

Employment (Amendment) Bill 2022

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A BILL

To

Amend the Employment Ordinance to regard a day on which an employee (*affected employee*) is subject to any restriction on movement imposed under the Prevention and Control of Disease Ordinance as a sickness day; to provide for sickness allowance to be paid to the affected employee under certain circumstances; to provide that it is not a valid reason to dismiss an employee or vary the terms of the employee's contract of employment on the ground of the employee being an affected employee; to provide that it is a valid reason to dismiss an employee (other than an employee that falls within a specified category) or vary the terms of the employee's contract of employment if he or she refuses to produce proof of vaccination after a request is made by the employer; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Employment (Amendment) Ordinance 2022.
- (2) Subject to subsection (3), this Ordinance comes into operation on the day on which it is published in the Gazette.

- (3) Sections 4(2), 6, 11 and 14 come into operation on a day to be appointed by the Commissioner for Labour by notice published in the Gazette.

2. Employment Ordinance amended

The Employment Ordinance (Cap. 57) is amended as set out in sections 3 to 14.

3. Section 2 amended (interpretation)

- (1) Section 2(1)—

Repeal the definition of *sickness day*

Substitute

“*sickness day* (病假日)—

- (a) means a day on which an employee is absent from the employee’s work by reason of the employee being unfit for work on account of injury or sickness; and
- (b) includes a day on which an employee is absent from the employee’s work by reason of the employee’s compliance with a Cap. 599 requirement;”.

- (2) Section 2(1)—

Add in alphabetical order

“*Cap. 599 requirement* (《第599章》規定) means a requirement set out in Part 1 of Schedule 11 that imposes a restriction on movement;”.

4. Section 32K amended (reasons for the dismissal or the variation of the terms of the contract of employment)

- (1) Section 32K(b), before “the capability”—

Add

“subject to section 32KB,”.

- (2) Section 32K(b)—

Repeal

“subject to section 32KB,”.

- (3) Section 32K(b)—

Repeal

“which he”

Substitute

“that the employee”.

5. Sections 32KA and 32KB added

After section 32K—

Add**“32KA. Compliance with Cap. 599 requirement not valid reason for dismissal etc.**

- (1) This section applies in relation to an employee who is subject to a Cap. 599 requirement, and is dismissed or has the terms of the employee’s contract of employment varied by the employer.
- (2) In determining for the purposes of this Part whether the employer has a valid reason for the dismissal of the employee or the variation of the terms of the employee’s contract of employment within the meaning of section 32K, the employee’s absence from work due to the employee’s compliance with the Cap. 599 requirement does not constitute a valid reason for the dismissal or variation.

32KB. Failure to comply with legitimate vaccination request regarded as incapable of performing work

- (1) For the purposes of section 32K(b), an employee who fails to comply with a legitimate vaccination request made to the employee by his or her employer is regarded as being incapable of performing work of the kind that the employee was employed by the employer to do.
- (2) For subsection (1), a legitimate vaccination request is made to the employee (*subject employee*) by the employer if—
 - (a) a written request that meets all the conditions set out in Part 1 of Schedule 12 is made to the subject employee by the employer; and
 - (b) if any other employee (*fellow employee*) of the employer performs work the nature of which is the same as, or similar to, that of the subject employee's work—a written request that meets all the conditions set out in Part 1 of Schedule 12 is made to every fellow employee by the employer.”.

6. Section 32KB repealed (failure to comply with legitimate vaccination request regarded as incapable of performing work)

Section 32KB—

Repeal the section.

7. Section 33 amended (sickness allowance)

- (1) Section 33(5)(a), after “subject to”—

Add

“paragraph (ab) and”.

- (2) After section 33(5)(a)—

Add

- “(ab) (if the employee is absent from work due to the employee’s compliance with a Cap. 599 requirement) subject to subsection (8), unless such day is shown, by any of the means specified in Part 2 of Schedule 11, to be a day on which the employee is subject to the Cap. 599 requirement;
- (ac) if the employee is subject to a Cap. 599 requirement due to the employee’s serious and wilful misconduct;”.

- (3) Section 33(5A), before “entered”—

Add

“(other than any sickness day that falls within paragraph (b) of the definition of *sickness day* in section 2(1))”.

- (4) After section 33(7)—

Add

- “(8) An employee is entitled to sickness allowance in respect of a sickness day that falls within paragraph (b) of the definition of *sickness day* in section 2(1) only if—
- (a) the period of the employee’s absence from work lasts for 4 or more consecutive days; and
- (b) the sickness day falls on or after the specified date.
- (9) For the purposes of subsection (8), it does not matter—
- (a) whether the period of the employee’s absence from work begins before the specified date;

- (b) whether the period relates to more than one Cap. 599 requirement; and
- (c) whether the period relates to more than one order, notice, declaration, direction or other instruction or request (however described) made, issued, published or given under the Prevention and Control of Disease Ordinance (Cap. 599).

