

EMPLOYMENT, PRIVACY & DISCRIMINATION

Employer's statutory and common law duties to ensure employees' safety and health at work during the Novel Coronavirus epidemic



Produced in partnership with Michael Szeto of ONC Lawyers

Introduction

As of 7 February 2020, there were 31,161 reported cases of Novel Coronavirus infection in Mainland China¹ and 24 reported cases in Hong Kong.² Hong Kong also confirmed its first death from the Novel Coronavirus on 4 February 2020. The statistics between 24 January and 7 February 2020 show that the number of reported cases is increasing at a fast pace.³ On Chinese New Year's Day (25 January 2020), the Government escalated the response level to Emergency⁴ and has launched a series of measures to reduce the risk of any Novel Coronavirus outbreak in the community. On 28 January 2020, the Government announced that Government employees (except those staffs or departments providing emergency and essential public services) would work from home from 29 January to 2 February 2020, and on 31 January 2020, has extended the work from home arrangement to 9 February 2020. It has also appealed to private sector organisations to make similar arrangements as far as practicable.

Employers need to be alert and responsive to the situation. In this article, we will discuss the employers' statutory duty as well as their common law duty to ensure their employees' safety and health at work in light of the recent spread of the Novel Coronavirus.

Employer's statutory duty to ensure safety and health at work of all its employees

Employers are under a statutory duty to ensure the safety and health at work of all their employees under section 6(1) of the Occupational Safety and Health Ordinance (Cap. 509) ("OSHO").

Section 6 (Employers to ensure safety and health of employees) of the OSHO reads as follows:

"(1) Every employer must, so far as reasonably practicable, ensure the safety and health at work of all the employer's employees.

¹ Statistics from CHP (as defined below, i.e. Centre for Health Protection) as of 6 February 2020 23:59.

² Statistics from CHP as of 7 February 2020 09:00.

³ According to the statistics from the Department of Health, between 23 January and 7 February 2020, the number of reported cases in Hong Kong has increased from 2 to 24 cases. In Mainland China, the number of daily reported cases from 24 to 26 January 2020 was approximately 500 to 800 cases per day. In the period from 27 to 31 January 2020, the number of reported cases in Mainland China was approximately 1,500 to 1,900 reported cases per day. In the period from 1 to 2 February 2020, the number of reported cases in Mainland China was approximately 2,500 to 2,800 reported cases per day. In the period from 3 to 6 February 2020, the number of reported cases in Mainland China was approximately 3,100 to 3,800 reported cases per day.

⁴ On 25 January 2020, the Government has escalated the response level to Emergency under the Preparedness and Response Plan for Novel Infectious Disease of Public Health Significance.

(2) The cases in which an employer fails to comply with subsection (1) **include (but are not limited to)** the following –

- (a) a failure to provide or maintain plant and systems of work that are, so far as reasonably practicable, safe and without risks to health;
- (b) a failure to make arrangements for ensuring, so far as reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage or transport of plant or substances;
- (c) a failure to provide such information, instruction, training and supervision as may be necessary to ensure, so far as reasonably practicable, the safety and health at work of the employer's employees;
- (d) as regards **any workplace under the employer's control** –
 - (i) a failure to **maintain the workplace in a condition that is, so far as reasonably practicable, safe and without risks to health**; or
 - (ii) a failure to provide or maintain means of access to and egress from the workplace that are, so far as reasonably practicable, safe and without any such risks;
- (e) a failure to **provide or maintain a working environment for the employer's employees that is, so far as reasonably practicable, safe and without risks to health**;

(3) An employer who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine of \$200,000.

(4) An employer who fails to comply with subsection (1) **intentionally, knowingly or recklessly** commits an offence and is liable on conviction to a fine of \$200,000 and to **imprisonment for 6 months.**"

(emphasis added)

This section 6(1) statutory duty to ensure the safety and health at work of all the employer's employees is subject to the proviso of "**so far as reasonably practicable**", and it includes, among other things, a duty to maintain the workplace in a condition that is safe and without risks to health,⁵ and to provide or maintain a working environment for the employer's employees that is safe and without risks to health.⁶

Any employer who fails to comply with such a duty commits an offence under section 6 of the OSHO and is liable on conviction to a fine of HK\$200,000 and, in cases where the employer intentionally, knowingly or recklessly fails to do so, to a fine of HK\$200,000 and to imprisonment for 6 months. The burden of proof is on the prosecution to prove beyond reasonable doubt that the employer has, so far as reasonably practicable, failed to discharge its statutory duty under section 6(1).

What is "reasonably practicable"?

Whether an employer has discharged its statutory duty under section 6(1) depends on the facts and circumstances. In *HKSAR v Gold Ram Engineering & Development Ltd* [2002] 2 HKC 600, the employees while working on a drilling-rig placed on a scaffold platform positioned on a shelf part-way up a slope used the drilling-rig as a hoist to lift a 80 kg hammer from the bottom of the slope up to the drilling-rig. During the lifting operation the drilling-rig tilted and the platform collapsed, killing one employee and injuring another. The employer was convicted before the magistrate's court on the basis that it had failed, insofar as it was reasonably practicable, to ensure the safety and health at work of its employees, contrary to sections 6(1), 6(2)(a), 6(2)(b) and 6(3) of the OSHO. The magistrate found that the employer failed to do what is "reasonably practicable" during the lifting operation. The risk of affecting the stability of the device being used to lift such a heavy hammer up a rugged incline onto a wooden scaffolding platform was obvious and could be anticipated. The employer appealed to the Court of First Instance ("CFI").

