



To: All newspapers/ radio & TV news department

Press Release

27 March 2003

(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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The Law Society of Hong Kong



致:各報章/電台/電視台

新聞稿

2003年3月27日

新聞發布會 - 非典型肺炎及僱傭條例

受到非典型肺炎事件的影響，每一位具責任感的僱主都考慮如何處理有關問題。這主要是人道的關懷，但亦涉及法律問題。現行的僱傭法例並沒有任何條文允許僱員基於同住家人受感染、或家中子女停課而可獲取請假的權利。但現時的法例允許僱員在已生病時請病假。條文並沒有提及一些更複雜的情況，例如僱員擔憂將會發病(因為工作關係、或已接觸到受病毒感染之環境)。<<僱傭條例>>並沒有為以上情況作出解定。但僱主需緊記在相關的法律條例下有以下的義務：

- (1) 首先，普通法及有關條文說明僱主有責任為員工提供一個安全的工作環境。清潔的工作環境及個人衛生設施尤為重要。如僱員有可能接觸到病毒(如其同住之家庭成員已染病)，則該僱員應獲准暫時停止工作，以免病毒繼續擴散。我們認為，在特殊的情況下，僱員如有機會受到感染，僱主應要求僱員暫時停止其工作。僱主更應鼓勵或要求該僱員暫時停止工作至病毒不作擴散為止，以便受感染人士獲得適當休息及隔離，同時減低病毒散播機會。僱員在此情況下應遵循僱主合理的指示及要求；公務員按照同樣的處理方法，香港政府允許公務員在有可能接觸到病毒(如其同住之家庭成員已染病)時申請病假，便是一個恰當的處理方法。我們同意如僱員濫用有關申請病假程序時，僱主可以紀律處理。
- (2) 另外，本港之反歧視法已成立超過六年，禁止任何對殘疾人士之歧視。僱主必須留意此條例中「殘疾」含義相當廣，這包括已成、即將成為及有可能成為殘疾者。毫無疑問若僱主因僱員將來可能染病〔如其家人已染病〕而將之解僱，則該僱主可能已觸犯反歧視法〔因為推斷僱員將會成為殘疾而對其作出損害性的行動，實已觸犯反歧視法〕。但若僱主解僱員工的理由是他因要作身體檢驗而未能達到工作要求，或要照顧殘疾家人而未能工作，僱員的情況便較為不利。因該僱員沒有按僱主的指示工作，未授權而缺席，法例便容許僱主扣起這筆薪金，或提出警告，或解僱。按個別情況而定當然有可能在某些情況下這亦屬非法解僱，觸犯殘疾或家庭狀況的歧視法。僱主在這時期應小心處理有關問題，作出合理的反應，並表現容忍。僱員亦不可以近日事件為藉口，申請不必要的假期或延長病假，相方的對話尤其重要：僱員更不可單方面作出行動和決定。



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目前非典型肺炎不幸地擴散，我們期望情況可盡快受到控制。在這期間，僱主和僱員均需要緊急而密切地留意他們的權利和義務。

香港律師會在此呼籲僱主履行他們的責任及義務，為僱員提供安全的工作環境，並以負責及體諒的態度對待受非典型肺炎影響的員工及外判商等人士，這些人士或由於自己或家人之健康而申請假期，亦擔憂因此而失去工作、被扣薪金或導致其他損失。僱員亦應理解部份中小企面臨因人手短缺而帶來的沉重壓力，而盡量為僱主提供相應的協助。在情況許可下，政府應考慮發出指引，或立法監管有關事宜，透過立法清晰界定僱員因需要接受身體檢查而請假等有關情況，以及合法獲取病假等事宜。

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