

Client Alert

Insurance

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Workplace injuries associated with mandatory COVID-19 vaccination

Alfred Tam and Linda Lee

To combat the surging fifth wave of the pandemic, the Hong Kong Government announced a new vaccine pass regime (the “**Vaccine Pass Rules**”) on 8 February 2022 under the Prevention and Control of Disease (Vaccine Pass) Regulation (Cap. 599L).

Under the Vaccine Pass Rules which take effect from 24 February 2022, only those who have received at least one dose of COVID-19 vaccination may be permitted to enter certain premises¹, with numerous exceptions. The Vaccine Pass Rules will affect employment across various industries and employees whose job duties have to be performed within these premises will have to observe the Vaccine Pass Rules.

In furtherance of the Vaccine Pass Rules, the Government proposed to amend the Employment Ordinance (Cap. 57) to provide that if an employee is unable to report for duty and attend work with the vaccine pass where it is legally required, termination on the basis of such non-compliance with the Vaccine Pass Rules will not constitute unreasonable dismissal. Terminating employment for absence due to compulsory quarantine will however be deemed as unreasonable dismissal.

Implications under the Employees’ Compensation Ordinance

Vaccination-related injuries are novel to the Employees’ Compensation Ordinance (Cap. 282) (the “**ECO**”). Employers and employees’ compensation insurers should bear in mind the legal implications of the Vaccine Pass Rules for potential claims under the ECO.

To qualify for compensation under the ECO, the employee has to prove the personal injury is caused by an accident arising out of and in the course of the employment. In other words, the employee has to be engaging in work or activities incidental to the work that he/she is employed to do at the time of the accident. The Court will take into account the place and hours of work, the nature of the vaccination and whether it was mandated by law or the employer, and whether the employee was acting in the employer’s interest or in furtherance of the employer’s purpose by receiving the vaccination.² If the vaccination is reasonable or necessary, having regard to all the circumstances, even if it is not part of the employee’s ordinary duty, it may be regarded as within the sphere of employment.³

If employees are required to be vaccinated under the Vaccine Pass Rules to carry out their employment duties, or otherwise mandated to do so by the employer, it would likely be considered incidental to employment. Injuries or deaths associated with vaccinations, including adverse reactions to the vaccine, accidents arising on the way to or from the vaccination venue, would potentially be subject to compensation under the ECO.

Where injuries arise due to the rare occurrence of adverse reactions and side effects caused by the vaccine, the injured may apply for compensation under the Indemnity Fund for Adverse Events Following Immunization with Coronavirus

¹ *Catering Premises and Scheduled Premises, including shopping malls, department stores, hotels, supermarkets, barber shops and hair salons, as set out in Schedule 2 of the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F)*

² *Chan Lap Sin Alexander v Gold Lion Productions Co (A Firm) [1995] HKCU 119*

³ *Slavin v AM Carmichael & Co Ltd [1945] 1 All ER 292 (HL)*

Disease-2019 (COVID-19) Vaccines (the “**AEFI Fund**”). The AEFI Fund provides extra protection to employers by reducing the compensation amount payable by the employer. If a claimant succeeds in a compensation claim under the ECO, the amount previously received from the AEFI Fund will be offset from the Court’s award.

Work Injury Cases in Other Jurisdictions

United Kingdom

In *Thomas v NHS Business Services Authority* [PO-2449] 16 September 2014, a community nurse applied for permanent injury benefit under the NHS Injury Benefit Scheme for chronic fatigue syndrome allegedly caused by Hepatitis B vaccinations. There is no disagreement that the vaccination was required in the course of her employment with National Health Service. The Pensions Ombudsman held that the nurse will be entitled to the benefit if her condition was **wholly or mainly attributable to her employment**.

United States

In *Home Depot United States, Inc. v. Noorani (Workers' Comp. Appeal Bd.)* 2021 Pa. Commw. Unpub. LEXIS 664, a customer service greeter claimed total disability benefits for an alleged work injury caused by a severe reaction to a flu vaccination he received at work. He was encouraged by the employer to receive the vaccination at a vaccine clinic on the employer’s premises. The Court is satisfied that the **medical evidence was sufficient** to support an award of benefits.

Canada

In Decision No. 607 02 [2002] O.W.S.I.A.T.D. No. 1373, the Panel stated that in determining whether there exists a causal link between the firefighter’s Hepatitis B vaccinations and his subsequent development of arthritis, **there needs to be more than a possibility that the vaccinations may have caused or contributed significantly to the development of the condition**.

Australia

In *Janice Pond v Hunter New England Local Health District* [2017] NSWWC 152, a nurse alleged that she sustained a condition known as transverse myelitis due to an H1N1 Fluvax vaccination injection. The vaccination was administered by the staff health unit at the John Hunter Hospital as an initiative to reduce workplace sickness. There is no dispute that the nurse was in the course of her employment at the time she received the vaccinations. However, the Workers Compensation Commission held that the **flu vaccination did not cause the condition** and hence the compensation claim failed.