⁵ Sections 6(1) and 6(2)(d)(i), OSHO.

⁶ Sections 6(1) and 6(2)(e), OSHO.

In the appeal, the CFI confirmed the magistrate's findings and affirmed that for the purpose of section 6, the court shall consider:

1. what precautions an employer had taken to ensure that it was a safe operation if there was a risk?
2. whether those precautions taken, so far as reasonably practicable, were sufficient?

What is "reasonably practicable" is always a balancing exercise of the risks and the sacrifice. It involves a consideration, in the light of the whole circumstances, at the time of the incident, whether the time, trouble and expense of the precautions are proportionate to the risks involved, and is also an assessment of the degree of security which the measures may be expected to afford.

Employer's common law duty to ensure safety and health at work of all its employees

In addition to their statutory duty under section 6(1) of the OSHO, employers are under a common law duty to act reasonably in all the circumstances including a duty of care, which extends to the provision of a safe place of work for all their employees.

In *Cheung Kin Kwok Alen v Lau Man Chee & Anor* [2004] 3 HKC 227, the Court of Appeal applied the dictum of Swanwick J in the English case of *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts Ltd)* [1968] 1 WLR 1776 and held that the overall test is whether the employer has conducted itself as a **reasonable and prudent employer**, who must do the following:

1. take positive thought for the safety of his workers in light of what he knows or ought to know;
2. weigh up the risks in terms of the likelihood of injury occurring and the potential consequences if it does; and
3. balance against the probable effectiveness of the precautions that can be taken to meet the risk and the expense and inconvenience involved.

If an employer is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, it is negligent. The burden of proof is on the employee to prove on the balance of probabilities that the employer has failed to do so.

In *Cheung Wai Kar v Dragon Kings Development Ltd t/a Famous (Dragon Kings) Restaurant* [2019] HKCFI 3114, the plaintiff employee was employed by the defendant employer as a substitute chef to work in the kitchen of its restaurant. The employee claimed he was instructed by his supervisor to clean the metal filter of the exhaust hood in the kitchen, and since this was about 2 meters from the ground, he had to climb onto the kitchen stove to clean it. The filter was covered with grease. His hand slipped and he cut his thumb on the sharp edge of the filter. The employee commenced civil proceedings against the employer on the basis, among other things, the employer was negligent in failure to provide a safe place of work and effective supervision. The employer argued that it should be a matter of common sense that the employee should not have stood on a greasy stovetop because it would be easy to slip.

Based on the fact that the employee was hired as a chef and not a cleaner, he had never cleaned filter before, he was new to the kitchen, he did not feel able to question his supervisor, he was not familiar with the equipment which might have been available, and the employer did not give him any instructions as to how to perform the task, the CFI found the employer was held in breach of its non-delegable duty to provide a safe system of work.

Discharging both the statutory and common law duties

In light of the recent spread of the Novel Coronavirus, what should employers do to discharge both their statutory duty and common law duty to ensure their employees' safety and health at work?

Employers are under a statutory duty to in **so far as reasonably practicable**, maintain the workplace in a condition that is safe and without risks to health, and to provide or maintain a working environment for the employer's employees that is safe and without risks to health. As for their common law duty, employers have a duty to provide a safe place of work for all their employees and to conduct themselves as **reasonable and prudent employers**.

According to Centre for Health Protection ("CHP"), the main mode of transmission of Novel Coronavirus is through respiratory droplets while the virus can also be transmitted through contact. The incubation period ranges from 2-10 days but can be as long as 14 days. As workplace is often crowded, there is an obvious risk that if one employee is infected with Novel Coronavirus, it can easily spread among other employees.

1. Office management

For office management, we have highlighted below some important enhanced measures extracted from (1) CHP's [Health Advice on Prevention of Severe Respiratory Disease associated with a Novel Infectious Agent in Workplace \(Interim\)](#) published on 7 January 2020 (last updated on 25 January 2020) ("**Health Advice in Workplace (Interim)**") and (2) [Guidelines for employers and employees in respect of prevention of Severe Acute Respiratory Syndrome \(SARS\)](#) issued by the Labour Department in November 2003 ("**SARS Guidelines**")⁷, which may be adopted by the employers so far as reasonably practicable:

- a. clean and disinfect workplace regularly in accordance with the Health Advice in Workplace (Interim);
- b. provide adequate and proper face masks and other personal protective equipment to employees when necessary;
- c. maintain good indoor ventilation by, e.g. keeping windows open as appropriate and where possible, having well-maintained air conditioning system;
- d. ensure toilet facilities are properly maintained; and
- e. provide liquid soap, disposable towels and hand-dryer in toilets.

