



INSURANCE & PERSONAL INJURY

Employee's rights to claim against the employer for Novel Coronavirus infection

Produced in partnership with Ray Lee of ONC Lawyers



Introduction

With the number of infections and death toll climbing in mainland China and Hong Kong, as well as over the globe, the Novel Coronavirus is turning into a major global public health crisis. On 30 January 2020, World Health Organization has declared a global public health emergency over the spread of the Novel Coronavirus.

In Hong Kong, on 25 January 2020, the Chief Executive has raised the response level to Emergency under the "Preparedness and Response Plan for Novel Infectious Disease of Public Health Significance". Further, in late January and February 2020, Hong Kong Government announced that, except for staff of the departments providing emergency and specified public services, all other employees of the Government are not required to return to the offices but to work at home from 29 January 2020 to 23 February 2020. The government also appealed to private organizations to make similar arrangement to reduce the risk of the spread of Novel Coronavirus.

Whilst some employees can work at home under the flexible working arrangement, some employees still have to go to offices to work in the absence of such arrangement or due to the nature of the work. Employees in some of the industries may even be at a higher risk of infection because of frequent contacts with suspected cases of Novel Coronavirus and people coming from mainland China and different countries, for example people working in hospitals, clinics, immigration areas, hotels and transportation hubs. This article will discuss whether employees can claim against their employers for getting infected of Novel Coronavirus during work or travel between place of residence and place of work.

Claim under the Employees' Compensation Ordinance ("ECO")

The ECO governs the rights and obligations of employees and employers, and forms of compensations in the context of work-related injuries. Section 5 of the ECO provides that an employee can claim employees' compensation for injury by accident which can be proved to have arisen out of and in the course of employment.

Different from SARS which is recognized as an occupational disease under the Second Schedule of the ECO, Novel Coronavirus is not an occupational disease prescribed under the ECO. Nonetheless, section 36 of the ECO gives employees the right to recover compensation under the ECO in respect of a disease which is not prescribed as an occupational disease, if the disease is a personal injury by accident arising out of and in the course of employment within the meaning of section 5 of the ECO.

Therefore, in order to bring a claim for employees' compensation in respect of a disease, the employee has to prove that he contracted the disease by accident arising out of and in the course of employment.

For the requirement of "by accident", in *Sit Wing Yi Sibly v Berton Industrial Ltd* (2013) 16 HKCFAR 104, the Court of Final Appeal held that "injury by accident" shall comprise cause and effect, with the accident being at least a contributory cause and injury being the effect. Whether or not an injury is sustained by accident is a mixed question of law and facts.

Regarding "arising out of and in the course of employment", the requirement that an injury arose "out of" employment is distinct from the requirement that it arose "in the course of" employment. Whilst arising "out of" employment requires some causal relationship between the work and the injury, arising "in the course of" employment relates to time conditioned by reference to the employee's service. Section 5(4)(a) of the ECO provides that an accident arising in the course of an employee's employment shall be deemed to also have arisen out of the employment, in the absence of evidence to the contrary.

As such, an employee who has contracted Novel Coronavirus and can prove that he has contracted the disease by accident arising out of and in the course of employment will be covered by the ECO and may make a claim against his employer under the ECO. For example, a doctor working in a public hospital or a front desk receptionist working in a hotel who get infected of the Novel Coronavirus during employment and can prove the above requirements may claim the Hospital Authority and the hotel owner employer respectively under the ECO.

Employees should note that the burden of proof is on the applicants, i.e. employees, to prove on the balance of probabilities that they have contracted the Novel Coronavirus by accident both arising out of and in the course of their employment, for example because of the contact with customers or patients during the employment.

Nonetheless, it must be noted that, in general, an employee is not considered to be in the course of his employment when the employee travels between place of residence and place of work before or after the work, except in some exceptional circumstances, such as when the employee travels as a passenger by any means of transport which is being operated by his employer other than as part of a public transport service (section 5(4)(d), ECO), drives or operates any means of transport arranged or provided by his employer (section 5(4)(e), ECO), or within the duration of a gale warning or a rainstorm warning (section 5(4)(f), ECO). Therefore, if an employee has contracted the Novel Coronavirus when he travels between the place of residence and place of work, generally he is not covered under the ECO and may not make a claim for employees' compensation against the employer.

It is acknowledged that in practice it may be difficult to pinpoint precisely when and where an employee was infected. If the dispute comes before the court, the court would have to make a judgment based on all the circumstantial evidence. E.g., if the employee works in a hotel where a confirmed patient had stayed and several of his colleagues are also infected, whilst the employee's residential area is free from confirmed case and he has not travelled to China, then the court would be entitled to draw the inference that the employee contracted the virus in the course of employment.

Common law negligence claim

An employee who has contracted Novel Coronavirus during the work may also bring a common law claim for damages against the employer if the infection is caused by the negligence, breach of statutory duty, wrongful acts or omissions of the employer.

Employers have non-delegable duty to take reasonable care of their employees' safety, including the provision of competent staff of employees, a safe place of work, safe equipment, a safe system of work, proper instructions and supervision, and adequate training.

To discharge the employers' duty in this regard, the employers shall take a number of measures, such as those advised by the Centre for Health Protection, at the workplace, including but not limited to cleaning and disinfecting workplace regularly, providing face masks and other personal protective equipment to employees, and circulating relevant guidelines to employees. Nevertheless, it should be noted that the employers' duty is not absolute. The employers are only required to take steps which are reasonably practical to ensure the employees' safety.

For example, in view of the shortage of face masks in the region, even though an employer cannot provide sufficient face masks to its employees, it is unlikely the employer will be found negligent if it has taken reasonable steps to source the face masks and has taken other measures to ensure the employees' safety.

On the contrary, if an employer does not take any measures at all in relation to the outspread of Novel Coronavirus and an employee has contracted the disease during the work, it is very likely the employer will be found negligent.

Insurance

Under section 40 of the ECO, all employers are obliged to take out a policy of insurance to cover themselves in respect of their liability to pay employees' compensation under the ECO and to pay damages under common law. If the employee has contracted the Novel Coronavirus during the work and can prove his claim for employees' compensation under the ECO and for damages under common law as discussed above, the employer can seek indemnity from his insurer. The employer should notify the insurer as soon as possible when his employee claims to have contracted the Novel Coronavirus during the work.

Conclusion

An employee who has contracted the Novel Coronavirus may claim against his employer by (a) making a claim for employees' compensation under the ECO if he can prove that he has contracted the disease by accident arising out of and in the course of the employment, and (b) bringing a common law claim for damages if he can prove that the infection is caused by the negligence, breach of statutory duty, wrongful acts or omissions of his employer.

SARS was added as an occupational disease under the ECO under an amendment of the ECO with effect on 8 February 2005, nearly 2 years after the outbreak of SARS in 2003. We shall keep an eye on any similar amendment to be made on the ECO to include the Novel Coronavirus as prescribed occupational disease under the ECO in the future, which will provide better protection to employees and expedite the compensation process for employees infected with the Novel Coronavirus during their work in the specified high-risk occupations.

Author

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Ray is a partner of ONC Lawyers and the head of Insurance and Personal Injury Department. He has been specializing in personal injuries and insurance-related litigation since he started his legal career. He has extensive experience in acting for claimants as well as insurance companies in employees' compensation and personal injuries claims. He also advises insurance companies on policy disputes including motor vehicles third party risks policies, employees' compensation policies, contractors' all risks policies and public liability policies. He is a contributor to "Health and Safety, Volume 31, Halsbury's Laws of Hong Kong, Second Edition 2011".

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