

# COVID-19 – Key vaccine considerations for employers

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**There have been a number of articles which have considered Hong Kong employers' rights to direct their workforce to be tested and vaccinated against COVID-19. The general consensus amongst legal practitioners in Hong Kong is that there is no statutory right to direct an employee to undergo testing and vaccination.**

In addition, although employers are legally required to take reasonable care of their employees' health and safety (both under common law and the Occupation Safety and Health Ordinance ("OSHO")), given that there are questions surrounding the effectiveness of the COVID vaccine, it is unlikely that an employer can rely on the OSHO in justifying mandatory vaccination.

There are very limited circumstances in which an employer could lawfully direct their employee to undergo testing and vaccination. Although each case would turn on its own facts, two key components would need to be in place; first, the employment contract must expressly reserve a right for the employer to direct an employee to be vaccinated (or be entitled to vary the employment

contract to give such a direction), and second, the employee's role requires the employee to be vaccinated in order to discharge their function (an example of this may be where the employee's role requires international travel to places where the employee requires a vaccination passport).

Absent these two components, it is a high-risk strategy for an employer to roll out a mandatory policy for all employees to be tested and vaccinated; aside from the potential negative publicity, a mandatory policy may open the employer up to certain legal liabilities and unintended consequences. This is developed further below.

## Constructive dismissal

Where employees arguably do not require vaccination to perform their role and/or their role can be performed without coming into the office, insistence on being vaccinated by the employer may amount to a fundamental breach of the employee's contract entitling the employee to resign and make a claim for constructive dismissal.

Employees who claim that they are constructively dismissed need not give advance notice that they are about to resign and may resign without prior warning. Depending on the seniority of the employee or the number of employees who take this path, the consequent disruption to the business could potentially be devastating.

## Discrimination

**Disability:** Disability under the Disability Discrimination Ordinance (Cap. 498) is broadly defined and includes any existing or pre-existing medical condition. Individuals who may have reason to be concerned about the effect of the vaccine due to a disability may potentially have a claim against an employer who insists that they be vaccinated as a condition of their employment or continued employment.

**Pregnancy:** Under the Sex Discrimination Ordinance (Cap. 480), pregnant women with legitimate concerns about the effect of the vaccine on their and their baby's health may decide to refuse their employer's direction to be vaccinated. If the employer insists on the vaccination and/or treats them less favourably as a result of their refusal to be vaccinated, the employee may also potentially have a claim against their employer.

## Personal Injury/Death

Employers may be at risk for a claim in the event of injury/death or injury as a result of an employee being vaccinated at the employer's direction. Accordingly, employers should review their insurance policy and consider whether their coverage would be adequate if employees are directed to be vaccinated and suffer any adverse reactions.

## Data Breach

Biometric data, such as data regarding the vaccination status of employees, constitutes personal data under the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"). Given the sensitivity of such data, employers must encrypt and store any data regarding employees' vaccinations securely, and restrict access to authorised personnel on a need-to-know basis. Any wrongful disclosure of such data could lead to a maximum penalty of HK\$1,000,000 and 5 years' imprisonment (Section 64, PDPO).

## Tips for employers to consider

### 1. Consultation

Employers should step back and consider the wishes and/or concerns of their workforce. If there is existing widespread support for vaccination, a mandatory policy may do more harm than good. Generally speaking, it is useful to hold employee

consultations to gauge employees' view before adopting a wholesale policy. This would also give employees' an opportunity to voice any queries and/or concerns in relation to any COVID related measures to be taken by the employer.

### 2. Time off work

To encourage vaccine take up, employers may decide to allow employees to attend appointments during working hours and reimburse their travel.

Employers should take care that any measures they put in place do not cross over into the realm of rewards. An employee that cannot be vaccinated for reasons related to their disability and/or pregnancy may claim that they are being discriminated against because they are being treated less favourably (as they would not be entitled to the reward) on the ground(s) of their protected characteristics.

### 3. Education

Employers also have a unique opportunity to encourage vaccination by providing educational training from trustworthy sources with a view to busting myths and alleviating any concerns employees may have about available vaccine options. The use of third party education providers may also give greater comfort to those employees who remain concerned about the effects of vaccination.

### 4. Update or implement COVID-19 policy

If employers don't already have a comprehensive COVID-19 policy in place, we recommend having a policy which covers as many eventualities as possible. The policy should also include other preventive measures (such as social distancing measures and mask wearing), since vaccination is a supplement rather than a replacement for preventing the virus.

A robust and well thought out policy, which accounts for a range of circumstances in the workplace and viable alternatives, is a helpful reference point for employers and employees. It should help to clarify any ambiguities amongst staff and evidence how the policy was carefully considered with all employees in mind.

### 5. Protect personal data

An updated data protection policy may also help assure employees that any personal data collected by an employer in relation to vaccinations will be treated as sensitive biometric personal data and protected in accordance with the employer's obligations under the PDPO.

Since employers have a duty to notify employees of the purpose for which their data is being collected before or upon collection, employees should be provided with a Personal Information Collection Statement before any such data is collected or stored by the employer.

## Conclusion

Employers should always think carefully about how to address any COVID related matters. It would be prudent to analyse the risk of liability against any benefits, bearing in mind the type of work which is required at that workplace.

Employers should therefore proceed with caution and seek legal advice before implementing a mandatory vaccination policy. Likewise, employees that have been instructed to take the vaccine and not do so should also seek legal advice in respect of their entitlement to refuse such a direction.

Please do not hesitate to contact Andrea Randall ([andrea.randall@rpc.com.hk](mailto:andrea.randall@rpc.com.hk) / +852 2216 7208), a Partner and Head of the Employment Practice in Hong Kong for any employment law related queries you may have.

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