(10) In subsections (8) and (9)—

specified date (指明日期) means the day on which the Employment (Amendment) Ordinance 2022 (of 2022) is published in the Gazette.”.

8. Section 35 amended (rate of sickness allowance)

Section 35(2)—

Repeal

“he not been sick”

Substitute

“the employee not been sick or injured or absent from work due to the employee’s compliance with a Cap. 599 requirement”.

9. Section 41AA amended (annual leave)

Section 41AA(7), after “injury”—

Add

“or absence from work due to the employee’s compliance with a Cap. 599 requirement”.

10. Sections 68A and 68B added

After section 68—

Add

“68A. Commissioner may amend Schedule 11

The Commissioner may, by notice published in the Gazette, amend Schedule 11.

68B. Commissioner may amend Schedule 12

The Commissioner may, by notice published in the Gazette, amend Schedule 12.”.

11. Section 68B repealed (Commissioner may amend Schedule 12)

Section 68B—

Repeal the section.

12. First Schedule amended (continuous employment)

(1) First Schedule, paragraph 3(2)(a)—

Repeal

“; or”

Substitute a semicolon.

(2) First Schedule, after paragraph 3(2)(a)—

Add

“(ab) absent from work due to the employee’s compliance with a Cap. 599 requirement; or”.

13. Schedules 11 and 12 added

After Schedule 10—

Add

“Schedule 11

[ss. 2, 33 & 68A]

Requirements and Means

Part 1

Cap. 599 Requirements

1. The requirements under section 29(1) and (2) of the Prevention and Control of Disease Regulation (Cap. 599 sub. leg. A) where the employee—
 - (a) is placed under quarantine or isolation under that Regulation; or
 - (b) is within a place that is placed under isolation under that Regulation.
2. The requirement not to contravene sections 13(1) and 16(1) of the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (Cap. 599 sub. leg. J) in relation to compulsory testing.
3. The requirement not to contravene section 19C(1) of the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (Cap. 599 sub. leg. J).

Part 2

Means Specified for purposes of Section 33(5)(ab)

1. The means specified for the purposes of section 33(5)(ab) are—
 - (a) a document (in hard copy form or electronic form)—
 - (i) issued by a public officer or any person on behalf of the Government; and
 - (ii) that shows the prescribed information relating to the employee;
 - (b) electronic data—
 - (i) access to which can be obtained, by telecommunications, in a manner specified by a public officer; and
 - (ii) that shows the prescribed information relating to the employee.
2. In section 1 of this Part—

prescribed information (訂明資料) means—

 - (a) the name of the employee who is subject to the Cap. 599 requirement mentioned in section 33(5)(ab) (or information that could identify the identity of the employee);
 - (b) the type of the restriction imposed by that requirement; and

- (c) the commencement date and the expiry date of the period for the restriction imposed by that requirement.

Schedule 12

[ss. 32KB & 68B]

Legitimate Vaccination Request

Part 1

Conditions

1. The request is one that requests the employee to produce, within 56 days from the date of the making of the request (*compliance period*), to the employer—
 - (a) if the place of work is situated in any premises, or if the place of work is a public transport carrier, in respect of which a Cap. 599L direction is in force—a record, document or information showing that the employee has, in relation to the premises or the carrier, been vaccinated in the specified manner for the purposes of the direction within the meaning of the Vaccine Pass Regulation; or
 - (b) a record, document or information showing that—
 - (i) if the Government, by any means other than a Cap. 599L direction, imposes a

- requirement (or makes a recommendation) that persons who perform a particular kind of work are to be (or should be) administered with a certain number of dose of a vaccine as defined by section 2 of the Prevention and Control of Disease (Use of Vaccines) Regulation (Cap. 599 sub. leg. K) (*vaccine*) in relation to the specified disease as at the date of the making of the request, and the work performed by the employee falls within that kind of work—the employee has been administered with that number of dose of the vaccine; or
- (ii) if no Cap. 599L direction or a requirement or recommendation mentioned in subparagraph (i) applies to the employee—the employee has been administered with at least one dose of the vaccine.
2. When making the request, the employer reasonably believes, having regard to the nature of the employee's work and the related operational requirements, that if the employee contracts the specified disease, the persons with whom the employee may come into face-to-face contact when the employee performs the employee's work will be exposed to the risk of infection.
3. The request is not made to an employee—
- (a) if section 1(a) or (b)(i) of this Part applies in relation to the employee—who is a person referred to in section 5(2) of the Vaccine Pass Regulation; or

- (b) if section 1(b)(ii) of this Part applies in relation to the employee—
 - (i) who is pregnant;
 - (ii) who is breastfeeding;
 - (iii) who is issued with a specified medical exemption certificate within the meaning of section 17 of the Vaccine Pass Regulation showing that it is unsuitable for the employee to get vaccinated during the compliance period; or
 - (iv) in relation to whom all of the following conditions are met—
 - (A) the employee holds a proof of discharge or recovery issued by a person specified by the Director certifying that the employee was diagnosed on a particular date as having contracted the specified disease;
 - (B) that date falls within 6 months before the date on which the request is proposed to be made.