2. Employees' personal hygiene

It is also important for an employer to maintain close communication with employees in respect of the importance of good personal hygiene in workplace for prevention and control of disease. For examples, an employer should, so far as reasonably practicable:⁸

- a. communicate health advice, guidelines and any special policy for dealing with the spread of Novel Coronavirus to employees;
- b. remind employees to wear surgical mask when required to work face to face with public or in crowded area;
- c. remind employees the importance of good personal hygiene;
- d. remind employees to consult a doctor in case of fever or cough, and not to go to work in case of fever; and
- e. avoid arranging unnecessary business trips to affected areas.

3. Temporary special work arrangement

- a. *Self-isolation for 14 days for employees who have travelled to Mainland China:* In its [press release](#) issued on 30 January 2020, the Labour Department appealed to employers that, among other things, (i) they should provide necessary personal protective equipment including surgical masks to front-line employees and those in need, and (ii) there should be special work arrangement for employees who have recently travelled to Hubei Province and other parts of Mainland China. For persons travelling from Hubei Province and now in Hong Kong, Department of Health requires them, if asymptomatic, to wear a surgical mask and continue to do so until after 14 days departing Mainland China, and self-isolate themselves for 14 days as far as possible. The Labour Department has also suggested that persons returning from other parts of

⁷ Whilst the SARS Guidelines are in relation to SARS, employers may consider and adopt the SARS Guidelines in respect of prevention of Novel Coronavirus since its main mode of transmission is similar to SARS.

⁸ See Health Advice in Workplace (Interim) and SARS Guidelines.

Mainland China to stay at home for 14 days upon their return as far as possible.

So far as reasonably practicable, employers should follow suit and consider allowing employees, if they have been to the Mainland China (in particular Hubei Province), to have flexible work arrangement. For example, provide special arrangement for employees to work from home during the isolation period and encourage them to wear surgical masks after they return to workplace. Employers should also provide surgical masks to employees who are in need as far as reasonably practicable.

- b. *Work from home arrangement*: As mentioned above, employers should consider following the Government's approach and allow employees to work from home so far as practicable.

Although it is advisable for an employer to follow the Government's advice as set out above in so far as practicable, what a reasonable employer should do is always a matter of balance between the risks, costs and effectiveness of the precautionary measures after taking into account of the circumstances as a whole. What may be reasonably practicable for one employer to do, may not be reasonably practicable for another employer to follow suit. In the unfortunate event that an employee is infected with Novel Coronavirus at work, it does not necessarily mean that the employer must be in breach of its statutory duty or common law duty. For example, an employer who has tried its best to provide surgical masks to all its employees but is only able provide some surgical masks to front-line employees because of the current shortage of surgical masks, can hardly be blamed and is unlikely to be in breach of its statutory or common duties.

Takeaways

Employers are under both a statutory duty and a common law duty to, so far as reasonably practicable, ensure the safety and health at work of all the employees. What is "reasonably practicable" involves a balancing exercise of risks, costs and effectiveness of the measures taken, and employers should act reasonably and prudently at times in light of the whole circumstances.

In light of the increasing number of reported cases of Novel Coronavirus in Hong Kong and Mainland China, employers should adopt, where appropriate and reasonably practicable, the enhanced measures and special arrangements specified in the Health Advice in Workplace (Interim), the SARS Guidelines, and other guidelines and announcements made by the relevant Government departments and authorities to discharge their statutory and common law duties to ensure the safety and health at work of all their employees. Employers are also encouraged to, so far as reasonably practicable, be flexible with work arrangement and to communicate closely with their employees for the time being until the Novel Coronavirus is under control. It is not necessary a breach of duty on the part of the employer even if its employee has contracted Novel Coronavirus at work. It all depends on whether the employer has done what is reasonably practicable in discharging its statutory duty under section 6(1) of OSHO and acted reasonably and prudently in discharging its common law duty.

Author

Michael Szeto

Partner, ONC Lawyers

Michael is a litigation partner of ONC Lawyers and heads the firm's Employment practice. He has many years of experience in handling complex commercial disputes, cases involving shareholders' disputes and regulatory matters under the Securities and Futures Ordinance, bankruptcy and insolvency matters, debt recovery and mortgagee actions. He frequently advises on various contentious and non-contentious employment matters, covering contract reviews, termination disputes, injunctive relief, discrimination and harassment claims, data privacy matters, as well as advice on matters relating to team moves, remuneration packages and employee incentive schemes. He is a frequent author of employment articles in industry publications and presenter to legal and HR professionals.

This document is available on Lexis Advance® Hong Kong Practical Guidance.

Lexis Advance® Hong Kong Practical Guidance provides up-to-date practice notes, precedents and know-how from specialist solicitors and barristers so you can work efficiently and provide advice with confidence. Lexis Advance® Hong Kong Practical Guidance contains exclusively written content by trusted experts in the field. ONC Lawyers is one of our many expert contributors from a range of Hong Kong legal leaders.

Discover Lexis Advance® Hong Kong Practical Guidance today by registering for a demonstration at www.lexisnexis.com.hk/lahk-pg