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C-19

REPORTING OBLIGATIONS ON HONG KONG EMPLOYERS IF AN EMPLOYEE CONTRACTS COVID-19

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With the widening impact of novel coronavirus (COVID-19) around the globe, governments and businesses alike are making every effort to mitigate the impacts of the global pandemic and the disruption it has caused. In our previous briefing, we highlighted various contractual, regulatory and operational issues businesses should consider, including employers' duties vis-a-vis their employees. In this briefing, we focus on the following practical issues arising out of COVID- 19:

- corporations' legal obligations to report or disclose details in the unfortunate event that an employee or director contracts COVID-19;
- the privacy issues arising out of such disclosures; and
- whether and to what extent employers can restrict employees' movements and benefits.

Reporting to the Government

While all registered medical practitioners are required to notify a public health authority of all suspected or confirmed cases of COVID-19, no equivalent general obligation has been imposed on a Hong Kong employer.

However, under the Employees' Compensation Ordinance (ECO), an employer is liable to pay compensation in respect of injuries sustained by its employees as a result of an accident arising out of and in the course of employment. To facilitate a subsequent compensation claim, the employer must report the injury to the Labour Department. On 10 February 2020, the Labour Department confirmed that, an employee may still claim compensation under ECO for a disease if it is a personal injury by accident arising out of and in the course of employment. It follows that the employer must notify the Labour Department of the injury. The employee could contact the Labour Department if he doubts whether the employer has made the requisite notification.

The English House of Lords has held that in the context of employee compensation, "accident" included absorption into the respiratory system of a type of germ. [1]As such, if an employee contracts COVID-19 while at work, he could claim that he has sustained injury by accident arising out of and in the course of employment and therefore claim compensation from his employer. Therefore, if you are informed by an employee that he contracted COVID-19 when he was at work, you will have to notify the Labour Department of the case. You will have to make a notification even if the employee is suspected by medical practitioners to have contracted the virus.

Whether or not the employee's compensation claim will be successful is an entirely different matter. Proving that he has contracted the virus during work (and not elsewhere) is likely to be difficult.

[1] *Brintons Ltd v Turvey* [1905] AC 230

Disclosure to stakeholders

Disclosure to other employees

An employer is not expressly required by law to disclose an employee's infection to its healthy employees. However, a non-disclosing employer may commit an offence by breaching the Occupational Safety and Health Ordinance (OSHO). OSHO requires every employer to, so far as reasonably practicable, ensure the health and safety of all employees at work. One example of breaching such obligation, as provided under OSHO, is failure to provide necessary information to ensure the safety and health at work of employees.

If an employee is found to have contracted COVID- 19, his activities and whereabouts in the workplace prior to diagnosis will be relevant to the detection and prevention of further infection. Therefore, it will be necessary to disseminate to other employees certain information regarding the infected employee (subject to data privacy considerations which will be discussed below). An employer may risk violating OSHO if it keeps its workforce in the dark in the unfortunate event of an employee contracting COVID-19.

There also exists a common law duty of care that requires an employer to avoid acts which could be reasonably foreseen to harm others. Non-disclosure of the fact that an employee has contracted COVID-19 is a failure to act which would give rise to liability in negligence in certain circumstances, including when there exists a special relationship between one party and the other. One established category of relationship where such positive duty may be owed is that of an employer and employees, such that the employer is duty-bound to act to protect its employees from harm, including disclosing relevant information so as to allow the employees to assess their own health risks and adopt precautionary measures (as explained above). In these circumstances, non-disclosure of a COVID-19 case may render an employer in breach of the common law duty of care owed to other healthy employees. In the event of an employee suffering any loss due to the lack of disclosure of an existing infection in the workplace, the non-disclosing employer may be liable for damages to the loss suffering employee.

Disclosure to clients, suppliers and other stakeholders

The common law duty of care also applies in relation to other non-employee stakeholders. This includes, for example, clients and suppliers.

Employees of clients and suppliers may have been in close contact with the infected employee in the same way as the employer's own employees. The pre-existing contractual relationship between the employer and its clients and suppliers may provide scope for the argument that there exists a special relationship between these parties, which means that the employer has a duty to act positively to prevent harm being caused to these contracting parties, although such argument would not be as strong as in the case of an employer/employee relationship. As such, it would be prudent for an employer to also disclose to major stakeholders such as potentially affected clients and suppliers any cases of COVID-19 among its employees. Failure to do so may render the employer in breach of its duty of care and liable for losses suffered by its stakeholders due to the non-disclosure.

Disclosure to the public (where an employer is a Hong Kong listed company)

Under the Securities and Futures Ordinance (SFO), a listed company has an obligation to disclose any 'inside information' to the public as soon as reasonably practicable after the information has come to its knowledge. A single case of infection within the workforce is unlikely to constitute 'inside information' that

must be disclosed under the SFO.[2] However, in the unfortunate event of, for example: (a) multiple cases of COVID-19 in individuals occupying key positions or; (b) mass infection in the workplace, an employer should consider treating such information as 'inside information', having regard to its potential to significantly jeopardise the employer's performance and materially affect its share price. In practice, we are fortunate not to have seen any disclosure of 'inside information' due to employees' infections, but two Hong Kong listed companies have chosen to voluntarily inform the market of the infection of an executive director.[3]

Quarantine

There is currently no regulation which imposes an obligation on employers to report cases where employees are subject to mandatory quarantine due to, for example, their being suspected to have contracted COVID-19 or having been in close contact with a confirmed case, or having returned to Hong Kong from overseas. However, employers should still consider the interests of other employees and stakeholders in determining whether or not to disclose the fact that an employee is subject to mandatory quarantine.

