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柯伍陳律師事務所

Speaker : Michael Szeto
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COVID-19 Employment Law Special

What Every Employer and Employee Should Know

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About the speaker

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Principal Areas of Practice 主要業務範圍

- Litigation & Dispute Resolution (訴訟及調解爭議)
- Arbitration & Mediation (仲裁及調解)
- Complex Commercial Disputes (複雜商業糾紛)
- Company & Shareholder Disputes (公司及股東糾紛)
- Corporate Fraud (企業詐騙)
- Criminal Litigation (刑事訴訟)
- Debt Recovery (債務追討)
- Employment, Privacy & Discrimination (僱傭、私隱及歧視)
- Regulatory Enforcement & Compliance (證券監管及法規)

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Statutory Duties

- Employment Ordinance (Cap. 57)
  僱傭條例
- Occupational Safety and Health Ordinance (Cap. 509)
  職業安全及健康條例 (簡稱：職安條例)
- Employees' Compensation Ordinance (Cap. 282)
  僱員補償條例
- Disability Discrimination Ordinance (Cap. 487)
  殘疾歧視條例

Common Law Duties

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Employment Ordinance (Cap. 57)

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Employment Ordinance (Cap. 57)

The Employment Ordinance (**EO**) is the main piece of legislation governing conditions of employment in Hong Kong. It covers a comprehensive range of employment protection and benefits for employees including :

- Wage Protection
- Rest Days
- Holidays with Pay
- Paid Annual Leave
- Sickness Allowance
- Maternity Protection
- Statutory Paternity Leave
- Severance Payment
- Long Service Payment
- Employment Protection
- Termination of Employment Contract
- Protection Against Anti-Union Discrimination

Employer's statutory and common law duties to ensure employees' safety and health at work

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Occupational Safety and Health Ordinance (Cap. 509)

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Section 6 (Employers to ensure safety and health of employees)

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

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

…

(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**;

…

(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**.

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Penalties:

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

- 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**.

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The statutory duty to ensure the safety and health at work of all the 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, and to provide or maintain a working environment for the employees that is safe and without risks to health.

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What is “reasonably practicable”?

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Whether an employer has discharged its statutory duty depends on the facts and circumstances.

HKSAR v Gold Ram Engineering & Development Ltd [2002] HKC 600

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?

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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

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In addition to their statutory duty under 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**.

Cheung Kin Kwok Alen v Lau Man Chee & Anor
[2004] 3 HKC 227

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 employer may be liable for damages.

- The burden of proof is on the employee to prove on the balance of probabilities that the employer has failed to do so.

- *Cheung Wai Kar v Dragon Kings Development Ltd t/a Famous (Dragon Kings) Restaurant* [2019] HKCFI 3114

What measures can an employer take to ensure that it has discharged its statutory and common law duties?

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Practical steps:

- Contingency Plan.
- Clean and disinfect workplace regularly.
- Maintain good indoor ventilation by, e.g. keeping windows open as appropriate and where possible, having well-maintained air conditioning system.
- Ensure toilet facilities are properly maintained, and provide liquid soap, disposable towels and hand-dryer in toilets.
- Provision of masks, sanitizers, wipes, etc.
- Communicate health advice, guidelines and any special policy for dealing with the spread of COVID-19 to employees.
- Remind employees:
  - to wear surgical mask when required to work face to face with public or in crowded area;
  - the importance of good personal hygiene; and
  - to consult a doctor in case of fever or cough, and not to go to work in case of fever.

Practical steps (cont'):

- Avoid arranging unnecessary business trips to affected areas.
- Flexible work schedule.
- Office rosters.
- Work from home arrangement.
- Special/enhanced measures may be appropriate for certain employees (pregnant employees, employees who have a public-facing role, etc.).
- Self-isolation for 14 days for employees who have travelled to China and S. Korea.

Employees' Compensation Ordinance (Cap. 282)

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Employees' Compensation Ordinance (Cap. 282)

The Employees' Compensation Ordinance (**ECO**) establishes a no-fault, non-contributory employee compensation system for work injuries.

An employer is liable to pay compensation in respect of:

- **injuries sustained** by his employees as a result of an **accident arising out of and in the course of employment**; or

- **occupational diseases** specified in the ECO suffered by the employees.

