EMPLOYMENT | COVID-19 Vaccines – What Should Hong Kong Employers be Thinking About?

The Hong Kong Government’s goal is to provide COVID-19 vaccines for the majority of the Hong Kong population during 2021 through its own vaccination programmes. It has said that members of the public can receive the vaccine on a voluntary basis free of charge. However, what should Hong Kong employers be thinking about in relation to the roll-out?

COVID-19 Vaccines – What We Know (as of 23 December 2020)

This is what we know so far:

- The Government has procured enough COVID-19 vaccines to cover Hong Kong’s population after reaching agreements to procure 22.5 million doses.
- The developers of the vaccines are AstraZeneca, Sinovac Biotech and BioNTech. The Government is looking for a fourth technology.
- The Government will set up an indemnity fund to provide financial support for those who may experience serious complications from getting the COVID-19 vaccination. The details are being worked out.
- The first batch of one million doses is expected to be delivered to Hong Kong in January 2021 at the earliest.
- As the Government will receive the vaccines in batches, it will prioritise vaccination to certain groups first, including to groups that have higher risks of coming into contact with the COVID-19 virus (e.g., healthcare workers), groups which have greater mortality rates after contracting the disease (e.g., the elderly, chronically ill patients), and/or groups which may easily transmit the virus to the vulnerable or weak if infected (e.g., staff of residential care homes).
- The Government has started a “Busting Myths about COVID-19 Vaccines” series to address concerns about the safety of the vaccines given the speed with which they have been developed.
Questions for Employers to Think About

As vaccination concerns public health, employers should monitor the development of the Government programme to roll out COVID-19 vaccines. Their roll-out may be more relevant or important to those in certain industries (such as healthcare) than others. Below are some questions that employers should be thinking about.

1. How Will Employers Get Access to a Vaccine?

As their supply is limited and as many people as possible need to be vaccinated, the Government is controlling the sourcing and administering of the vaccines to the general public. As such, employers are unlikely to be able to source a vaccine directly (at least in the beginning) but this may change later as supply gradually increases.

Although the Government has announced plans to provide free vaccination to the Hong Kong population, we do not have any information at this stage on whether it will extend the programme to employees on an employment visa or business travellers who come into Hong Kong when border restrictions are lifted.

2. Do Employers Have a Right to Require Employees to be Vaccinated?

Employers have an obligation under the Occupational Safety and Health Ordinance (OSHO) and common law to take all reasonably practicable steps to ensure the safety and health at work of all of their employees. The issue then is whether requiring an employee to be vaccinated to come into the workplace will be a “reasonably practicable step” for employers to take to ensure safety and health in a workplace.

What is considered a “reasonably practicable step” will depend on the facts of each case and there is no “one-size-fits-all” approach. Each workplace will have their particular types and levels of risk. For example, medical institutions and elderly homes will have higher risks associated with COVID-19 than, say, an office environment. The risk may also be higher depending on what is required of the employee, for example, where an employee is required to work in an overseas location with high rates of infection. Employers should perform a risk assessment to identify the potential health and safety risks, the degree of such risks and the potential consequences if such risks materialise and what reasonably practicable steps may be taken to mitigate those risks. In carrying out this risk assessment employers should also pay attention to employees who cannot gain access to the vaccine immediately (for example, due to the Government’s regulations on priority in distribution).

There is insufficient information to predict with certainty the effectiveness of a vaccine and any potential side effects. As more details about a vaccine are released, employers should pay attention to the literature around its safety and effectiveness to assess the risks in requiring employees to be vaccinated.

3. Can Employers Require Employees to Disclose or to Produce Proof of Whether They Have Been Vaccinated?

Depending on the circumstances (and these may be limited 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 (PDPO) as the requirement will inevitably involve the collection and processing of employees’ personal data.

The PDPO 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 PDPO 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.

4. What If an Employee Does Not Want to Be Vaccinated?

The actions that an employer may take will depend on (among other things) whether the requirement to be vaccinated is reasonably necessary and practicable to ensure the safety and health at work of its employees and protect public health. If it is not, then the employer may not be able to do much. If it is, then the employer may be able to take certain actions in respect of the employee. What steps may be taken will of course depend on the circumstances, but may include disciplinary action.

The obligations that the employer must comply with include the contract of employment, the OSHO and Disability Discrimination Ordinance. They may also have to consider employee relations issues as well, for example, if the employee is what is described as an “anti-vaxxer”.

Conclusion

The Government is taking the lead on sourcing and rolling out COVID-19 vaccinations. It is important that employers stay posted on developments. Information from the Government on the COVID-19 vaccines can be found here: https://www.coronavirus.gov.hk/eng/covid-vaccine.html

While employers should consider the roll-out of a vaccine as part of their risk assessment and risk mitigation strategy in discharging their obligations to take reasonably practicable steps to ensure the safety and health at work of their employees, they should remember that a vaccine is only one of a many number of ways of fighting COVID-19 and reducing risks. An employer should consider its position on whether it will require its employees to be vaccinated and be prepared to communicate openly with employees regarding their approach as part of good employee relations but also to combat misinformation and rumours.

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