

We are all in this together: navigating employment issues during COVID-19

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The COVID-19 pandemic has posed unprecedented employment law challenges for both local and multinational corporations. Employers are making efforts to continue business whilst minimizing health risks for their employees. In some cases employers are forced to consider furloughs, working hours reductions, and redundancies as part of their response.

With a view to supporting businesses and employment, the government announced on 8 April 2020 a HK\$80 billion Employment Support Scheme, as part of the second round of Anti-epidemic Fund measures, which subsidizes 50 percent of the monthly wages of the employee capped at HK\$9,000 per month for six months, as long as employers make contributions to Mandatory Provident Fund schemes for workers.

In this article, we provide analysis and insights to help you manage employment-related risks during the trying times.

Prevention from contagion at the workplace/health protection

Employer's general duties with regard to health protection

The Occupational Health and Safety Ordinance (Cap. 509) provides that every employer must, so far as reasonably practicable, ensure the safety and health of all employees at work, which entails a duty to take reasonable steps to ensure that their employees are not infected in the workplace.

On 30 January 2020 the Labour Department (LD) issued a press release urging employers to provide protective equipment to front-line staff and introduce flexible working arrangements where appropriate.

Employers are advised to follow the recommendations as set out in the [Health Advice on Prevention of Coronavirus disease \(COVID-19\) in Workplace \(Interim\)](#) published by the Centre for Health Protection of the Department of Health (CHP) and last updated on 30 March 2020 (the Guidelines), to prevent the spread of COVID-19 in the workplace generally. In particular, if a suspected or confirmed case of COVID-19 is encountered in the workplace (whether suspected or confirmed by local or overseas authorities, which are in communications with the CHP), employers should take the appropriate cleaning and disinfection steps recommended under the Guidelines, namely:

- Equip cleaning staff with appropriate personal protective equipment including surgical masks, latex gloves, disposal gowns, eye protection, and optionally.

- Ensure that all potentially contaminated surfaces or items are disinfected by one in 49 diluted household bleaches.
- Ensure that enhanced measures as set out in the Guidelines are taken if there is blood, secretions, vomitus, or excreta spillage.

The CHP will further communicate with the employer regarding waste disposal depending on whether COVID-19 is suspected, confirmed, or excluded.

Remote working

An employer can require an employee to work from home if having the employee attend the office creates a risk to the health and safety of other staff, but employers are not required under Hong Kong law to request all employees to work from home.

The Occupational Safety and Health Council has also issued a COVID-19 [OSH Information Pack](#) which sets out a recommended approach for employers, including introducing flexible and agile working arrangements and undertaking precautions, such as maintaining at least two meters between seats, replacing physical meetings with video or phone calls, and encouraging employees to wear masks at work. These are however only recommendations and are not mandatory.

Employee's rights in case of incapacity for work

The press release issued by the LD on 30 January 2020 also indicates that if an employee is required or ordered by a health officer to be placed under medical surveillance or quarantine, he or she will be issued a medical certificate confirming the same. The employer must grant that employee sick leave in accordance with requirements under the Employment Ordinance (Cap. 57) (EO) or the relevant employment contract.

Under the Employees' Compensation Ordinance (Cap. 282) (ECO), if an employee (1) sustains an injury or dies as a result of an accident arising out of and in the course of his employment; or (2) suffers incapacity arising from an occupational disease, the employer is generally liable to compensate the employee under the ECO. Further, an employer must notify the LD of any accident arising out of and in the course of the employee's employment or occupational disease that causes the death or total or partial incapacity of the employee in the manner and notice period prescribed under the ECO, irrespective of whether the accident gives rise to any liability to pay compensation or not.

As of the date of publishing this article, COVID-19 has not been prescribed as an occupational disease under the ECO. However, it is noted in the [press release](#) titled "Protection under the Employees' Compensation Ordinance for employees contracting the Severe Respiratory Disease associated with a Novel Infectious Agent in the course of work" dated 10 February 2020 issued by the government that:

1. COVID-19 may still constitute an injury by accident if arising out of and in the course of employment.
2. The LD may consider amendment of the ECO to allow for the inclusion of COVID-19 as a prescribed occupational disease.