In *Military Rehabilitation and Compensation Commission v Benjamin James Edward May* [2016] HCA 19, Mr. May suffered from disabling symptoms, including vertigo, after receiving vaccinations that were required during his employment in the Royal Australian Air Force. **The Court was not satisfied on the evidence that Mr. May suffered a physical injury that can be attributed to the vaccinations as dizziness was not an injury** and thus not compensable.

The above cases involve vaccinations mandated by employers, and the position for vaccinations made compulsory by the government remains to be seen. However, it is discernible that claims based on post-vaccination medical conditions face considerable difficulty in proving causation. Most claims were declined due to the lack of medical evidence.

A Snapshot on Vaccine Mandates in Other Countries

A number of countries have decided to boost their vaccination coverage against COVID-19 with vaccine mandates but the implementation and legal consequences vastly differed. Below is a snapshot of the mandatory vaccination policies of selected countries as at the date of this publication:

Country	Target Group	Vaccination Policies
Austria	Anyone over 18	Mandatory vaccination, testing or COVID-19 recovery requirements in the workplace since 1 November 2021. Effective from 3 February 2022, unvaccinated adults will be subject to fines of up to €3,600.
Costa Rica	All public sector employees	Proof of vaccination required for access to hotels, resorts, restaurants,

		bars, cafes, stores, museums, theatres, cinemas, gyms, leisure facilities and adventure tourism services.
Germany	All employees in care homes, hospitals, doctors' offices and outpatient clinics, as well as midwives, physiotherapists and massage therapists	Healthcare workers are required to prove they have been fully vaccinated against COVID-19 or have recently recovered from the illness. If no proof is provided, health authorities will be informed and they may decide to ban the person from entering the facility where they are working or from continuing to exercise their profession.
Italy	Anyone over 50	Those in the workforce who are over 50 are required to show a health pass proving they have either been vaccinated or recently recovered from COVID-19, or face suspension from work.
France	Anyone entering specified public places	Vaccine pass required for access to public places e.g. restaurants, cafes, cinemas and long-distance trains.

Next Steps for Employers or Insurers

Employers to note

When administering or facilitating vaccination under the Vaccine Pass Rules, an employer should:-

- a) Consider reasonable adjustments to the job duties of unvaccinated employees (where possible) to avoid potential liability under the ECO;
- b) Encourage employees to seek medical consultation in advance to see if they are physically fit to be vaccinated and if negative, obtain a medical exemption certificate instead;
- c) Provide detailed instructions and guidelines to employees with regard to any vaccination policy; and
- d) Report any vaccine-related injury on duty to its employees' compensation insurer in a timely and honest manner.

Insurers to note

When an employer submits a vaccine-related claim to its employees' compensation insurer, the insurer should:-

- a) Elicit as much details as possible regarding the vaccination, including the date, the dose, the type and the place of vaccine;
- b) Elicit all medical proof relating to the employee concerned, including medical documents showing his/her pre-existing medical condition and post-vaccine reaction / condition;
- c) Ascertain with the employee concerned whether he/she has received any medical exemption certificate or sought any medical consultation prior to the vaccination;
- d) Ascertain with the employer regarding its vaccination policy (whether it is mandated by the Government or

incentivized by the employer itself); and

- e) Consult their legal advisers when there is any complication regarding the vaccine-related claim, whether in fact or in law.

Vaccine-related claims, same as most of the personal injury claims, are highly fact-sensitive. After all, it is a question of law, supported by thorough analysis on facts and medical evidence. We consider it prudent for insurers / employers to consult their legal advisers when necessary in order not to expose themselves to a floodgate of vaccine injury claims.

Concluding Remarks

An employee **may** be entitled to employees' compensation if he/she sustains an injury due to mandatory vaccination and the injury occurred out of and in the course of employment. The gist of the claim will lie in the causal nexus between the vaccination and the subsequent medical condition.

To prevent the floodgate of potential COVID-related litigations, we envisage that only significant post-vaccination reaction may be considered an injury. More severe reactions include blood clots, allergic reactions (anaphylaxis), seizure, stroke or death. Claims under the ECO will likely be denied if the employee only suffers from mild symptoms after vaccination, such as headache, fever, fatigue, nausea or dizziness.

Whilst vaccination is not entirely risk-free for individuals, it is by far the most efficient way to contain the spread of infectious diseases whilst contributing to herd immunity. A vaccination mandate at the workplace should be task-oriented and in the interest of the employer's business. When implementing vaccination policies, an employer must be vigilant not to discriminate against employees who cannot be vaccinated by reason of their disability and/or other attributes (e.g. religion) which are protected by law.

Want to know more?

Alfred Tam
Partner
alfred.tam@deacons.com
+852 2825 9490

Linda Lee
Partner
linda.lee@deacons.com
+852 2825 9610

Gary Lui
Partner
gary.lui@deacons.com
+852 2825 9581

Gere Sit
Partner
gere.sit@deacons.com
+852 2825 9632

Christina Hung
Consultant
christina.hung@deacons.com
+852 2825 9293

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