

# Corporate Commercial Client Alert

## Employment and Pensions

4 March 2022

### Guidance note: Amendments introduced by the Employment (Amendment) Bill

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The [Employment \(Amendment\) Bill](#) (the “**Bill**”) comes as part of the Hong Kong Government’s recent efforts to combat the 5<sup>th</sup> wave of the COVID-19 pandemic. This note sets out to explain points to note under the Bill and also some practical tips for employers to consider.

#### 1. What are the main amendments introduced by the Bill?

Since the onset of the 5<sup>th</sup> wave, many have been subject to movement restrictions under the Prevention and Control of Disease Ordinance (Cap. 599), namely compulsory quarantine and testing orders (“**Cap. 599 restrictions**”). To address the effects which Cap 599 restrictions may have on employment, the Bill sets out to amend the Employment Ordinance so that:

- a) a day on which an employee is subject to any Cap. 599 restriction (an “**affected employee**”) is regarded as a sickness day under the Employment Ordinance;
- b) sickness allowance would be paid to an affected employee under certain circumstances;
- c) it is not a valid reason to dismiss an employee or vary the terms of an employee’s employment contract on the ground of the employee being an affected employee; and
- d) it is a valid reason to dismiss an employee (other than an employee that falls within a specified category – see question 3 below) or vary the terms of an employee’s employment contract if the employee refuses to produce proof of vaccination after the employer makes a request.

The most substantial amendments to the Employment Ordinance introduced by the Bill therefore aim to protect those who cannot attend to work due to a Cap. 599 restriction from termination or having their employment terms varied, and potentially entitling them to claim sickness allowance.

#### 2. When can an affected employee claim sickness allowance under the Bill?

For an affected employee to be entitled to sickness allowance, the employee:

- a) must be able to show appropriate evidence per the requirements of the Bill. Part 2 of Schedule 11 to the Bill stipulates that this either means a document (in hard copy form or electronic form) issued by a public officer or any person on behalf of the Government, and which shows the prescribed information (defined below) relating to the employee; or electronic data access to which can be obtained, by telecommunications, in a manner specified by a public officer, and which shows the prescribed information relating to the employee (“**appropriate evidence**”). “Prescribed information” means the name of the affected employee, the type of Cap. 599 restriction imposed on the employee, and the commencement and expiry date of the period for the restriction imposed;
- b) must be absent from work for not less than four consecutive days due to the Cap. 599 restriction; and

- c) must not be subject to such restriction due to the affected employee's own serious and wilful misconduct (e.g. breaching the social distancing measures under Cap. 599).

It is our understanding that many employees who have been or become subject to Cap. 599 restrictions have not been able to produce the appropriate evidence to their employers even upon their recovery and/or return to work, due to them not yet having received any such evidence or information from the Government. In such cases, it would be prudent for employers to verify as far as is reasonably practicable their employees' claims and entitlement to sickness allowance.

For example, the Government [announced](#) on 25 February 2022 that due to the relatively high infection risk in the community, positive results from Rapid Antigen Test ("RAT") are relatively certain. Members of the public tested positive by RAT, whether distributed by the Government or on their own purchase, should according to the Government be considered positive cases. Therefore, if an employee can present evidence of such positive results for the day the employee reports sick (and/or if applicable, evidence that the employee has submitted positive RAT results onto the Centre for Health Protection's designated webpage (<https://www.chp.gov.hk/cdpi/>)), the employer may take this as sufficient evidence of sickness.

3. When can I terminate an employee under the Bill?

***Not when an employee is complying with a Cap. 599 restriction***

- Under the Bill, an employee's absence from work due to his/her compliance with a Cap. 599 restriction does not constitute a valid reason for dismissal or variation.
- To recap, section 32K of the Employment Ordinance sets out five reasons which constitute valid reasons of termination by an employer. An employee, however, is only entitled to such protection under the three circumstances specified under section 32A, namely (i) where an employee has been employed under a continuous contract for a period of not less than 24 months; (ii) where an employee is employed under a continuous contract and the employer unilaterally varies the terms of the employee's employment contract in order to extinguish or reduce the employee's rights under the Employment Ordinance; or (iii) where the employer terminates the employee other than for a valid reason under section 32K and in contravention of certain laws.
- The Bill therefore intends to protect employees so that employers cannot effect terminations solely because an employee is subject to a Cap. 599 restriction. However, as is clear from the above, not all employees could benefit from such protection (e.g. the employee has been employed for less than 24 months).
- Having said that, it remains unlawful to terminate any employee who is on statutory paid sick leave; pregnant and/or on maternity leave; or is suffering from work related injury before having entered into an agreement with the employer for employee's compensation or before the issue of a certificate of assessment. It is also unlawful to terminate an employee by reason of their (i) giving of evidence or information in any proceeding or inquiry in connection with the enforcement of labour legislation, industrial accidents or breach of work safety regulations; (ii) involvement in any trade union or its activities; or (iii) disability, gender, marital status, pregnancy, breastfeeding status, race, or family status.

***When the employee does not comply with the employer's legitimate vaccination request***

- The Bill is clear that if an employee fails to comply with an employer's "legitimate vaccination request" (see below), the employee may be regarded as being incapable of performing the work which the employee was employed to do, therefore constituting a valid reason for dismissal or variation of employment terms.
- In summary, a vaccination request by an employer only qualifies as a "legitimate vaccination request" under the Bill if:
  - a) the employer requires the employee's vaccination proof in order to comply with the Vaccine Pass Regulation (e.g. restaurants) or a Government requirement or recommendation, or neither of the aforementioned requirements (in which case the proof that can be sought is that the employee has received at least one dose of the vaccine);
  - b) the employer at the time of making the request reasonably believes that, having regard to the nature of the employee's work and the employer's operational requirements, if the employee contracts the

specified disease (such as COVID-19), the persons with whom the employee may come into face-to-face contact when the employee performs his/her duties would be exposed to the risk of infection;

- c) the request is in writing and given to all employees who perform work the nature of which is the same as, or similar to, each other;
- d) the employer gives the employees 56 days from the day of the request to show the relevant vaccination proof; and
- e) the request is not made to an employee who is exempted under the Vaccine Pass Regulation, or if only one dose of the vaccine is required, the request is not made to an employee who is pregnant, breastfeeding, certified to be unsuitable to be vaccinated, or certified to have recovered from the specified disease within 6 months from when the request is proposed to be made.

Employers should note that their vaccination requests must comply with all of the above in order for the request to be a "legitimate vaccination request" under the Bill.

These are very tough times for everyone, please take care and stay safe!

## Want to know more?

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