



## Hong Kong Covid-19 Emergency Response

### Frequently Asked Questions (FAQ) for Civil Society Organizations & Social Enterprises

This FAQ has been prepared by PILnet in conjunction with its law firm partners in May/ June 2020 to provide practical guidance on certain operational challenges which civil society may be facing during the Covid-19 pandemic in Hong Kong. It will be updated periodically so we can provide you with the most up to date information as the situation evolves. This FAQ is not intended to provide, or should it be relied on as, any legal advice. PILnet's clearinghouses continue to operate as usual. If you are a civil society organization or social enterprise in need of legal support of any kind, please contact us at [hkprobono@pilnet.org](mailto:hkprobono@pilnet.org) and we will locate free legal assistance for you.

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#### Potential liabilities arising from Covid-19 and how to address them

*We thank Latham & Watkins LLP (questions 1 - 5) and Linklaters (questions 6-10) for providing the answers to these questions.*

1. If a Covid-19 case is traced to one of our employees, does our organization have any liability or other risks?

Depending on whether the COVID-19 infection is acquired from the workplace, an employee may have a claim against the employer. However, the question of liability depends on the facts and evidence of each case. If you have a specific concern about your organization's potential liability towards an employee and would like legal



advice, please contact us at [hkprobono@pilnet.org](mailto:hkprobono@pilnet.org) and we will locate legal assistance for you.

### **Employees' Compensation Ordinance (Cap. 282) (the "ECO")**

COVID-19 is not currently classified as an occupational disease under the ECO. Yet, the ECO stipulates that an employee contracting a disease not prescribed as an occupational disease may still claim compensation from the employer under the ECO if it is an injury or death by accident arising out of and in the course of employment, and the employer may be liable to pay compensation. However, whether an employer is liable depends on whether it can be proven that the employee has in fact contracted the virus during the course of employment. This is not easily done, especially in light of the delay in obtaining a test result.

### **Occupational Safety and Health Ordinance (Cap. 509) (the "OSHO")**

Hong Kong has not yet enacted any employment specific laws with respect to COVID-19. Under the OSHO, an employer has a duty to take reasonable care of all employees' safety and health and to provide and maintain the workplace in a safe condition without risks to health. This duty would include implementing the relevant guidelines issued by the HKSAR Government, which include:

- [Health Advice on Prevention of COVID-19 in Workplace \(Interim\);](#)
- [Guidelines for Centre-based Services for the Prevention of COVID-19 \(Interim\);](#)  
and
- The guidelines published by the Food and Environmental Hygiene Department referred to in the answers to question 4 below.

The breach of the duty of care provision under OSHO can attract criminal liability and if convicted, the employer can be fined up to HKD200,000. Intentional, knowing or reckless failure to comply with this duty can be punished by imprisonment of up to six months. It should be noted that to be liable, it must be proven that the virus was contracted as a result of the employer's failure to provide a safe working environment. Proving this may be difficult for the same reasons mentioned above.

### **Potential common law (case law) liability**

In addition to the above, an employee can also make a claim against an employer under common law by bringing proceedings in the court. Under common law, employers have a non-delegable duty to take **reasonable care** of all employees' safety and health and to provide a safe place of work. If it is proven that an employee has contracted the virus as a result of the breach of duty of care by the employer, the employer may be liable to pay damages. The standard required is one of reasonableness - the court will look at all the circumstances, including the size and financial resources of the employer, the degree of risks involved and whether the employer has implemented the relevant guidelines issued by the HKSAR Government. Again, the employee must prove that the failure of the employer to maintain a safe



working environment caused the COVID-19 infection, which makes this type of claim difficult to establish.

### Other risks in connection with an employee's COVID-19 infection

In addition to the above, you might wish to take note of:

- **Discrimination against employees** - An employer should not treat any employee who has contracted the virus less favorably than it would treat someone who is not suffering from it. This means that the employer should continue to pay the infected employee, and should not dismiss the employee solely because they had contracted (or has been suspected to have contracted) Covid-19. Mandatory testing for a suspected infection of COVID-19 would not constitute discrimination.
- **Employees refusing to attend work** - Although generally speaking an employee cannot refuse to attend work just because they are fearful of contracting the virus, they would be lawfully entitled to do so if they feel their workplace is dangerous or hazardous to their health - i.e. an employee has been confirmed as having Covid-19 and the workplace has not been evacuated and professionally cleaned.

