

Insights

COVID-19 VACCINATION AND RELATED EMPLOYMENT LAW ISSUES

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With the gradual lessening of locally acquired cases of COVID-19, on 28 April 2021, the Government announced measures to relax restrictions in respect of the operation of restaurants and other premises. While catering business owners and customers welcomed the lengthening of operating hours permitted, various legal issues arise from the relaxation measures, in particular the differential treatment afforded to those who have received a COVID-19 vaccine as compared to those who have not.

Under the latest measures, which the Hong Kong Government refers to as “vaccine bubble”, if all staff in a catering business have received the first dose of vaccine, that business is permitted to provide dine-in services until 11:59pm. If all staff have received both doses, the time for closure for dine-in service can be extended to 1:59am on the subsequent day. For bars and pubs, provided that all staff and customers have received the first dose, the premises may operate until 1:59am on the subsequent day.

It therefore is clear that catering businesses and bars/pubs owners have incentive to encourage, or even require, their staff to get vaccinated.

The following discussion explores some of the key employment law issues in relation to vaccination.

Can an employer require his employee to be vaccinated against COVID-19?

It depends. (Yes, this is the proverbial “lawyer’s answer”, but there is no single answer that covers all situations.)

The general principle is that an employee must comply with any “lawful and reasonable” order from their employer. Under section 9 of the Employment Ordinance (Cap 57), an employee who refuses to do so can be dismissed summarily.

Under section 6 of the Occupational Safety and Health Ordinance (Cap 509), an employer has the duty to ensure, so far as reasonably practicable, the safety and health at work of all their employees.

The following will explore whether an instruction to an employee to get vaccinated is “lawful” and “reasonable”.

As regards the “lawfulness” of an instruction to get vaccinated, there is no law that allows an employer to require, or that prohibits an employer from requiring, an employee to be vaccinated.

An employer also should avoid falling foul of the various anti-discrimination ordinances¹. An employer should avoid making decisions about vaccination instructions based on the employee’s sex (including a woman’s pregnancy status), disability, family status and race. Any instruction which is discriminatory will be unlawful.

As regards the “reasonableness” of an instruction to get vaccinated, a wide range of factors has to be considered, including whether the employee’s work nature involves a high risk of contracting COVID-19 or close contact with other employees/customers, whether the employee’s refusal to get vaccinated would cause his employer loss of business, whether the employee has other valid reasons for refusing vaccination (e.g. religious or pre-existing health concerns). However, it should be noted that under the “vaccine bubble”, staff who are unfit to receive vaccination because of health reasons may submit a declaration form and a medical certificate to the employer (instead of getting vaccinated), but they have to take a COVID-19 test every seven days.

Therefore, much depends on context. The courts may be more inclined find it reasonable to require a caretaker of an elderly home, who is responsible for taking care of and is in close proximity with vulnerable elderly people, to be vaccinated. On the other side of the spectrum, it is unlikely to be reasonable to require an employee who spends most of his time working from home to get vaccinated.

Given the possible risks inherent in issuing instructions requiring employees to be vaccinated, employers can consider as an alternative encouraging employees to do so by providing incentives² (e.g. giving a day’s leave for employees to get vaccinated).

Can an employer require their employee to declare whether they have been vaccinated?

Again, this depends on whether this requirement is lawful and reasonable. Whether an employer is entitled to do so is highly fact sensitive, and the wide range of factors above has to be considered.

If an employer does decide to collect this type of personal data from employees, the employer must comply with the Personal Data (Privacy) Ordinance (Cap 486). Personal data on who is or is not vaccinated must be collected for a lawful purpose directly related to a function or activity of the employer, i.e. to comply with government regulations or ensure the safety and health of other employees/customers. Once collected, such data should be processed in a secure manner and should be kept only for as long as necessary for the fulfilment of the purpose of using the data. Use of the data should be limited to or related to the original collection purpose.

A case study: Australian flu shot case

Whilst the issues above are untested in the Hong Kong courts, guidance can be drawn from a recent decision by the Australian Fair Work Commission (“**FWC**”) (Australia’s national workplace relations tribunal), in relation to the requirement for employees to take the influenza vaccination (not COVID-19 vaccination).

In *Bou-Jamie Barber v Goodstart Early Learning* [2021] FWC 2156, the FWC upheld the decision to terminate a childcare worker who refused to take a flu shot. In this case, Goodstart required all employees to receive flu shots unless the employee had a medical condition preventing them from doing so. The FWC held that Barber’s failure to comply with a lawful and reasonable direction from Goodstart to have a flu shot was a valid reason for her dismissal.

In finding that Goodstart’s vaccination policy was reasonable, the FWC considered various factors, including the fact that (a) childcare is an industry where safety is of “paramount importance”, (b) Goodstart had a statutory duty under various work health and safety legislation to ensure the health and safety of its employees (including Barber) and the children in its care, (c) in light of the industry in which Goodstart operated, a mandatory vaccination policy was the most effective control measure, whereas other measures (e.g. social distancing or requiring staff to wear PPE) would be impractical, and (d) vaccinations would reduce the risk of flu being transmitted.

This FWC decision shed some light on the type of factors the courts may consider in determining whether a vaccination policy is “lawful and reasonable”. However, this decision should not be treated as setting a precedent for Hong Kong purposes that requiring employees to be vaccinated always would be permissible. As the FWC in that case has stressed, its decision specifically was related to the influenza vaccination in a childcare environment, where the risks and concerns were distinct.

As discussed above, much depends on context, and any analysis on the lawfulness/reasonable of a vaccination policy would be highly fact-sensitive.

Conclusion

As the Government continues to roll out its plans on the “vaccine bubble”, it is expected that there will be an increasing business imperative for employers to have as many employees vaccinated as possible.

Considering the possible legal implications in imposing a strict policy to require employees to get vaccinated, employers should first consider to provide incentives to encourage employees to do so. In any event, an employer must ensure that its policies do not contravene the anti-discriminatory laws, and the collection of data on the employees’ vaccination status must abide by the Personal Data (Privacy) Ordinance.

1. These ordinances are the Sex Discrimination Ordinance (Cap 480), Disability Discrimination Ordinance (Cap 487), Family Status Discrimination Ordinance (Cap 527) and Race Discrimination Ordinance (Cap 602).
2. Some industry commentators suggest that employers should offer rewards to those who get vaccinated, rather than taking benefits away from those who refuse to be vaccinated. The Equal Opportunities Commission has warned that removing or denying benefits for employees who refuse to get vaccination could be found to have broken the anti-discrimination law. See: EOC warns firms against penalising unvaccinated staff. (2021, June 3). RTHK English News: <https://gbcode.rthk.hk/TuniS/news.rthk.hk/rthk/en/component/k2/1594075-20210603.htm>

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