



# The COVID-19 Vaccine Dilemma in an employment context in Hong Kong

As we approach the first anniversary of the World Health Organisation declaring COVID-19 as a global pandemic, many jurisdictions are still grappling with the seemingly unstoppable spread of the virus. In response, governments around the world are looking to roll out vaccines as soon as they become available. In Hong Kong, the government has introduced the COVID-19 Vaccination Programme (“Programme”), which allows Hong Kong residents to be voluntarily vaccinated free of charge.

Throughout the course of the COVID pandemic, many businesses (especially those in consumer and retail sectors) have been heavily disrupted by mandatory lockdowns, restricted operating hours and limitations on social gatherings.

With the Programme in its initial stages of roll out, many employers will be confronted with the question as to whether they can or should compel their employees to get vaccinated. The issues with vaccinations involved from a policy perspective require a delicate balancing of individual liberties, public health and employment obligations and responsibilities. This delicate balancing act is being tested (pardon the pun) already in an employment context, with the Hong Kong government linking the reopening rights of certain businesses with COVID-19 testing of their employees.

In this article, we provide a framework through which employers may wish to consider vaccination issues relating to their employees. Importantly, this is an evolving area, and the impact of this framework may differ from one business to another quite markedly, and also in response to developments in government policies.

## High level principles

Before addressing specific scenarios, it may be useful to highlight a few high level guiding principles:

01

An employer has an obligation to provide a safe workplace to its employees;

02

The Disability Discrimination Ordinance (DDO) requires employers to accommodate employee’s medical conditions and/or disabilities;

03

Likewise, an employer should not make hiring decisions on the basis of a prospective employee’s vaccination status to avoid being seen to be discriminating against a certain class of people (i.e., those susceptible to COVID-19);

04

In respect of existing employees, the employer should not be requesting for vaccination history unless relevant for any legitimate purpose (e.g. relaying such information to insurance companies when requested), and in this regard, the employee should have given explicit consent for such information to be collected and transferred onto the third party;

05

The employment contracts generally do not expressly provide the right for an employer to insist upon an employee's vaccination, and even if such a right was included, it may not be enforceable;

06

The Programme proposed by the Hong Kong government does not recommend vaccination for all. Groups such as those under the age of 16 years (for the BioNTech vaccination) or those under the age of 18 years (for the Sinovac and AstraZeneca vaccines), and pregnant women are generally either not recommended or are ineligible for vaccination. The Programme is also being rolled out in phases, and eligibility for vaccination will not be uniform amongst employees until the Programme is in its final phase. Consequently, employers should not adopt a single point-of-time approach;

07

The Programme details also identifies groups of people who may not be suitable for vaccination. The key point here is that employers should not impose a blanket requirement (or even recommendation) that all staff must or should be vaccinated, since this conflicts with Hong Kong government health advice.

What would seem to follow from the above is that employer should not mandate the vaccination of their employees, and, any recommendation on vaccination should recognize that this may not be suitable for all groups.



## Could government policy potentially change the current stance?

Yes it could. Currently, vaccination under the Programme is administered on a voluntary basis. There are also no guidelines or orders from the Hong Kong government which provides any clarity on vaccinations in the workplace. There is also currently no linkage between vaccination and the right to reopen businesses or accepting a higher concentration of customers in a business in the same way as we have seen recently with COVID-19 testing. To reiterate, there is a significant difference between COVID-19 testing and vaccination both from the perspective of the level of individual choice which may be seen as reasonable, and the potential for adverse reactions (personal or medical).

In the absence of such guidelines, employers must continue to abide by the existing employment contracts, employment legislation and case laws.

However, if the Hong Kong government provides directions (for example by gazetting directions and specifications under the Prevention and Control of Disease Regulations) requiring businesses in certain industries to operate only if its staff are vaccinated, employers would then be in a position of greater strength to require its employees or new hires to be vaccinated. Importantly though, any decisions in relation to requiring vaccinations should be made in light of any government guidance or direction.

## Where is it likely to get more complex?

While the above framework is likely to deal with a broad array of situations, it is not difficult to conceive of circumstances where more nuanced issues may arise. For example:



How should employers approach employees who are required to travel overseas for business purposes? What if the destination country requires all visitors to be vaccinated before entry;



Can an employer restrict an employee's duties in circumstances where they are not vaccinated? What if there is guidance from the government requiring workers dealing with vulnerable individuals to be vaccinated?

In reality, we suspect that many of the practical issues employers will deal with are likely to fall into these categories. The answer to many of them is "it depends" and the position will become more clear as the Programme continues to be rolled out. Factors such as the following are likely to be relevant to any decision:

1



The extent to which the relevant restriction or entitlement is proportionate and reasonable from a health and safety perspective in all of the circumstances;

2



The extent to which the relevant restriction or entitlement is integral and materially affects the employee's ability to carry out normal duties and responsibilities;

3



The extent to which the relevant restriction or entitlement is consistent with prevailing government health directives and executive orders at the time; and

4



The extent to which the relevant restriction or entitlement takes into account groups with specific needs, such as persons under age 18 or pregnant women or those with certain health conditions, such that it does not operate in a discriminatory way.





# How should employers handle employees in relation to the vaccine?

Employers may wish to highlight to their employees that the Programme is available and to refer employees to the government website for the details relating to queries they may have in relation to the vaccine. This is important because, as noted earlier, not all of the population is recommended to be vaccinated.



## Conclusion

We understand many employers desire to utilize the Programme to provide a safe workplace. However, employers should be prudent when directing their employees in relation to getting vaccinated and avoid any acts which may potentially be seen as unreasonable or discriminatory. In addition, employers should continuously monitor government announcements relating to the Programme, including any executive orders. While support for the vaccination programme is a laudable aim from a public health perspective and this may align with business objectives, the legal rights of employees need to be respected in the process.

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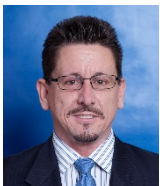
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