

Ebola and Employer Obligations

The outbreak of the Ebola Virus Disease (“Ebola”) in West Africa has received considerable media attention as it begins to spread outside of Africa. In August 2014, the Government of Hong Kong confirmed that Ebola is grouped under Viral Haemorrhagic Fever (“VHF”), which is one of the notifiable diseases under the Prevention and Control of Disease Ordinance (“PCDO”). This means medical practitioners are under a statutory obligation to notify the Director of Health of any suspected or confirmed case of Ebola.

While there are no recorded cases in Hong Kong so far (and we hope there will not be), it is worth reminding ourselves of an employer’s legal obligations and prepare for the unfortunate event should Ebola reach Hong Kong. In this update are some Q&As on an employer’s obligation in dealing with an Ebola outbreak including, what are an employer’s legal obligations, can an employer direct an employee to go home or stay at home if there is an outbreak, can an employee be directed to see a doctor and can an employer screen employees and customers before entering its premises?

1. WHAT ARE AN EMPLOYER’S MAIN LEGAL OBLIGATIONS?

The main areas of an employer’s legal liability associated with Ebola in the workplace include:

- Ensuring so far as reasonably practicable the workplace health and safety of employees (i.e., obligation under Occupational Safety and Health Ordinance (“OSHO”) and common law duty of care);
- Complying with obligations under the contract of employment and the Employment Ordinance (“EO”) (e.g., continuing to pay wages, ensuring the employer works within the terms of the contract of employment);

- Complying with the Disability Discrimination Ordinance (“DDO”); and
- Complying with the Employees’ Compensation Ordinance (“ECO”) (e.g., having appropriate insurance and timely reporting of illnesses/death). While the only insurance an employer is legally required to take out is the appropriate insurance under the ECO, an employer may also wish to consider business interruption insurance, medical insurance and evacuation cover.

2. DO I NEED TO PREPARE FOR AND HAVE IN PLACE A WORKPLACE PLAN TO DEAL WITH EBOLA?

There is no legal obligation in Hong Kong on an employer to specifically have a workplace Ebola response plan. However, the OSHO requires all employers in Hong Kong to, so far as reasonably practicable, ensure the safety and health at work of all the employer’s employees. One reasonably practicable step an employer could take is to develop a plan dealing with workplace health and safety issues associated with Ebola.

We recommend that employers prepare a detailed plan and implement it. The more detailed the plan the better prepared an employer will be to cope with any Ebola outbreak. A plan should deal with preparations to prevent an Ebola outbreak, what happens during the outbreak and the steps to be taken after the outbreak. Both workplace health and safety issues and business continuity issues should be covered.

The Ebola response plan may be a part of a broader pandemic preparedness plan.

3. WHAT SHOULD A WORKPLACE EBOLA RESPONSE PLAN COVER?

The plan should deal with the following:

Before an outbreak

- Preventive measures. In August 2014, the Centre for Health Protection issued [Health Advice in Workplace – Prevention of Ebola Virus Disease](#) (the “Health Advice”) which sets out guidelines on preventive measures that may be taken.
- Regular disinfection of the workplace.
- Making sure that employees, suppliers and customers are aware of the employer’s plans in the event of an outbreak.
- Ensuring sufficient supplies of appropriate masks, alcohol wipes, gloves, paper towels, thermometers, disinfectants, etc.

During an outbreak

- The steps that the employer will take to ensure the safety of employees while at work during an Ebola outbreak including how an employer will identify risks of employees becoming infected and how to minimise such risks.
- Communication strategies such as how and what information will be communicated to employees, suppliers and customers.
- Where employees will work, e.g., home, in the office or in alternative temporary offices.
- At what stage will the workplace be closed and who will make the decision.
- How to deal with deaths of colleagues, e.g., counselling.
- A mechanism for determining whether employees, suppliers and customers will be allowed access to the workplace, especially if they show symptoms of having Ebola.
- What to do with high risk/exposure staff (e.g., key employees and employees who travel)?

After an outbreak

- Ways to ensure that employees and customers have fully recovered before they are allowed back into the workplace.
- Rehabilitation for sick employees returning to the workplace or assistance to the colleagues and family of an employee who have died as a result of Ebola.

Communication with employees and being flexible on enforcing requirements imposed on employees under their contract of employment will be important in

maintaining employee relations and reducing anxiety and panic during an outbreak. Therefore, depending on the circumstances, employers may wish to:

- discuss with staff about the possibility of a workplace closure prior to closing;
- allow employees to take annual leave or unpaid leave once sick leave has been exhausted;
- allow employees to work from home; and
- explore salary reduction or unpaid leave as an alternative to termination of employment where business has slowed down.

Employers should make visitors to its offices aware of any health and safety hazards associated with entering the workplace prior to any intended visit where reasonably practicable.

