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# Hong Kong employment issues arising from coronavirus disease



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## Introduction

On 4 February 2020 Hong Kong reported its first fatality relating to Coronavirus Disease 2019 (COVID-19), which originated in Wuhan, China. The number of globally confirmed cases of COVID-19 has surpassed the number of cases reported during the severe acute respiratory syndrome outbreak in 2003. On 30 January 2020 the World Health Organisation declared the outbreak a Public Health Emergency of International Concern.

In Hong Kong, COVID-19 has caused serious disruption to the economy and has had a considerable impact on its workforce.

On 28 January 2020 the Hong Kong government announced that its employees (except for staff in departments providing emergency services and essential public services) were not required to return to their offices and should work from home as of 29 January 2020 in order to prevent the spread of COVID-19. Such measure extended until March. The government also called on institutions in the private sector to adopt similar measures to assist in minimising the threat of COVID-19 spreading in the wider community. Businesses in Hong Kong have adopted a range of measures, up to and including temporarily shutting down their operations.

COVID-19 has proven to be unpredictable and it remains unclear how long it will continue to affect Hong Kong. Therefore, employers will continue to have to deal with its effects on their businesses and should ensure that they are fully aware of their legal obligations towards their employees. This article sets out some of the key issues that employers should consider in dealing with the outbreak.

## Employers' legal obligations relating to employees' health and safety

Employers have a statutory and common law duty to provide a safe place of work for all of their employees. Pursuant to the Occupational Safety and Health Ordinance (Cap 509), employers must, insofar as it is reasonably practicable, ensure the health and safety of their employees at work. This includes maintaining a workplace that is safe and without risks to health.

To satisfy these obligations, employers should implement measures in the workplace to:

- reduce health risks in the office space<sup>(1)</sup> (eg, increasing ventilation and providing antiseptic soap);
- reduce health risks that may arise from employees (eg, requiring all employees to immediately report whether they have travelled to regions at high risk for COVID-19 or any symptoms of COVID-19, such as fever); and
- manage any COVID-19 outbreaks that may arise from potentially infected employees (eg, monitoring the news to identify whether any individual confirmed to have contracted COVID-19 has visited a retail space).

### **Employers' general employment obligations**

Over the course of the COVID-19 outbreak, it has become common for shops and retailers with reported contact with individuals confirmed to have contracted COVID-19 to suspend business as a form of self-quarantine. Some employers have also instructed individual employees who have been in contact with individuals confirmed to have contracted COVID-19 to self-quarantine.

Employers are reminded that employees generally have an implied right to work. Accordingly, employers cannot unilaterally decide to place employees on unpaid leave. As an alternative to this, employers should consider asking employees whether they will, for the purpose of reducing the risk of infection, agree to:

- take annual leave with the employer's consent;
- enter into an agreement with the employer to take unpaid leave;
- work from home (if such arrangements are available); or
- a reduction in salary for the self-quarantine or work-from-home period.

Regardless of the option implemented, employers should always ensure that employees who are on annual leave, statutory sick leave or are working from home continue to receive their wages, statutory and contractual benefits.

Where an employee agrees to a variation of their contractual terms, employers should document any such variations (especially those relating to a reduction of salary and benefits) in writing. Written variations should be signed by both employers and employees to avoid disputes later.

### **Discrimination**

Pursuant to their obligations under the Occupational Safety and Health Ordinance, employers may be required to prevent employees who have or are suspected of having contracted COVID-19 from entering the workplace.

COVID-19 is likely to fall within the wide meaning of 'disability' set out in the Disability Discrimination Ordinance (Cap 487). An employee subjected to less favourable treatment by their employer as a result of having or the suspicion of having contracted COVID-19 may allege unlawful discrimination.

However, the Disability Discrimination Ordinance provides an exemption for discriminatory acts relating to a disability that is an infectious disease. Such discriminatory acts are not unlawful if they are reasonably necessary to protect public health. **(2)** Pursuant to the guidance set out by the Equal Opportunities Commission, **(3)** it is unlikely to be unlawful to prevent an employee from attending work to avoid creating a public health risk.