Part 2

Interpretation

1. In this Schedule—

Cap. 599L direction (《第599L章》指示) means a direction issued under section 3(1) of the Vaccine Pass Regulation;

specified disease (指明疾病) means the coronavirus disease 2019 (COVID-19), which is specified in item 8A of Schedule 1 to the Prevention and Control of Disease Ordinance (Cap. 599);

Vaccine Pass Regulation (《疫苗通行證規例》) means the Prevention and Control of Disease (Vaccine Pass) Regulation (Cap. 599 sub. leg. L).”.

14. Schedule 12 repealed (legitimate vaccination request)

Schedule 12—

Repeal the Schedule.

Explanatory Memorandum

The main object of this Bill is to amend the Employment Ordinance (Cap. 57) (*principal Ordinance*)—

- (a) to regard a day on which an employee (*affected employee*) is absent from work (*day of absence*) by reason of the employee's compliance with a requirement imposed under the Prevention and Control of Disease Ordinance (Cap. 599) that restricts the movement of the employee (*Cap. 599 requirement*) as a sickness day under the principal Ordinance;
 - (b) to provide for sickness allowance to be paid to an affected employee for the day of absence under certain circumstances;
 - (c) to provide that it is not a valid reason to dismiss, or vary the terms of the contract of employment of, an employee on the ground of the employee being an affected employee; and
 - (d) to provide that it is a valid reason to dismiss, or vary the terms of the contract of employment of, an employee (other than an employee that falls within a specified category) if the employee refuses to accede to a request for proof of vaccination made by the employer.
2. Clause 1 sets out the short title and provides for commencement.

3. Clause 3 amends the definition of *sickness day* in section 2(1) of the principal Ordinance to include a day on which an employee is absent from work by reason of the employee's compliance with a Cap. 599 requirement and also provides for the definition of *Cap. 599 requirement*.
4. Clause 5 adds new sections 32KA and 32KB to the principal Ordinance to—
 - (a) provide that in determining whether an employer has a valid reason for the dismissal of an employee or the variation of the terms of the contract of employment with the employee, the employee's absence from work due to the employee's compliance with a Cap. 599 requirement does not constitute a valid reason for the dismissal or variation; and
 - (b) provide that an employee who fails to comply with a legitimate vaccination request (being a written request that meets all the conditions set out in Part 1 of the new Schedule 12 added by clause 13 and in relation to which the new section 32KB(2)(b) is complied with) made to the employee by the employer is regarded as being incapable of performing the employee's work.
5. Clause 7 amends section 33 of the principal Ordinance to—
 - (a) provide for the circumstances under which sickness allowance is payable to an affected employee in respect of a day of absence; and
 - (b) provide that an employee is not entitled to sickness allowance if the employee is subject to a Cap. 599 requirement due to the employee's serious and wilful misconduct.

6. Clause 8 amends section 35 of the principal Ordinance to provide that no sickness allowance is payable in respect of a day on which an employee would not have worked had the employee not been absent from work due to the employee's compliance with a Cap. 599 requirement.
7. Clause 9 amends section 41AA of the principal Ordinance so that any period of absence from work due to the employee's compliance with a Cap. 599 requirement occurring during a period of annual leave (*annual leave period*) is not to be counted as part of that annual leave unless the period of absence commences after the commencement of the annual leave period.
8. Clause 10 adds new sections 68A and 68B to the principal Ordinance so that the Commissioner for Labour may, by notice published in the Gazette, amend the new Schedules 11 and 12.
9. Clause 12 amends the First Schedule to the principal Ordinance so that if in any hour an employee is absent from work due to the employee's compliance with a Cap. 599 requirement, that hour is to be counted as an hour in which the employee has worked.
10. Clause 13 adds—
 - (a) new Schedule 11 to the principal Ordinance to set out the list of requirements each of which constitutes a Cap. 599 requirement and also the means specified for the purposes of the new section 33(5)(ab); and
 - (b) new Schedule 12 to the principal Ordinance to provide for the conditions for a legitimate vaccination request referred to in the new section 32KB.

11. The new sections 32KB and 68B and the new Schedule 12 are to expire on a day to be appointed by the Commissioner for Labour. Clauses 4(2), 6, 11 and 14 provide for the repeal of those sections and that Schedule and the related amendment to section 32K(b) of the principal Ordinance.
12. The Bill makes no amendment in respect of other aspects of statutory sick leave and sickness allowance.