4. CAN I DIRECT MY EMPLOYEES TO GO HOME OR STAY AT HOME IF THERE IS AN OUTBREAK?

Yes, but it depends. If an employer reasonably suspects that an employee either (a) has Ebola and is contagious or (b) if the employee enters the workplace he/she will be exposed to risks to his health and safety, then (depending on the particular circumstances) the employer should direct the employee not to attend at the workplace. The employer should continue to comply with its obligations under the contract of employment (e.g., to pay wages).

5. CAN I DIRECT AN EMPLOYEE TO SEE A DOCTOR?

Yes, but it depends. Requesting an employee to see a doctor is invasive and an employer would therefore generally require an express power in the contract of employment in order to direct an employee to see a doctor. Depending upon the circumstances, an employer may require an employee to obtain a clearance from a doctor before being allowed to enter into the workplace.

6. DO I HAVE TO CONTINUE TO PAY WAGES AND PROVIDE OTHER EMPLOYMENT RELATED ENTITLEMENTS DURING AN EBOLA OUTBREAK?

Yes. The contract of employment will continue during an Ebola outbreak unless the employment has ceased. An employer cannot refuse to pay wages simply because the employee is unable to attend the workplace or perform any work because of an Ebola outbreak.

7. CAN I QUARANTINE CERTAIN STAFF TO CERTAIN PARTS OF AN OFFICE OR SEND THEM TO A DIFFERENT OFFICE?

It depends but is possible. An employer must be careful not to contravene the DDO. An employee with Ebola or suspected of having Ebola will be a person with “disability” for the purposes of the DDO. Depending on the circumstances (including if an exception applies under the DDO – see Q11 below), an employer may ask an employee to work from a particular part of an office if it is to ensure his/her and/or other’s health and safety. As to whether an employer can send an employee to work in a different office, that would also depend on the circumstances including the contract of employment (e.g., whether it provides that the employee is entitled to work at a particular location), the extent of the travel required and inconvenience suffered by changing the work location. For example, it may not be reasonable to change an employee’s workplace from Hong Kong to a place overseas when the employee does not usually travel as part of his duties. However, changing the employee’s workplace from, say, Central to Causeway Bay may be reasonable.

8. CAN I DIRECT MY EMPLOYEES TO REPORT SUSPECTED CASES OF EBOLA?

Yes, in the event of an Ebola outbreak, in our view, it would be lawful and reasonable to ask an employee to report if he suspects he has Ebola.

9. CAN AN EMPLOYEE LAWFULLY REFUSE TO ATTEND WORK IF THERE IS AN EBOLA OUTBREAK?

It depends but is possible. An employee can only lawfully refuse to attend work if he reasonably fears for his health and safety by doing so. Section 10 of the EO entitles an employee to terminate his contract of employment without notice or payment in lieu if he reasonably fears physical danger by violence or disease which was not contemplated by his contract of employment expressly or by necessary implication. If an employer requires an employee to attend work in these circumstances, it is likely to be in breach of the OSHO.

10. CAN I SCREEN EMPLOYEES AND CUSTOMERS BEFORE ALLOWING THEM TO ENTER THE WORKPLACE?

Maybe. Depending upon the extent of the outbreak, the screening of employees and customers may be a reasonable step for an employer to take to reduce the

risk of its employees being exposed to harm. However, depending upon technological and medical testing limitations, there may be logistical and privacy issues with undertaking any such screening in a timely and effective manner before gaining entry to the building.

11. CAN I STOP A CUSTOMER FROM ENTERING THE WORKPLACE IF I SUSPECT HIM OF HAVING EBOLA?

Maybe. The DDO prohibits discrimination against a person with a disability in the provision of goods, services or facilities, as well as in the employment field. There is an exception if the disability is an infectious disease (which includes Ebola) and the discriminatory act is reasonably necessary to protect public health. So, if a customer is infected with Ebola and there is the risk of the customer exposing the employees to harm the employer may refuse entry to that person.

12. IS AN EMPLOYEE WHO HAS EBOLA ENTITLED TO COMPENSATION UNDER THE ECO?

Maybe. Unlike SARS and Avian influenza A, Ebola and VHF are not currently classified as an occupational disease under the ECO for payment of compensation. However, section 36 of the ECO provides that an employee shall have the right to recover compensation under the ECO in respect of a disease which is not a prescribed occupational disease if contraction of the disease amounts to a personal injury by accident arising out of and in the course of employment.

In determining whether the contraction of the disease amounts to a personal injury “by accident”, the Labour Department will assess whether there was “an accident” which must be distinct from the injury/disease, with the accident being at least a contributory cause and the injury/disease being the effect. Circumstantial evidence including the medical records and relevant information of the case would be relevant in determining whether “an accident” has occurred. The Labour Department will handle such cases in line with the same principle.

Having regard to the above, an employee who has contracted Ebola out of and in the course of employment may be entitled to compensation under the ECO.

Conclusion

We anticipate that health and safety issues relating to Ebola may be at the forefront of employers' minds over the coming months and we will continue to keep you informed of any new developments and/or guidelines issued by the Government.

In view of the potential outbreak of Ebola, we recommend employers consider the measures outlined above (if it has not already done so) to safeguard critical employees and operations.

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