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Managing A Safe Return To Work: 6 Key Considerations

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With the transition of several states in Malaysia into Phase 2 or Phase 3 of the National Recovery Plan (NRP) and the roll out of Phase 3 of the National COVID-19 Immunisation Programme (PICK), business owners are looking to reopen their business premises upon obtaining the requisite approval from the Ministry of International Trade and Industry and relevant regulatory authorities.

Consequently, it is prudent for employers to monitor their employees' vaccination status to gauge the level of protection against the risk of COVID-19 infection at the workplace. Additionally, employers should also formulate safety management policies based on the data collected. In this alert, we address 6 key issues that the employers should consider when they implement such COVID-19 safety measures.

Q1: Do employers have a duty to provide and maintain a safe workplace?

- **Employer's duty under the Occupational Safety and Health Act (OSHA) 1994**

Pursuant to the OSHA 1994, every employer has a duty to ensure, so far as is practicable, the safety, health, and welfare of all his employees at work. Essentially, Section 15 of the OSHA 1994 extends such duty to include the provision and maintenance of an environment for employees that is, so far as is practicable, safe, without risks to health, and adequate as regards facilities for their welfare at work.

One of the ways in which employers may fulfill their aforesaid duty during the COVID-19 pandemic is to monitor their employees' vaccination status and make strategic decisions in relation to the reopening of their business premises to mitigate against the risk of transmission at the workplace.

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- **Employer's duty under contract law and common law**

Arguably, an employer's duty to provide a safe working environment can also be implied under contract and common law.

The Industrial Court in *Melewar Corporation Bhd v Abu Osman* ruled that "...in law, an employer owes a contractual obligation to his employees, female or otherwise to ensure that he provides a safe and conducive working environment in which they can function"¹. Additionally, the case of *Gelau Anak Paeng v Lim Phek San & Ors* has recognised the common law duty of an employer to take reasonable precautions to protect its employees against danger².

Considering the high transmissibility risk of COVID-19, potentially, such contractual and common law duty owed by the employers to their employees may extend to cover a general duty on the part of employers to provide and maintain a reasonably safe workplace with minimal risk of COVID-19 infection.

Q2: Can employers collect and process information relating to their employees' vaccination status?

Employers may collect and process information pertaining to the vaccination status from their employees for purpose of mitigating the risk of COVID-19 transmission at the workplace. However, it is crucial for employers to be mindful of the sensitive nature of such information under the Malaysian Personal Data Protection Act (PDPA) 2010.

Section 4 of the PDPA 2010 defines "sensitive personal data" as "...any personal data consisting of information as to the physical or mental health or condition of a data subject, his political opinions, his religious beliefs or other beliefs of a similar nature, ...".

¹ [1994] 2 ILR 807.

² [1986] 1 MLJ 271.

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As such, an employee's COVID-19 vaccination status and the reason(s) for such employee to refuse vaccination along with any supporting evidence relating thereto would fall within the definition of "sensitive personal data" under the PDPA 2010.

Accordingly, an employer shall not collect, record, hold, store, process, transfer or disclose any information relating to the COVID-19 vaccination status of an employee unless such employee has given his explicit consent, failing which such employer commits an offence and on conviction, may be liable to a fine not exceeding RM200,000 or to imprisonment for a term not exceeding 2 years or to both³.

Q3: How do employers record the consent of their employees?

Employers are required to record the consent of their employees in any form that such consent can be recorded and properly maintained by the employers.⁴

One common method to obtain such consent is to require each individual employee to affix his or her signature in a declaration of consent form. Such consent form may state, *inter alia*, that the employee explicitly consents to the collecting, recording, storing, disclosing, and/or transferring of his sensitive personal data, including any information relating to his vaccination status under the PICK.

Q4: Can employers compel their employees to be inoculated with COVID-19 vaccine?

As of the date of this alert, the Malaysian Government has not enacted any statutory provisions to provide for mandatory COVID-19 vaccination.

Therefore, while employers may incentivize and encourage their employees to be vaccinated and to furnish the data relating thereto to them, employers do

³ Section 40(3) of the PDPA 2010. Also note Section 133 of the PDPA 2010.

⁴ Regulation 3(1) of the Personal Data Protection Regulations 2013.