- COVID-19 is **not** a prescribed **occupational disease** under the ECO → Cannot make a claim based on occupational disease under ECO.

- An employee shall have 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 ECO**.

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When an employee travels between place of residence and place of work before or after work, will the employee be considered to be in the course of his employment under the ECO?

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Generally, "**No**", except where an accident to an employee resulting in injury or death is deemed to arise out of and in the course of his employment:

- while travelling as a passenger to or from his place of work by a means of transport operated or arranged by his employer and other than as part of a public transport service;

- while travelling by a direct route between his residence and his place of work for the purpose of and in connection with his employment by driving or operating any means of transport arranged or provided by his employer;

- when typhoon signal No. 8 or above or a red/black rainstorm warning is in force, while travelling from his place of residence to his place of work by a direct route within a period of four hours before the time of commencement of his working hours for that day, or from his place of work to his place of residence within a period of four hours after the time of cessation of his working hours for that day; or

- while travelling, for the purpose of and in connection with his employment by any means of transport permitted by his employer, between Hong Kong and any place outside Hong Kong or between any other such places outside Hong Kong.

If an employee sustains a work injury outside Hong Kong, would he be covered by the ECO?

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Yes, ECO applies to employees employed in Hong Kong by local employers injured while working outside Hong Kong.

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Government of HKSAR Press Release (issued on 10 February 2020 at HKT 22:56)

"*Protection under the Employees' Compensation Ordinance for employees contracting the Severe Respiratory Disease associated with a Novel Infectious Agent in the course of work*

****

In response to media reports that employees, including medical staff, would not be entitled to protection under the Employees' Compensation Ordinance (ECO) if they contract the Severe Respiratory Disease associated with a Novel Infectious Agent (novel coronavirus), a Government spokesman made the following clarification today (February 10): …"

"… *According to ECO, if an employee sustains an injury or dies as a result of an accident arising out of and in the course of his employment, or suffers from an occupational disease prescribed by ECO, his employer is in general liable to pay compensation under ECO. Although Severe Respiratory Disease associated with a Novel Infectious Agent is not a prescribed occupational disease under ECO, section 36 of ECO stipulates that an employee may still claim compensation under the Ordinance for a disease if it is a personal injury by accident arising out of and in the course of employment.*

If an employee contracts or suspects having contracted novel coronavirus by accident arising out of and in the course of his employment, he should inform his employer immediately so that his employer can notify the Labour Department (LD) of the injury. If the employee has doubt as to whether his employer has reported the injury to LD, he could approach the Employees' Compensation Division of LD direct. …"

Practical steps

- Check the coverage of EC insurance.
- If an employee contracts or suspects having contracted COVID-19 by accident arising out of and in the course of his employment, he should inform his employer immediately so that his employer can notify the Labour Department of the injury.
- If the employee has doubt as to whether his employer has reported the injury to the Labour Department, he could approach the Employees' Compensation Division of the Labour Department directly.
- Employer should also inform the insurer of the incident.

Disability Discrimination Ordinance (Cap. 487)

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Disability Discrimination Ordinance (Cap. 487)

Section 2. Interpretation

disability (殘疾), in relation to a person, means—

…

(c) the presence in the body of organisms causing disease or illness;

(d) the presence in the body of organisms capable of causing disease or illness;

…

and includes a disability that—

(i) presently exists;

(ii) previously existed but no longer exists;

(iii) may exist in the future; or

(iv) is imputed to a person;

Disability Discrimination Ordinance (Cap. 487)

“Direct discrimination”

- occurs when a person is treated less favorably than another person who does not have disability.

“**Indirect discrimination**”

- occurs when a condition or requirement, which is not justifiable, is applied to everyone, but in practice it adversely affects persons who have disabilities.

- The DDO stipulates that it is unlawful for an employer to discriminate against or harass an employee on account of his/her disability in the course of the employee's employment with the employer.

- COVID-19 amounts to a disability within the definition section under the DDO.

Disability Discrimination Ordinance (Cap. 487)

Section 61. Infectious diseases

(1) Subject to subsection (2), **nothing in this Ordinance shall apply** to a person who discriminates against another person with a disability if—

(a) that person's disability is an **infectious disease**; and

(b) the discriminatory act is **reasonably necessary to protect public health**.

….

