

Mandatory vaccinations for employees in Hong Kong

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In the wake of the Chief Executive’s remarks last week, where she urged private sector employers in Hong Kong to require COVID-19 vaccinations for employees, the question at the top of every employer’s list is – can we legally require employees to undergo vaccination, and if they refuse, require those employees to be regularly tested?

Many employers have so far adopted the carrot rather than the stick approach, preferring to encourage employees to take the vaccine by providing factual information about the different vaccines, offering time off to attend appointments, and reimbursing travel expenses. Mandatory vaccination and/or testing may well have been considered to be a high-risk strategy last year, but the tide appears to be turning.

Can employers mandate vaccinations?

In Hong Kong, employers have no statutory right to direct an employee to undergo vaccination or to even get a COVID test.

Notwithstanding the uncertainty in the law, a number of businesses and sectors have been implementing a mandatory vaccination policy in line with their business needs. Employers in the F&B industry have required their staff to be vaccinated in light of their customer-facing roles (especially since the Government has allowed only those premises with vaccinated staff to remain open after a certain time). Employers in the aviation industry have required staff, especially flight crew, to be vaccinated in light of the international travel regulations in different countries abroad. The civil service, teachers and healthcare workers are now also required to be vaccinated (at least one shot) or else face COVID testing every two weeks at their own expense.

Employers may now seek to rely on the Government's calls as a justification for making the vaccination or testing mandatory. However, if the employee refuses, or resigns in protest, the Government's actions would not provide the employer with an absolute defence to any claim brought.

That said, given the current state of play, it would appear difficult for an employee, absent any medical or other valid reasons, to successfully advance a claim that their employer's mandatory vaccination policy is an unlawful direction and/or in breach of their employment contract. The Court will have in mind that the Government is encouraging of mandatory vaccination and/or testing and there may be genuine occupational reasons for that approach.

Should employers mandate vaccinations?

If there is an operational need for the business to require employees to be vaccinated, it is easy to answer this question. However, in other circumstances, this decision is a lot harder. For example, if it remains possible for staff to work from home without impacting the business or if employees who are not vaccinated can easily be redeployed within the business, it may not be necessary to mandate vaccinations.

It would also not be advisable to subject employees to a mandatory policy if they have a genuine medical, or other, valid reason for not being able to take the vaccine. As such, it would make sense for employers to have an open dialogue with staff about vaccinations. This will allow employers to address any concerns head on and to ensure that anyone who cannot receive the vaccination for medical or other valid reasons are identified (and therefore not inadvertently discriminated against).

Ultimately, employers will be making a business decision. If the policy is made mandatory and only a small portion of employees choose to terminate their employment, the cost to the business may be minimal vis-à-vis getting the business fully functioning and running to pre-pandemic productivity. For employers that have already tried numerous carrots, they may feel justified in now offering a stick.

Can employers ask for employees' vaccination status?

When implementing a mandatory vaccination policy or coming to a decision on whether or not to implement one, employers may well need to find out who in the workforce is vaccinated or intends to get vaccinated. This information is likely to constitute "Personal Data" under data protection legislation in Hong Kong, the Personal Data (Privacy) Ordinance.

Employers should ensure that they comply with the principles of the Ordinance and the guidance of the Privacy Commissioner for Personal Data when collecting, storing and sharing their employee's Personal Data. A data protection impact assessment will usually assist employers with the key considerations for ensuring data protection.

Subject to existing contracts and policies in place, employers may collect their employees Personal Data so long as it is necessary and collected for a clear purpose, and that purpose is clearly communicated to the employees. Employers should also explain to the employee, how their Personal Data is stored and the circumstances in which their Personal Data may be disclosed to third parties (for eg in order to comply with a Government order). Employers should record this communication in writing and ideally ask the employee to confirm their consent to the collection, storage and transfer of their Personal Data.

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