Data privacy considerations

Collection of data regarding employees' travel history and whether they have symptoms of (or have contracted) COVID-19 is not prohibited by the Personal Data (Privacy) Ordinance (PDPO). However, employers must comply with the requirements of the PDPO when they collect such information. To the extent such collection is not permitted by existing privacy notices issued under the PDPO, then employers should strongly consider issuing a fresh privacy notice. Such a privacy notice should explain to the employee:

- the purpose for which their data is being collected (which in this case would be to ensure the health and safety of employees and certain external stakeholders);
- that such data may be disclosed to third parties, including those discussed above; and
- how long the data will be retained by the employer.

Disclosure of the identity of employees who have, or are suspected to have, contracted COVID-19 will raise issues in relation to the employees' personal data. To the extent an employer's privacy policy does not permit disclosure of an employee's relevant personal data (e.g. name, home location, recent travel history etc.), the employer may nevertheless disclose the data to third parties without the data subject's consent in circumstances where not doing so would be likely to cause serious harm to the physical or mental health of third parties.[4] However, anyone disclosing such data must adopt the least intrusive way of doing so by, for example, disclosing only the minimum amount of data required in order to achieve the purpose of the disclosure (in such cases, it is likely that information such as contact details, dates of birth and HKID details would not be necessary, whereas names may be).

It is also worth noting that the Prevention of Control Disease (Disclosure of Information) Regulation makes it an offence for a person to fail to comply with a request from a health officer for information relevant to the handling of the COVID- 19 outbreak and which is within that person's knowledge, possession

[2] Inside information' must be 'likely to materially affect the price' of the shares of the listed company if the information were to become generally known to the market.

[3] See the voluntary announcements by Lion Rock Group Limited on 13 March 2020 here and Left Field Printing Group Limited on 13 March 2020 here.

[4] See section 59 of the PDPO.

or control.[5] To the extent the request requires the disclosure of personal data, such disclosure would be permitted under the PDPO.[6]

Further considerations in relation to employees

Apart from disclosing appropriate level of information concerning infected employees, employers in Hong Kong should prepare the workplace for the pandemic so as to minimise the health risks to the employees and others to whom a duty of care is owed.

Most employers should have, by now, suspended all non-essential business travels.

While employers cannot impose restrictions on their employee's freedom to travel during non- working days, employers should dissuade employees from traveling overseas so as to protect them from the risk of contracting the virus as well as preventing business disruption. The various mandatory quarantine measures recently imposed by the Government in Hong Kong mean that an employee returning from overseas will likely be subject to a mandatory quarantine order. As highlighted in our previous client briefing, the employee will be issued a medical certificate by a medical officer if he is required or ordered to be put under quarantine. As such, the employee will effectively be on sick leave while quarantined.

To minimise any business disruptions likely to be caused by employees traveling abroad, employers are advised to immediately issue guidelines on travel arrangements to or from affected areas, and develop a notification procedure for employees who expect themselves to be affected by the disease and relevant public health measures so that employers are informed of employees' travel plans well in advance.

Employers are reminded that the current outbreak of the coronavirus does not relieve them from complying with other obligations under the Employment Ordinance. Despite the difficult times posed by the situation, employers are not allowed to reduce or forfeit employees' entitlements such as annual leave payment or salary. Nevertheless, where both parties are agreeable, employers and employees are generally free to make arrangements for a period of voluntary leave to be taken by the employees on a paid or unpaid basis.

Conclusion

While we are all hoping for the best, we should no doubt prepare for the worst, at a time when the numbers of confirmed cases of COVID-19 continue to rise across the world. For an employer, disclosure of cases of COVID-19 infections among its employees is one of the first steps it can take to satisfy its legal duties and mitigate the adverse impacts of the global pandemic.

Awareness and communication of when an employee has, or may have, contracted COVID-19 is as relevant as ever. The following factors should be considered:

- All employers in Hong Kong should already have a COVID-19 action plan in place, which requires employees to self-declare their suspected or actual cases of COVID-19 as well as informing their employer who in the workplace (both employees and external stakeholders) they have recently been in close contact with.
- Employers should keep a clean working environment to minimise the risk of any employee contracting COVID-19 at work, in order to prevent an 'accident', for which the employer must compensate the employee under the ECO.

[5] See section 3 of the Prevention of Control Disease (Disclosure of Information) Regulation.

[6] See section 60B of the PDPO.

- Employers should have contingencies in place in the event there is a suspected or confirmed case of COVID-19 among its employees. Those contingencies should include ensuring the relevant privacy policy documents are in place prior to any reporting, as discussed above, as well as how to communicate with and monitor the welfare of the employee while they are in quarantine.
- If having an employee attend the office may pose a risk to the welfare of other employees, an employer can and should require that employee to work from home until a risk assessment determines that it is safe for them to return to the office.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.

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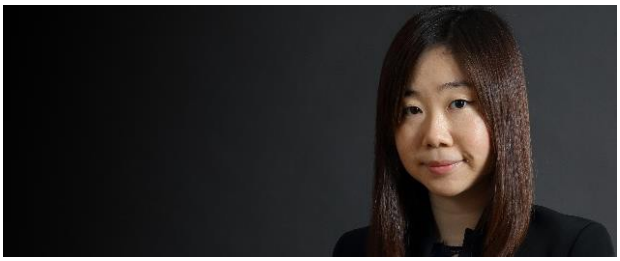

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