(3) In this section, infectious disease (傳染病) includes—

(a) any scheduled infectious disease, or a disease caused by a scheduled infectious agent, within the meaning of the **Prevention and Control of Disease Ordinance (Cap. 599)**; and

(b) any communicable disease specified by the Director of Health by notice in the Gazette.

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Prevention and Control of Disease Ordinance (Cap. 599)

Schedule 1. Scheduled Infectious Diseases

34AAA. Severe respiratory disease associated with a novel infectious agent (嚴重新型傳染性病原體呼吸系統病) (Added L.N. 3 of 2020)

Can an employee refuse to go to work in fear of his safety and health?

Can an employer dismiss the employee because of his absence from work?

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Essential conditions of an employment contract at common law

Implied duties of employer:

- Duty not to give unreasonable and unlawful order.
- Duty to pay wages.
- Duty to provide work.
- Duty of trust, confidence and respect.
- Duty to take reasonable care for the safety of employees.
- Duty to provide adequate supervision, equipment and training.
- Duty to indemnify employees against expense necessarily incurred during employment.

Essential conditions of an employment contract at common law

Implied duties of employee:

- Duty of obedience to lawful and reasonable orders.
  - Unless the job duty carries danger which is immediate, personal and unavoidable.
- Duty of good faith, loyalty and fidelity.
- Duty of care.
- Duty to adapt.

Employee's duty to obey lawful and reasonable orders

- Employees have a duty to obey all lawful and reasonable orders of their employer. What is considered as "reasonable" is fact-sensitive and depends on the context of each case.

- Where an employer gives a direction to an employee that is both lawful and within the scope of the employee's employment, the employee is obliged to comply with such direction.

- Failure to comply may result in a fundamental breach permitting the employer to dismiss the employee summarily.

Termination of Employment Contract Without Notice or Payment in lieu of Notice

An employer may summarily dismiss an employee without notice or payment in lieu of notice:

(1) if the employee, in relation to his employment:

- wilfully disobeys a lawful and reasonable order;
- misconducts himself;
- is guilty of fraud or dishonesty; or
- is habitually neglectful in his duties; or

(2) on any other ground on which he would be entitled to terminate the contract without notice at common law.

Termination of Employment Contract Without Notice or Payment in lieu of Notice

Summary dismissal is a **serious disciplinary action**. It only applies to cases where an employee has committed very serious misconduct or fails to improve himself after the employer's repeated warnings.

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Termination of Employment Contract by Notice or Payment in lieu of Notice

A contract of employment may be terminated by the employer or employee through giving the other party due notice or payment in lieu of notice.

Termination of Employment Contract Without Notice or Payment in lieu of Notice by Employee

An employee may terminate his contract of employment without notice or payment in lieu of notice:

- if he **reasonably fears physical danger by** violence or **disease** such as was not contemplated by his contract or employment expressly or by necessary implication;
- if he is subjected to ill-treatment by the employer;
- if he has been employed for not less than five years and is certified by registered medical practitioner or a registered Chinese medicine practitioner as being permanently unfit for the type of work he is being engaged; or
- on any other ground on which he would be entitled to terminate the contract without notice at common law.

Constructive dismissal under common law

- An employee may accept a fundamental breach of the employment contract by the employer and claim constructive dismissal against the employer.

- Circumstances that have been found sufficiently serious to warrant the employee terminating the employment and claiming constructive dismissal include:
  - failure to pay wages and other benefits;
  - failure to provide a reasonable amount of work;
  - unilateral change or variation in the terms and conditions of employment;
  - reduction in wages;
  - substantial reduction in working hours.

Can an employer request an employee to

(1) come into work on a roster or
(2) work from home?

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Employee's implied duties:

- Duty of obedience to lawful and reasonable orders
- Duty to adapt

Can an employee request an employer to allow him to

(1) come into work on a roster

or (2) work from home?

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- Yes, if the employer consents.

- The Labour Department has encouraged employers to be considerate and show understanding to such employees' situation and make flexible arrangements, including where practicable allowing employees to work from home or granting paid leave to them. This will help maintain good labour-management relations and protect the health of all employees as well as the community.

Can an employer deduct his employee's wages for absence from work?

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- It depends on the facts and circumstances.
- What is the reason for the employee not going into work?

