SINGAPORE'S VACCINATE OR REGULAR TEST REGIME: DIFFERENTIATING BETWEEN VACCINATED AND MEDICALLY-ELIGIBLE BUT UNVACCINATED EMPLOYEES

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The Singapore government recently announced a new Vaccinate or Regular Test (VoRT) regime which requires medically eligible employees either to be vaccinated against COVID-19 or to undergo regular testing. The VoRT regime must be mandatorily implemented from 1 October 2021 for employers and employees in selected sectors, while all other employers are encouraged to adopt the VoRT regime voluntarily. Where employers have implemented the VoRT regime as a company policy, employers may differentiate the applicable workplace measures to be adopted for vaccinated and unvaccinated employees in their workforce.

This article provides an overview of the VoRT regime, and discusses some of the key considerations to be taken into account by employers when implementing the VoRT regime as a company policy.

TRIPARTITE GUIDELINES ON COVID-19 VACCINATION IN EMPLOYMENT SETTINGS

The initial advisory providing guidance on COVID-19 vaccination in employment settings was released by the tripartite partners, comprising the Ministry of Manpower, National Trades Union Congress and Singapore National Employers Federation, on 2 July 2021 (Initial Advisory). Since then, the Initial Advisory has been superseded by an updated advisory on COVID-19 vaccination in employment settings released by the tripartite partners on 23 August 2021 (Second Advisory).

INITIAL ADVISORY

Under the Initial Advisory, the tripartite partners clarified that while employers should encourage medically eligible employees to get vaccinated, employers must not terminate the employment of employees solely on the ground of the employees declining to be vaccinated. The Initial Advisory also provided that in employment settings where employees are exposed to higher risk of COVID-19 infection (as compared to the general employment setting), employers may consider requiring COVID-19 vaccination as a company policy for attendance at higher risk employment settings.

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For lower risk employment settings (an office environment, even with frequent in-person interaction with clients, was considered as falling under this category), it was considered sufficient that the existing safe management measures were adhered to, and expressly provided that there was no need for employers to further segregate vaccinated employees from non-vaccinated employees. This position has substantively changed in the Second Advisory (see below), and a regime was introduced differentiating between vaccinated employees and medically eligible but unvaccinated employees, even in lower risk employment settings.

SECOND ADVISORY

The Second Advisory, which supersedes the Initial Advisory, introduces the VoRT regime, and clarifies that from 1 October 2021, the VoRT regime must be mandatorily implemented by employers in specific sectors, including for the following sectors and types of workers:

1. Healthcare (e.g., public and private hospitals, traditional chinese medicine clinics, allied health services);
2. Eldercare (e.g., nursing homes, senior care centers, residential facilities);
3. Settings with children aged 12 years and below (e.g., preschools, early intervention centers, student care centers, schools, tuition and enrichment centers);
4. Border front-line workers (e.g., workers at air, land and sea checkpoints, marine & process workers);
5. COVID-19 front-line workers (e.g., workers at community care facilities, government quarantine facilities, patient transporters, swabbers);
6. Workers in construction and process construction & maintenance;
7. Food services (e.g., wait staff, kitchen staff);
8. Pivoted bars, nightclubs, discotheques and karaoke establishments that are allowed to re-open;
9. Personal care services with prolonged close contact between individuals (e.g., spa, massage and facial therapists, hairdressers, make-up artists);
10. Gyms and fitness studios (e.g., instructors and trainers, receptionists);
11. Arts classes (e.g., dancing, singing, wind/brass instruments, voice and theatre training classes);
12. Public service, including uniformed services;
13. Retail malls and large standalone stores;
14. Supermarkets;
15. Markets (e.g., stallholders and assistants);
16. Last mile delivery personnel, including parcel and food delivery personnel;
17. Cleaners in sectors listed above, and those offering disinfection services; and
18. Public and private transport (e.g., public bus captains, front-line staff at public transport nodes, taxi and private-hire car drivers, driving school/private driving instructors).

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In respect of sectors where implementation of the VoRT regime is not mandatory (namely those not falling into the categories stated above, which includes general office settings), implementation of the VoRT regime is strongly encouraged by the government.

