, to:

- only permit customers or users who have scanned the "LeaveHomeSafe" QR code, or who have registered their personal details and information in relation to their visits, to enter the premises; and

- make arrangement for regular COVID-19 testing (polymerase chain reaction-based nucleic acid test) of staff every 14 days with the notification of the negative results.

Information collected from the above measures shall be kept for 31 days. Failure to comply with the above measures or other requirements may result in the implementation of additional measures to reduce the risk of transmission including but not limited to closure of the premises for a period ranging from 3 to 14 days.

Are employees required to undergo regular COVID-19 testing?

The issue is whether requesting an employee to undergo regular COVID-19 testing is a lawful and reasonable request and within the scope of his/her employment. Considering that such direction is made in accordance with the Government's policy and is the statutory requirement for resuming normal business (e.g., availability of dine-in services between 6 p.m. to 10 p.m. and headcount for each table), it is clear that the request is lawful, reasonable and within the scope of employment. Therefore, refusal to comply with such lawful and reasonable request may lead to disciplinary proceedings and possibly sufficient ground for summary dismissal against the employee.

Employer's right to request for COVID-19 testing records

A government electronic platform has been set up for the public to download testing record and SMS notification of the result will also be sent to the employees. The employer has a legitimate ground to collect the tests results from its employees. Nevertheless, such collection of these records is regarded as collecting and processing employees' personal data subject to the Personal Data (Privacy) Ordinance of Hong Kong. Hence the employers are under the obligation to notify the employees the specified purpose for collecting the data (i.e., for infection control and compliance with the Government's policy) and obtain consent of the employees.

Payment for COVID-19 Testing

Employees can either opt for (1) free testing services provided by the Government at the designated community testing centers; (2) free deep throat saliva specimen collection packs available for collection at various designated post offices, MTR stations and outpatient clinics of the Hospital Authority; or (3) COVID-19 testing offered by private

entities recognized by the Department of Health.

Regular COVID-19 testing of the staff is required for the specified business to remain open. An employer may encourage or schedule its staff to undergo the testing free-of-charge at the facilities operated or funded by the Government. However, if it becomes impracticable for an employee to receive free testing (e.g., the public facilities are fully booked), employers should pay for the testing carried out by the employees. The testing fees, if paid by employees, are incurred for carrying out the employees' duties of which the employees are under the implied duty to indemnify.

Conclusion

Employees should strictly observe the latest COVID-19 directions set out by the Government and undergo testing at least every 14 days. Employers should perform their obligations by ensuring their staff comply with the testing requirements, protect their personal data and pay for the tests where applicable.

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