If an employee is put under medical surveillance or quarantine

- Where an employee **has contracted COVID-19**, the employer should grant the employee sick leave in accordance with the EO or the relevant employment contract (if applicable).

- If the employee is taking paid sick leave, the employer will need to pay sickness allowance in accordance with the EO or the employment contract (if applicable).

- An employer is prohibited from terminating the contract of employment of an employee on his paid sickness day, except in cases of summary dismissal due to the employee's serious misconduct. An employer who contravenes the above provision is liable to prosecution and, upon conviction, to a fine of $100,000.

If an employee is put under medical surveillance or quarantine

Labour Department's press release on 30 January 2020:

> "*If an employee is required or ordered by a health officer to be placed under medical surveillance or quarantine, that individual* ***will be issued a medical certificate with the "under medical surveillance" statement****.*
>
> *The employer* ***must*** *grant that employee sick leave* ***in accordance with requirements under the EO or relevant employment contract****.*"

If an employee is put under medical surveillance or quarantine

Labour Department (Labour Relations Division)'s publication in March 2020:

- An employee who is subject to quarantine ordered by a Health Officer is required to satisfy the requirements under the EO in order to be entitled to sickness allowance under the EO:
  - sick leave is supported by an "appropriate medical certificate"
  - sick leave is not less than 4 consecutive days
  - employee has accumulated sufficient number of paid sickness days

- "Appropriate medical certificate":
  - issued by any registered medical practitioner, registered Chinese medicine practitioner or registered dentist
  - specifies no. of days on which the employee was, is or will be, unfit for work
  - specifies the nature of the sickness or injury on account of which, the employee was, is or will be, unfit for work.

- If an employee **does not contract any disease during quarantine** and **therefore no sick leave being granted**, the **EO does not provide for wage arrangements** in such circumstances. Employers are encouraged to make flexible arrangement.

If an employee refuses to attend work

- Employees have a duty to obey all lawful and reasonable orders of their employer.
- Where an employer gives a direction to an employee that is both lawful and within the scope of the employee's employment, the employee is obliged to comply with such direction.
- Failure to comply may result in a fundamental breach permitting the employer to dismiss the employee summarily.
- **Deduction of wages**: Yes, an employer can deduct a sum of wages which is proportionate to the period of time the employee is absent from work.

Can an employee refuse to attend business trip at places with COVID-19 outbreak?

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- Employees should not disobey a lawful and reasonable order unless there is a **clear, credible and imminent personal threat** for the employee to follow such order.

- An employee is likely bound to obey an instruction to attend business trip if doing so is properly related to his job character or capacity in which he is employed.

- Burden would be on the employee to establish **a reasonable excuse to not obey a prima facie lawful and reasonable instruction** of the employer.

- In order to justify the disobedience of an instruction to attend business trip, there must be an **immediately threatening danger** for the employee to contract COVID-19 due to the trip.

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Employer’s statutory and common law duties to ensure safety and health at work:

- Need to take reasonably practicable measures to ensure the safety and health of all employees at work.

- e.g. provide masks and protective equipment, arrange accommodation with reasonable hygiene standard.

Termination of Employment Contract Without Notice or Payment in lieu by Employee

An employee may terminate his contract of employment without notice or payment in lieu if he **reasonably fears physical danger by** violence or **disease** such as was not contemplated by his contract of employment expressly or by necessary implication.

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Can an employer reduce the employee's wages?

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- An employer may reduce the employee's wages with the employee's consent provided there is **consideration**.

- An employer may not unilaterally reduce the employee's wages without the employee's consent. In doing so, the employer may be in breach of the EO.

- If an employer reduces an employee's wages without his consent, the employee may make a claim for remedies against an employer for **unreasonable variation of the terms of the employment contract**.

Reality of employee's bargaining position

Huen Fook Nam v Penthalpha Enterprises Ltd (Unrep., HCA 15860/1999)

Unfavourable new terms of employment was offered to the employee that reduced scope of the employee to earn commission.

