

Hong Kong HR Toolkit – main legal considerations for mental wellbeing at work

Sickness Leave and Sickness Allowance

Eligibility for statutory sickness allowance

An employee employed under a continuous contract is entitled to sickness allowance under the Employment Ordinance (the “EO”) for sick leave (including leave for mental health issues) if:

- he/she has taken four or more consecutive sick leave days;
- the sick leave is supported by an appropriate medical certificate as set out in the EO; and
- the employee has accumulated a sufficient number of paid sickness days under the EO, unless there is a more beneficial contractual entitlement.

Prohibition of termination

It is a criminal offence for an employer to terminate the employment of an employee (other than for summary dismissal) on any sickness day in respect of which the employee is entitled to be paid sickness allowance under the EO.

Practical Tips

Mental health policy and employee assistance programme (“EAP”)

Having a policy in place helps to illustrate an employer’s commitment to ensuring the mental health and wellbeing of its employees and an EAP provides employees with confidential support.

Appropriate training

Employees and managers should be trained to recognise and respond to signs of stress and to avoid behaving in a way that creates an unduly stressful workplace.

Seeking medical information

While it is permissible to seek medical information from employees, employers should be cautious of potential data privacy and discrimination implications.

Employer’s Duty of Care

Duty to take reasonable care to ensure the safety and health of the workforce

An employer owes its employees a duty of care. If an employee suffers a psychiatric illness which is reasonably foreseeable by the employer and to which the employer has made a material contribution, the employer may be liable in a negligence claim. An employer may also be vicariously liable for actions committed by its employees.

Discrimination

Anti-discrimination ordinances in Hong Kong

The anti-discrimination ordinances prohibit less favourable treatment on the ground of certain protected characteristics such as a person’s disability. Under the Disability Discrimination Ordinance (the “DDO”), disability is defined widely and includes most forms of mental illnesses (including those that presently exist or those that existed in the past).

Reasonable accommodation

In relation to a decision to terminate the employment of or not to employ a person with a disability, there may be a defence available to an employer under the DDO if the employer can show (a) that the employee is unable to perform the inherent requirements of the job; or (b) would, in order to carry out those inherent requirements, require services or facilities (i.e. accommodation) and the provision of such accommodation would cause unjustifiable hardship on the employer.

Sickness Management

Understanding the nature of the absence

Different types of sickness absences (e.g. whether short-term intermittent absences or long-term absences) may warrant a different response from the employer. During the absence management process, employers should not make assumptions and should use neutral language when communicating with the employee.

Discussions with employee

Maintaining good communication is key and vital to absence management. It starts even before employees are absent (e.g. informal chats asking how they are). Return-to-work interviews may also assist to avoid a culture of absenteeism within the workplace.



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