

Updates to the Hong Kong Employment Ordinance in response to Covid-19



September 2022



Overview

The Employment (Amendment) Ordinance 2022 (**Amendment Ordinance**) took effect from 17 June 2022. In view of various social distancing measures to combat the Covid-19 outbreak, the Hong Kong government amended the existing Employment Ordinance Cap.57 (EO) in order to reinforce rights and benefits of affected employees when they are absent from work as a result of complying with anti-epidemic requirements under the Prevention and Control of Disease Ordinance (**Cap.599**) or other subsidiary legislation.

It should be noted that the Amendment Ordinance has no retrospective effect, but it contains a sunset clause which can be repealed when the Covid-19 pandemic is under control and vaccination is no longer a matter of public health concern.

Employers should familiarise themselves with the following new amendments to the EO:

- Sickness allowance to be paid to affected employee;
- Dismissal of affected employee or variation of employment terms;
- Failure to produce proof of vaccination falls within one of the valid reasons for dismissal.

This article also highlights the rights and obligations of employers and employees under the current hotel quarantine arrangements.

Sickness allowance to be paid to affected employee

The Amendment Ordinance further expanded the definition of sickness day, in which it recognises the day on which an employee is subject to any anti-pandemic restrictions to be regarded as "sickness day(s)", including an isolation order, a quarantine order or a requirement under restriction-testing declaration.

Employees who are absent from work, due to their compliance with the government's anti-pandemic requirement under Cap.599, are entitled to sickness allowance under section 33 of the EO. Employers are required to pay sickness allowance to the employees provided that the employees could present the following proof in lieu of that shows prescribed information relating to the employee:

- A document issued by a public officer or any person on behalf of the government; or
- Accessible electronic data

Employers may be in breach of the EO if they fail to compensate or pay the sickness allowance to the employees accordingly.

Dismissal of affected employee or variation of employment terms

Under the Amendment Ordinance, employers may make a legitimate vaccination request.

Section 32KA of the EO stipulates that an employee's absence from work due to compliance with anti-epidemic requirements will be considered as invalid reason for dismissal or variation of terms of the employment contract. In other words, the dismissal of an employee by reason of his absence due to his compliance with the anti-epidemic measures will be considered as unreasonable dismissal.

That being the case, affected employees who are under continuous contract for a period of no less than 24 months, and who are dismissed other than valid reasons, are entitled to make claims for remedies against their employers for unreasonable dismissal.

In the event of unreasonable variation of terms of the employment contract, this is where an employer varies the terms of the employment contract either in the absence of an express term in the contract or without the consent of the employee.

In defending any legal action by the affected employee, the employer has the burden of proving that there is a statutory valid reason for the dismissal or the variation of terms in the employment contract was reasonable. Unless a valid reason for this variation has been justified, it shall be deemed that the employer intends to reduce or extinguish any benefit, rights or protection conferred upon the employees.

Failure to produce proof of vaccination falls within one of the valid reasons for dismissal

On the contrary, the dismissal will not be considered as unreasonable dismissal if it was by reason of an employee's non-compliance with legitimate vaccination requests which are set out under Schedule 13 of the EO. Employees are required to produce a record or document within the compliance period (within 56 days from the date of making request) indicating that they have been vaccinated for the purpose of the Vaccine Pass Regulation.

If employees fail to produce requested documentation regarding their vaccination, an employer may terminate the employment contract without notice or payment if the employee wilfully disobeys a lawful and reasonable order under section 9 of the EO.

Section 32K of the EO sets out the following legitimate and fair reasons for dismissals:

- Conduct of the employee (for example, employee's misconduct, persistent lateness, disclosing confidential information);
- Capability or qualifications of the employee;
- Redundancy of the employee;
- Employee could not continue to work in the position held without contravention of the law, if the employee were to continue in the employment of the employer or, were to so continue without that variation of the terms of his contract of employment;
- Any other substantial reason that the court or the Labour Tribunal believes that it was sufficient cause to justify the dismissal of the employee

For the purposes of the Amendment Ordinance, an employee who fails to comply with a legitimate vaccination request made by his employer is regarded as being incapable of performing work pursuant to **section 32K(b) of the EO**. It follows that failure to comply with legitimate vaccination requests will constitute a valid reason for employers to dismiss employees or vary terms in the employment contract.

When making a legitimate request regarding vaccination, it is necessary for employers to reasonably believe that the employees will be exposed to the risk of infection when they perform their duties under the employment contract, having regard to the nature of the work and operational requirements under the Occupational Health and Safety Ordinance.

Employers are advised to pay attention that the amendments do provide exemptions to the following types of employees, namely those:

- Who are pregnant;
- Who are breastfeeding;
- Who are issued with a specified medical exemption certificate that it is unsuitable for the employee to get vaccinated during the compliance period, within the meaning of section 17 of the Vaccine Pass Regulation;
- Who were diagnosed on a particular date as having contracted the specified disease, and are able to provide certified proof. That date falls within 6 months before the date on which the request is proposed to be made.

Remedies for unfair dismissal or unreasonable variation of terms of the employment contract

If the Labour Tribunal (LT) finds that the employee had been unreasonably dismissed or there was variation of terms in the employment contract, the LT may:

- Order reinstatement or re-engagement to the employee, requiring the employer to treat the employee as if he had not been dismissed;
- Award terminal payments to the employee under the EO as it considers fair and appropriate.
- Award monetary compensation up to maximum of HK\$150,000 if no order for reinstatement or re-engagement is made.

Hotel Quarantine and “3+4 Arrangement”

From 12 August 2022 onwards, the Hong Kong government announced a shortening of the hotel quarantine period for inbound travelers from 7 days to 3 days.

Under the current arrangement, individuals arriving in Hong Kong from Taiwan or other overseas destinations are obliged to:

- Undertake compulsory quarantine for three nights in a designated quarantine hotel (DQH);
- Undergo daily rapid antigen tests during the quarantine period;
- Undergo polymerase chain reaction (PCR) test on Day 2 of arrival at Hong Kong.

Under the Amendment Ordinance, the three-day compulsory quarantine under Cap. 599 requirement will not be considered as “sickness day”, thereby employees subject to the hotel quarantine are not entitled to sickness allowance.

Individuals are allowed to leave the DQH after being consecutively tested negative for three days and will undergo home medical surveillance for four nights subject to Amber Code restrictions under the Vaccine Pass. Under the government guidance, amber code holders are allowed to travel to work even for those who work at premises that require ‘active checking’ of the vaccine pass.

During the home medical surveillance period, employers are entitled to either direct their employees to stay home or travel to work, subject to contractual and statutory obligations.

Employers should always assess circumstances of individual cases to determine whether directing employees to stay home is a reasonably practicable step to ensure the safety and health at work for their employees under the Occupational Safety and Health Ordinance (Cap. 509). They should review the employment contracts to ensure that stay home arrangement complies with their obligations under the contract.

If employees test positive

A person who tests positive of Covid-19 is recognised as a type of disability under the Disability Discrimination Ordinance (**DDO**).

Employers should also be cautious of putting employees who are infected with or are recovered from Covid-19 under the less favourable treatment on the ground of disability. In which recovered employees are being protected under DDO.

Please [reach out to us](#) if you have any questions.