Judge To said:

"*… the employment market was against the Plaintiff and his position in the Defendant was not strong.* ***He had no bargaining power*** *… The Defendant could at any time give a month's notice to terminate the Plaintiff's employment if the Plaintiff did not accept the new terms …* ***As for consideration, the Defendant's agreement to continue the Plaintiff's employment on the new terms or the Defendant's forbearance from exercising its right to terminate the employment provided the necessary consideration.*** *This may be nothing but a peppercorn, but is nevertheless* ***sufficient as a matter of law***". (emphasis added)

Deductions from wages

- EO provides that no deductions shall be made by an employer from the wages of his employee or from any other sum due to the employee otherwise than in accordance with the EO (e.g. deductions for absence from work).

- An employer who unlawfully deducts his employee's wages commits an offence and is liable to a fine of HK$100,000 and to imprisonment for 1 year.

Unreasonable Variation of the Terms of the Employment Contract

An employee may claim for remedies against an employer for unreasonable variation of the terms of the employment contract if:

- the terms of the employment contract are varied without the employee's consent and the employment contract does not contain an express term which allows such a variation; and

- the terms of the employment contract are varied other than for a valid reason as specified in the EO.

Valid reasons for dismissal or variation of the terms of the employment contract under the EO

Under the EO, the five valid reasons for dismissal or variation of the terms of the employment contract are:

- the conduct of the employee;
- the capability or qualifications of the employee for performing his work;
- redundancy or other genuine operational requirements of the business;
- statutory requirements; or
- other substantial reasons.

Remedies for unreasonable variation of the terms of the employment contract

The Labour Tribunal, in considering the case, may order:

- reinstatement or re-engagement (subject to the mutual consent of both the employer and employee); or

- an award of terminal payments against the employer.

Constructive dismissal under common law

- An employee may accept a fundamental breach of the employment contract by the employer and claim constructive dismissal against the employer.

- Circumstances that have been found sufficiently serious to warrant the employee terminating the employment and claiming constructive dismissal include:
  - failure to pay wages and other benefits;
  - failure to provide a reasonable amount of work;
  - unilateral change or variation in the terms and conditions of employment;
  - reduction in wages;
  - substantial reduction in working hours.

Can an employer request an employee to take no-pay leave (停薪留職)?

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- There is no provision under the EO on no pay leave.

- **Lay-off**: Where an employee is employed under a contract that **his remuneration depends on his being provided by the employer with work**, he shall for the purposes of "severance payment" under the EO be taken to be laid off where the total number of days on each of which such work is not provided for him exceeds:

  - half of the total number of normal working days in any period of 4 consecutive weeks; or
  - one-third of the total number of normal working days in any period of 26 consecutive weeks,

  and he is not paid a sum equivalent to the wages which he would have earned if work had been provided on the days on which no work was provided.

Severance Payment

An employee employed under a continuous contract for not less than 24 months is eligible for severance payment if:

- he is dismissed by reason of redundancy;
- his fixed term employment contract expires without being renewed due to redundancy; or
- he is laid off.

Constructive dismissal under common law

- An employee may accept a fundamental breach of the employment contract by the employer and claim constructive dismissal against the employer.

- Circumstances that have been found sufficiently serious to warrant the employee terminating the employment and claiming constructive dismissal include:
  - failure to pay wages and other benefits;
  - failure to provide a reasonable amount of work;
  - unilateral change or variation in the terms and conditions of employment;
  - reduction in wages;
  - substantial reduction in working hours.

What are an employer's obligations if an employee contracts COVID-19?

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- Where an employee has contracted COVID-19, the employer should grant the employee sick leave in accordance with the EO and the relevant employment contract.

- Under the EO, an employee employed under a continuous contract is entitled to sickness allowance if:
  - the sick leave is supported by an appropriate medical certificate;
  - the sick leave is not less than four consecutive days; and
  - the employee has accumulated sufficient number of paid sickness days.

- An employer is prohibited from terminating the contract of employment of an employee on his paid sickness day, except in cases of summary dismissal due to the employee's serious misconduct. An employer who contravenes the above provision is liable to prosecution and, upon conviction, to a fine of $100,000.

- The employer is required to pay the following sum of money to the dismissed employee within 7 days after the day of termination:
  - payment in lieu of notice;
  - a further sum equivalent to seven days' wages as compensation; and
  - any sickness allowance to which the employee is entitled.

Q & A

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THE END

THANK YOU!

Important Notice:
The law and procedure on this subject are very specialised and complicated. This presentation is just a general outline for reference and cannot be relied upon as legal advice in any individual case.

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