COVID-19: CAN YOU REQUIRE YOUR EMPLOYEES TO GET THE COVID-19 VACCINE IN CHINA?

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China Labor, Employment, and Workplace Safety Alert

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BACKGROUND

The Chinese government's approval of the Sinopharm and Sinovac vaccines have paved the way for the general public in China to get vaccinated. As a result, some companies are questioning the benefits and legality of requiring employees to be vaccinated with one of the approved vaccines before returning to their China-based offices or facilities.

Similar to most other developed economies, Chinese employers have a duty to provide a safe workplace for their employees. As such, this article will explore the relevant laws, regulations and practices in China in hopes of clarifying a framework for how management teams should consider these important workplace safety issues.

RELEVANT LAWS, REGULATIONS, AND PRACTICES

Local policies and practices that relate to COVID-19 vaccine programs vary across different Chinese provinces and cities. Given that most multinational corporations have their presence in Shanghai and most major cities in China have implemented similar COVID-19 measures as have been implemented in Shanghai, this alert will examine relevant Shanghai policies and practices and use them as a general point of reference.

With respect to an employer's responsibilities to ensure workplace safety, the “Shanghai Municipal Public Health Emergency Management Regulations” (the Regulations) provide that companies need to:

- Establish an internal public health management system;
- Take primary responsibility for implementing public health incident control and disposal measures within the companies;
- Strengthen responsibility and management system for prevention and control work;
- Exercise strict control over key personnel, key groups, important places and facilities; and
- Strengthen health monitoring and report abnormal situations to relevant authorities in a timely manner.

In reviewing the Regulations, the question for employers then becomes how to provide a safe workplace as mandated by law without infringing on employees' individual freedoms – can they require certain (or all) employees to get a state-approved vaccine to ensure workplace safety?

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In Shanghai, one of the principles currently adopted by Shanghai authorities towards the COVID-19 vaccine is “to protect key groups” with high exposure risks. Nevertheless, even for people with high exposure risks, such as those handling imported cold-chain products and people working in exposed sectors (e.g., port inspection and quarantine, aviation, public transport, fresh market, medical treatment and disease control), there is no mandate they must get vaccinated. Rather, the Shanghai local government encourages them to get vaccinated according to current local policies. As such, the emergency-use vaccinations are currently given to people with high exposure risks on a voluntary and informed consensual basis. As of 22 January 2021, it was reported that 840,000 individual workers in Shanghai with high exposure risks have been vaccinated.

Drawing a comparison between wearing face masks and getting vaccinated, individuals in Shanghai must wear face masks in public, while getting vaccinated is optional. With respect to wearing masks, Regulations specifically provide that individuals must wear face masks when entering public places. Such public places include hotels, restaurants, theatres, library, shopping malls, mass transit, etc. As the requirement to wear face masks in the public is mandatory under the Regulations, certain work places that are akin to “public places” by size, structure or functionality may set their own rules and require individuals who are entering their premises to wear face masks.

Although an employer in Shanghai has the foregoing workplace safety responsibilities, unlike wearing a face mask which prevents the spreading of COVID-19, the direct purpose of the COVID-19 vaccine is to protect the relevant employees from being infected, and even if one is inoculated, the COVID-19 vaccination is not 100 percent effective and could cause, in certain classes of vulnerable people, health complications. Hence, it would be difficult to justify mandating COVID-19 vaccine in the workplace as a workplace safety measure.

Another piece of legislation relevant to vaccinations is the Law of the People's Republic of China on Vaccine Management, which outlines the national immunization program China has put in place. The national immunization program is currently formulated and promulgated by the State Council. Vaccines covered by the national immunization program, such as vaccines for inactivated poliovirus vaccine (IPV), are compulsory and individuals are generally required to be vaccinated unless they have certain special conditions, such as a health condition that may lead to vaccination contraindication. To date, COVID-19 vaccine has not been included in the national immunization program, and hence individuals can choose to be vaccinated on a voluntary basis.

CONCLUSIONS

COVID-19 vaccination is currently not mandatory in laws and regulations in China; it is encouraged and is on a voluntary basis. There is a need to monitor the local policies and practices for any development.

The idea of encouraging employees at positions with a high exposure risk in the workplace to be inoculated with the COVID-19 vaccine on a voluntary basis may potentially be justified due to the obligation of the employer to provide a safe workspace for its employees. However, such arrangement in the workplace would need to go through due procedure under the laws in China, by soliciting opinions from and discussion with employee representatives or all employees (as the case may be), and negotiations with trade unions or employee representatives.

It is important to note that labor contract laws in China are pro-employee, therefore legal advice should be sought when employers consider having COVID-19 vaccines in the workplace in China as a policy.

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