In view of the contagious nature and severity of COVID-19, it would appear reasonable for an employer to require employees displaying symptoms of COVID-19 to refrain from going to work. While such treatment may be discriminatory, it is unlikely that this amounts to unlawful discrimination because it is reasonably necessary to protect public health. Employers should ensure that they consider all of the relevant factors and alternatives before taking any potentially discriminatory actions to avoid imposing any unreasonable or unnecessary hardship on employees. Employers should also be careful not to single out specific employees or groups of employees when implementing risk reduction measures.

### **Data privacy issues**

In view of preventing an outbreak of COVID-19 in the workplace, employers may ask their employees to submit health declaration forms or undergo temperature testing.

Such measures involve the collection of personal medical data. Therefore, they are subject to the Personal Data (Privacy) Ordinance (Cap 486). Data Protection Principle 1 of the Personal Data (Privacy) Ordinance provides that only necessary, adequate but not excessive personal data can be collected by a data controller for a lawful purpose directly related to its function or activity.

The medical data in this case is collected to monitor and prevent health risks in the workplace. Given employers' obligation under the Occupational Safety and Health Ordinance, it is likely that any such collection of medical data will be considered necessary and directly related to an employer's lawful functions. Therefore, such measures are unlikely to be in breach of Data Protection Principle 1.

Data Protection Principle 3 requires that personal data is used only for the purposes for which it was collected. Any other use of such personal data requires separate consent. In view of the COVID-19 outbreak, the privacy commissioner recently stated **(4)** that separate consent under Data Protection Principle 3 may not be required when personal data is used to safeguard public health.

The privacy commissioner stated that the right to personal data privacy must be balanced against the absolute right to life and the public interest. Section 59 of the Personal Data (Privacy) Ordinance also provides an exemption from Data Protection Principle 3 where the use of data concerns safeguarding the physical or mental health of the data subject or any other individual in the public interest.

Accordingly, when collecting and using medical data, employers should:

- refrain from asking for excessive medical data;
- inform employees of the purposes of collection and class of person to whom the data may be transferred;
- ensure that personal data is fairly collected; and
- ensure that the use of data remains within the scope of the intended purpose or purposes under Section 59 of the Personal Data (Privacy) Ordinance.

### **Employees' right to refuse work**

Pursuant to Section 10 of the Employment Ordinance (Cap 57), an employee who reasonably fears for their physical safety due to violence or disease may terminate their employment contract. In these circumstances, employees are not required to provide notice or make a payment in lieu.

While COVID-19 is regarded as a serious public health problem, employees cannot choose to terminate their employment without notice merely on the basis that there is a general risk of infection. Employees may run the risk of being dismissed with or without notice if they persistently refuse to return to their place of work or wilfully disregard the lawful instructions of their employer. The specific circumstances of an employee's employment would need to involve a genuine risk of exposure to infection in order for such a right to terminate to arise. That position may change if, for instance, the Hong Kong government raises the threat level or imposes more drastic health measures.

### **Longer-term implications for employers**

In order to minimise risks to health and safety during the outbreak of COVID-19, while maintaining business continuity, employers should:

- consider adopting flexible working arrangements;
- continually evaluate workplace response protocols in the event of an outbreak;
- educate employees about how to reduce health risks;
- inform employees of their expectations with regard to working arrangements if a work-from-home system is implemented;
- comply with the relevant employment laws when formulating measures to create a safe working environment; and
- consult with employees and – where possible – address their concerns and anxieties about the situation.

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### **Endnotes**

(1) See the Centre for Health Protection's fact sheet on Severe Respiratory Disease associated with a Novel Infectious Agent in Workplace.

(2) Section 61(1) of the Disability Discrimination Ordinance.

(3) Disability Discrimination Ordinance Code of Practice on Employment (2011).

(4) Media Statement, 26 February 2020.

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