Employer's response to temporary decrease or lack of workload

Utilization of accrued but unused annual leave

Employers are allowed under the EO to designate the dates on which employees take annual leave so long as the employer gives 14 days' advance notice (except where a shorter period of notice is agreed to between the employer and employee).

In respect of contractual annual leave (i.e., annual leave in addition to the statutory minimum annual leave provided under the EO), whether the employer can require employees to utilize all or some of such annual leave within a prescribed period depends on the drafting of the employment contract and where applicable, the employee handbook (provided that the handbook also forms part of the employment contract).

As statutory annual leave is subject to a 14-day notice period which may not be applicable to contractual annual leave, it is important to agree with the employees whether the annual leave taken will be first deemed as statutory or contractual to avoid any potential dispute.

No pay leave or reduced pay due to shortened work time

Employers in Hong Kong cannot force employees to take unpaid leave or reduced pay, despite a drastic drop in business and workload. Employees must consent, preferably in writing.

If the employer insists on unpaid leave or reduced pay, the employee may be entitled to treat the employer as having repudiated the employment contract and claim for damages. If an employer unilaterally reduces wages without obtaining the employee's consent, disputes in relation to under payment of wages may arise and the employer may risk being imposed a fine of up to HK\$350,000 (in respect of each employee) and criminal prosecution (imprisonment of up to three years).

For employees whose remuneration is dependent on the amount of work provided by the employer (e.g., employees paid on hourly or daily basis), it is important to check whether the employment contract contains any express guarantee of a minimum amount of working hours. Past practice between the employer and employee may constitute a basis for implying such terms.

Even if there is no such express or implied term, the EO provides an additional layer of support. Where an employee is hired under a contract on such terms and conditions that his remuneration thereunder depends on his being provided by the employer with work of the kind he is employed to do, he shall be taken to be laid off and therefore entitled to the statutory severance payment under the EO, where the total number of days on each of which such work is not provided for him by the employer exceeds:

- a) Half of the total number of normal working days in any period of four consecutive weeks.
- b) One-third of the total number of normal working days in any period of 26 consecutive weeks.

Any period during which an employee is not provided with work because of a lock-out by his employer (i.e., closing of a place of employment, or the suspension of work), or as a result of a rest day, a statutory holiday, or a day of annual leave, shall not be taken into account as normal working days in determining whether an employee has been laid off.

Pay cuts

Any reduction in pay would amount to a variation of employment terms, which requires prior consent from the employee. Hong Kong law does not allow unilateral deduction of wages subject to a number of exceptions. The fact that it has become financially onerous to pay wages is not a valid justification.

Potential consequences of unilateral pay cuts include monetary compensation (including interest on the outstanding amount of wages) and criminal liability.

Financial aid/governmental support

In addition to the HK\$80 billion Employment Support Scheme as mentioned above, the government, as the single largest employer in the city, has also committed to create 10,000 civil service jobs in 2020-2021.

Industry-specific aids have also been rolled out to keep afloat businesses which have completely shut down due to COVID-19 and to preserve employment. For example, registered tutorial schools and education centers which have been operating in the three months before the class suspension – November, December, and January, are eligible to apply for a one-off relief grant of HK\$40,000 whereas licensed travel agents will be receiving cash subsidy ranging from HK\$20,000 to HK\$200,000.

Redundancies

There is no blanket restriction with regards to terminating employment during the COVID-19 crisis. Employers are however reminded to observe the usual termination procedures and obligations set out in the EO and in provisions of the employment contracts, including serving notice or making payment in lieu of notice (if applicable), as well as paying termination payments on time. For employees employed under a continuous contract for two years or above, there must be a "valid reason" for termination of such employees and redundancy is one of such valid reasons under the EO.

Notifying authorities of COVID-19 cases

The LD has recommended that employees inform their employers, and their employers inform the LD in turn, if an employee contracts or suspects to have contracted COVID-19 by accident arising out of and in the course of his employment. While the legal position in Hong Kong is not settled as to whether COVID-19 will constitute an injury and therefore whether the ECO applies in this context, in light of government recommendations, it is prudent for employers to inform the LD in the manner and notice period prescribed under the ECO if an employee contracted or is suspected to have contracted COVID-19 that arose out of and in the course of his employment and led to his death or total or partial incapacity.

There is however no legal obligation on an employer in Hong Kong to notify the CHP about any suspected or known COVID-19 cases.

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