

COVID-19 Vaccines and the Workplace

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The Advisory Panel on COVID-19 Vaccines has considered that the benefits of authorizing the use of the COVID-19 vaccines for protecting against infection outweigh the risks under the current global epidemic situation. In the absence of local regulations around workforce vaccinations, employers should consider the following points if they wish to implement a vaccination policy in the workplace.

Workplace safety and vaccination

Under the Occupational Safety and Health Ordinance of Hong Kong and common law, employers have an obligation to take all reasonably practicable steps to ensure the safety and health of all their employees at work and should perform a health and safety risk assessment including the degree and the potential consequences if such risks materialize and what reasonably practicable steps may be taken to mitigate such risks.

The key question is whether an employer may legitimately require an employee to be vaccinated.

At this moment, there is insufficient information to predict with certainty the effectiveness of a vaccine and/or any potential side effect. Employers should continue to assess the safety, effectiveness

and risks of vaccination as more information and data become available. Nevertheless, it is impracticable in the near future to expect the Hong Kong Government to impose any legal requirement for anyone to be vaccinated. Without any legal backup, it is not legitimate for an employer to “require” its employees to receive any type of COVID-19 vaccination.

On the other hand, employees taking vaccinations may protect against infection for not only themselves, but also all types of people in the workplaces. This is especially so for those premises occupied by the more fragile members of the public such as elderly homes and hospitals as well as for the workplaces with large numbers of visitors without wearing masks like restaurants. An infected employee will also put the colleagues at risk, and timely vaccinations may mitigate such risk. An employee may find it necessary to take the vaccination if he/she is required to travel and work overseas where infection rates are higher. Thus, employers might like to “encourage” its employees to be vaccinated voluntarily, but that should not lead to a direction. However, an employee’s refusal to take vaccination as encouraged by the employer is not a ground for dismissal.

Rights and freedom and disability discrimination

Under Article 39 of the Basic Law, the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Therefore, Article 39 may present a challenge to enforcing any “vaccination requirement” that may be imposed by an employer on its employees.

In general, any employer must comply with the contract of employment, the Occupational Safety and Health Ordinance and the Disability Discrimination Ordinance of Hong Kong. Thus, candidates with certain medical conditions who are not hired because of their unwillingness to be vaccinated may have claims against an employer for making vaccination a condition for employment under the Disability Discrimination Ordinance.

Data privacy

Depending on the circumstances, the requirement for employees to disclose or to submit proof that they have been vaccinated may be considered a lawful and reasonable

order of the employer. If an employer requires its employees to make such a disclosure, then they will need to comply with the Personal Data (Privacy) Ordinance of Hong Kong as the requirement will involve the collection and processing of personal data. The Ordinance requires, among other things, that the collection of the data is necessary for the purpose for which it is collected and is adequate but not excessive. The law also requires data users to take all practicable steps to ensure the personal data collected is accurate and not retained for a period longer than is necessary for the fulfilment of the purpose for which the data is used.

Conclusion

The employer should start thinking about the risks and challenges relating to its vaccine policy for its employees while continuing to observe the law, respect employee’s freedom, and also to monitor closely the latest government guidance.

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