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not have the authority/right to compel their employees to be inoculated with COVID-19 vaccine before returning to work at the business premises.

Q5: Can employers dismiss employees who refuse to be vaccinated?

By virtue of the Industrial Relations Act 1967, employers are required to have just cause or excuse before terminating a contract of service.

It is unlikely that the employees' refusal to be vaccinated will constitute a valid ground for dismissal. However, depending on the facts of each case, the refusal to be vaccinated may be held by the court as having just cause or excuse if such refusal has led to a breach of the employee's duty under his contract of service. In any event, employers are advised to seek professional legal advice before taking any action so as to avoid potential unfair dismissal claims.

As an alternative measure, employers may classify such employees under the "high-risk" category and implement safety protocols to manage such risk accordingly, as suggested below.

Q6: Can employers implement COVID-19 vaccination policies?

Employers, particularly those in high-risk industries, may formulate COVID-19 vaccination policies to be implemented at their workplace.

Such policies may cover, *inter alia*, information about the PICK and the vaccines available under such programme, vaccination risk-benefit assessment of the relevant industry, incentives for employees to receive the COVID-19 vaccine and any practical safety protocols which will be adopted by the employers to provide a safe working environment to mitigate the risks faced by high-risk employees (e.g. employees who are yet to be vaccinated, employees who are medically vulnerable, or employees who do not want to be vaccinated due to medical reasons).

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As an illustration, employers may devise several ways to allow high-risk employees to work without jeopardising their business operations, such as implementing work from home policies or practicing strict social distancing and regular COVID-19 screening.

Further, it is also important for such policies to provide for any religious and medical exemptions that are consistent with public health recommendations (e.g. the contraindications to and precautions of each type of vaccines as set out in the [Clinical Guidelines on COVID-19 Vaccination in Malaysia](#)) and the constitutional right of freedom of religion⁵ conferred to Malaysian citizens.

Mandatory vaccination: The way forward?

In the United States, the California Department of Public Health has issued a [public health order](#) to require all school staff to either show proof of full vaccination or be tested at least once per week⁶. Pursuant to new regulations published by ministers in the United Kingdom, COVID-19 vaccinations will be made compulsory for care home staff, subject to limited exemptions⁷.

In Malaysia, there were discussions by the previous administration on the enforcement of mandatory COVID-19 vaccination policies⁸. With the emergence of several variants of concern (e.g. Delta) and variants of interest (e.g. Lambda) which are more transmissible and deadlier than the original COVID-19 strain, it remains to be seen how the government

⁵ Article 11 of the Federal Constitution.

⁶ Office of Governor Gavin Newsom, 'California Implements First-in-the-Nation Measure to Encourage Teachers and School Staff to Get Vaccinated' <<https://www.gov.ca.gov/2021/08/11/california-implements-first-in-the-nation-measure-to-encourage-teachers-and-school-staff-to-get-vaccinated/>> (11 August 2021).

⁷ Independent, 'COVID vaccines to be mandatory for care home staff from 11 November, government guidance says' <<https://www.independent.co.uk/news/health/covid-vaccine-mandatory-care-homes-b1897851.html>> (6 August 2021).

⁸ Bernama, 'Action against anti-vaxxers to be announced by next month' – PM Muhyiddin' <<https://www.bernama.com/en/region/news.php?id=1992129>> (13 August 2021)

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of the day would strategise its policy to achieve a balance between prioritising individual freedom of choice versus public/societal health.

Conclusion

At the time of writing this alert, Malaysia is fighting a battle against COVID-19 infections. Undoubtedly, positive COVID-19 cases at the workplace have disrupted business operations, threatened the safety of staff and their family members, and dampened the national economy.

By taking steps to monitor the status and rate of vaccination among the workforce before reopening of business premises and by formulating COVID-19 vaccination policies and safe management measures to address the aforesaid concerns, the risks faced by employees at the workplace can be reduced while our country seeks to return to normalcy by increasing the vaccination rates and implementing more robust policies and protocols to deal with the pandemic.

Authored by Shera Chuah, an associate with the firm's Corporate & Real Estate Transactions practice and Teoh Yun Xin, a former intern with the firm under the RDS Internship Programme.

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