Where employers have adopted the VoRT regime as a company policy, they may, in consultation with the unions (if applicable), consider adopting the following differentiated workplace measures for their workforce:

- Testing frequency: Employers may subject unvaccinated employees to additional COVID-19 tests, in addition to the COVID-19 tests to be taken by both vaccinated and unvaccinated employees (if any). As a guideline, reference for testing frequency can be taken from the Ministry of Health's guidelines for the VoRT regime, which is twice a week for unvaccinated employees in selected sectors. Where applicable, COVID-19 tests administered under the existing Fast and Easy Testing (FET) or Rostered Routine Testing (RRT) regimes, which use either a Polymerase Chain Reaction (PCR) or supervised FET, can be counted towards these requirements.
- Work and social events: Employers may require unvaccinated employees to complete COVID-19 Pre-Event Testing (PET) and be able to produce negative test results before permitting any of its unvaccinated employees to participate in workplace events. Employers may also consider implementing reduced group sizes when unvaccinated employees participate in work and social events, especially those involving mask-off activities, subject to compliance with the relevant Ministry of Health guidelines.
- Deployment: While employers may continue to deploy unvaccinated employees in higher risk activities with regular testing, employers may consider redeploying unvaccinated employees to employment settings with lower risks of COVID-19 infection, commensurate with the employee's experience and skills and in accordance with the employer's existing redeployment policies. Where an employer does not have an existing redeployment policy, the terms and conditions for redeployment should be mutually agreed upon between the employer and the unvaccinated employee.
- Additional COVID-19 related expenses: Employers may require medically eligible unvaccinated employees to bear additional costs of COVID-19 related expenses (e.g., costs of test kits, costs of Stay-Home Notice (SHN) accommodation) which are incurred over and above those for vaccinated employees. These COVID-19 related expenses can be recovered through salary deductions, subject to the written consent of the employee as required under the Employment Act (Chapter 91), or by requiring the relevant employees to pay the relevant service providers directly.
- Leave: In comparison to vaccinated employees, where medically eligible but unvaccinated employees are discharged later from COVID-19 related treatments or are required to serve longer periods of movement restrictions (e.g., SHNs), employers can require that the additional days due to such delays be deducted from the relevant employee's existing leave entitlements. Further, where the employee's leave entitlements have already been exhausted, employers may require the employee to take no-pay leave.
- Medical benefits: Employers may choose to exclude medically eligible but unvaccinated employees from medical benefits associated with COVID-19, such as insurance coverage. Note, however, that employers cannot exclude employees from medical benefits that are mandated by legislation. This includes the statutory obligation of an employer under the Employment Act to bear or reimburse the fees of examination of an employee by a registered medical practitioner where the employee has completed at

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least three months of service and is, after the examination, certified by the medical practitioner to be entitled to paid sick leave.

- Others: Employers may implement other workplace measures, but must be prepared to justify to employees or the Singapore Government that such measures are reasonable and necessary for the employer's business operations and to better protect the health and safety of all of its employees.

Note that while employers are either required or strongly encouraged to adopt the VoRT regime, under no circumstances may an employer terminate or threaten to terminate an employee's employment on the ground of the employee declining a COVID-19 vaccination.

Similar to the Initial Advisory, the Second Advisory recommends that employers should urge all medically eligible employees to vaccinate against COVID-19, and should implement public education programs on vaccine safety and efficacy for employees. In particular, the Second Advisory provides that employers should facilitate COVID-19 vaccinations by granting paid time-off to employees for COVID-19 vaccinations, and additional paid sick leave (beyond contractual or statutory requirements) should an employee experience a vaccine-related adverse effect.

OTHER CONSIDERATIONS

All employers, regardless of sector, may ask employees for their COVID-19 vaccination status for business purposes, such as business continuity planning. Employers who adopt the VoRT regime can further require employees to produce proof of vaccination, failing which employers may treat such employees as unvaccinated for the purposes of vaccination-differentiated measures. From a practical perspective, obtaining proof of COVID-19 vaccination could include requesting to sight or receive a copy of an employee's “COVID-19 Vaccination Records” page on Health Hub, “COVID Health Status” page on the TraceTogether mobile application or a copy of the employee's COVID-19 vaccination certificate.

When collecting and using an employee's COVID-19 vaccination status and proof of vaccination status (if applicable), employers must ensure compliance with Singapore's data protection laws. Under the Personal Data Protection Act 2012 (PDPA), “personal data” includes data, whether true or not, about an individual who can be identified from that data, and covers personal data stored in both electronic and non-electronic formats. The PDPA further provides that organizations, which definition includes employers, must cease to retain documents containing personal data, or remove the means by which the personal data can be associated with particular individuals, as soon as it is reasonable to assume that (i) the purpose for which that personal data was collected is no longer being served by retention of the personal data; and (ii) retention is no longer necessary for legal or business purposes.

As employees can be identified from information on vaccination status or any proof of vaccination status kept by an employer, each employee's vaccination information will constitute personal data and will be protected under the PDPA. This means that employers must not retain information about an employee's COVID-19 vaccination status for any longer than is necessary, should the employee's vaccination status no longer be relevant.

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WHAT WE CAN DO TO ASSIST

We can assist with advising on the obligations of employers in light of the above guidelines, and also provide practical guidance on implementation of the VoRT regime and other best practices during this COVID-19 period.

In addition, if you would like to take this opportunity to review your global COVID-19 practices, K&L Gates has lawyers across 46 offices globally who would be happy to assist you with your specific requirements in the relevant jurisdiction(s), and with the convenience of a single point of contact.

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