



To: All newspapers/ radio & TV news department

Press Release

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(for immediate release)

Atypical Pneumonia and Employment Ordinance

The pneumonia virus raises matters which every responsible employer in Hong Kong must think about. These are largely “humanitarian” but related legal questions arise. The basic employment laws contained in the Employment Ordinance do not contain provisions which allow employees, as of right, to take time off because they are concerned about becoming unwell, or because a family member or other person sharing accommodation is sick, or because a child’s school has been closed. The law does allow employees to take time off, with sick pay if accrued entitlements have not been used up; but the provisions envisage and apply only to employees already sick and incapable of work. They do not address the more complex situation of where an employee fears becoming sick (either through attending work or through having been exposed to the virus already). The EO clearly does not answer all questions. Employers do have to bear in mind their obligations under other employment-related laws, as follows:

- (1) Firstly, there is the long established obligation of an employer to provide a safe place of work. This derives from both common law and statute. A clean working environment, and facilities for full personal hygiene, are very important. These laws would also mean, for example, that where there is a probability of an employee having been closely exposed to the virus (for example, because a family member has it), that employee should be allowed to stay away from work – in fact, in our view, not only allowed to stay away from work, but be encouraged or in some cases even required to stay away from work. This absence should last for the period necessary to establish that the virus has not been communicated and that steps can be taken to ensure that the exposed employee is physically separated for the time being from the contagious person. The employee of course must obey all reasonable requests of the employer; so an employer such as the Civil Service, in requiring employees applying for leave due to a family member having the disease to produce supporting evidence, is acting properly. We agree that employees who abuse these processes should be subject to disciplinary procedures.
- (2) Secondly, Hong Kong has had, for more than six years now, anti-discrimination laws which prohibit detrimental discriminatory treatment on the ground of (among other things) “disability”. Employers need to bear in mind that the provisions define “disability” very widely, and in particular a disability can include an imputed or anticipated or potential disability. Certainly if an employer was to dismiss a worker because the employer felt he might become ill (eg because of a relative) in the future, that would be discrimination (as it is detrimental treatment on the ground that disability is expected to occur in the



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future). If an employer dismisses someone because, acting contrary to the employer's demands, he took time off to check his own health, or to look after a dependent who is absent from work or school due to disability, and that resulted in dismissal, the position is more difficult. Such an employee has breached his duties by disobeying the employer, and as the law stands the employer is entitled to withhold pay for unauthorised absence, or to give a warning, or to dismiss. Depending on the facts of each case, it is of course possible that in some instances such action could be detrimental treatment amounting to unlawful discrimination under the disability or family status discrimination ordinances. Employers must proceed with care and act reasonably and with tolerance. Employees in turn must not seek to take advantage by taking unnecessary or prolonged leave. Dialogue between both sides is very important: employees should not seek to make unilateral decisions.

This broad topic of employee rights and employer obligations (and, conversely, employee obligations and employer rights) needs to be looked at closely and urgently in the context of the recent unfortunate development of atypical pneumonia, which it is to be hoped will be brought under control quickly. In the meantime, the Law Society urges employers to act responsibly having regard to their obligation to provide a safe workplace and also the concerns of employees and subcontractors who fear loss of jobs or pay, or other detriment, due to their taking action directly arising from concerns over the health of these workers and their families. Employees need to understand the enormous pressure which will be put on, in particular, small and medium sized business, by prolonged absences and should also act responsibly and with flexibility. The government should consider a statement of guidelines, or possibly legislative intervention, to clarify key aspects, for example, in relation to employees who consider that they need to take leave for check-ups or monitoring.

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