2. If a Covid-19 case is traced to one of our beneficiaries, does our organization have any liability or other risks?

Whether the organization would have any liability or other risks if a Covid-19 case is traced to one of their beneficiaries would depend on how the beneficiary contracted the disease. Please consult the answers below for cases such as if a beneficiary has contracted the virus on the organization's premises, or if food provided /delivered by the organization caused said beneficiary to contract the virus.

3. If someone contracts Covid-19 and can be traced to our organization's premises / place where one of our activities took place, does our organization have any liability?

An individual may bring a claim against an organization under tort law or the Occupiers Liability Ordinance (Cap. 314) (the "OLO") for failing to ensure that its premises were safe for visitors.

Under the OLO, an occupier owes the duty to take reasonable care to ensure the safety of its visitors using the premises. Reasonable care would include implementing the relevant guidelines issued by the HKSAR Government referred to in the answer to Question 1 above.

The issue of liability depends largely on the measures, if any, the organization took when it was known that there were community infections. For example, if the organization fails to sterilize its premises after a person known to have been contracted COVID-19 visited those premises, it may have breached its duties under the OLO. Even if a breach of duty is established, there must be a causal link between the occupier's breach of duty and the COVID-19 infection.



The extent of the organization's duty and the measures to be put in place will vary depending on the specific circumstances. For example, more stringent safety protocols and more supplies such as alcohol wipes, masks or soap etc. would be expected for activities targeted at children. There is no one-size-fits-all solution. Organizations should also consider putting up warning signs around the premise warning visitors of any health and safety hazards (e.g. if any confirmed or suspected cases of COVID-19 have taken place in or around the area / premise).

4. Our organization works with delivery / provision of food and drinks, are we at more risk of additional liability during the coronavirus outbreak? If so, what additional precautions should we take?

According to the WHO, it is highly unlikely that people can contract COVID-19 from food or food packaging. This is because COVID-19 is a respiratory illness and the primary transmission route is through person-to-person contact and through direct contact with respiratory droplets generated when an infected person coughs or sneezes.

However, the following potential additional risks/liability may still arise during the COVID-19 outbreak:

- **Infringement of the Food Business Regulation** in relation to the protection of food from risk of contamination - Every person engaged in any food business must take all steps reasonably necessary to protect the food from the risk of contamination or deterioration.
- **Claim of negligence** - Food retailer generally owes a duty of care to its ultimate consumers and has responsibility to ensure that food sold is safe and fit for human consumption.
- **Contractual claim** - The Sales of Good Ordinance (Cap. 26) states that there is an implied condition that the food sold is of merchantable quality and is reasonably fit for consumption. If the food retailer handles food in an unhygienic way, leading to food contamination, it may have breached this implied condition and, therefore, be liable for loss.

Examples of additional precautions that can be taken can be found in the following leaflets published by the Food and Environmental Hygiene Department:

- ["Food Safety and Hygiene Advisory for Food Premises on the Prevention of COVID-19"](#);
- ["Food Safety Advice on Prevention of COVID-19 and FAQs"](#); and
- ["Precautions for Food Delivery Agents on the Prevention of COVID-19"](#).

The WHO has also provided comprehensive [guidelines](#) as to measures that can allow food workers to limit the spread of COVID-19, with measures such as the use of disposable gloves, physical distancing in the workplace, delivery staff not leaving their vehicles during delivery, or properly sanitizing before passing delivery, use of disposable containers and packaging etc.



5. Our organization works with vulnerable people (e.g. the elderly, children), are we at more risks of additional liability during the coronavirus outbreak? If so, what additional precautions should we take?

The likely risk of additional liability would merely be that since vulnerable people are much more susceptible of contracting the coronavirus, claims under tort law or the OLO for failing to ensure that the premises were safe for visitors would be much easier to prove since safety protocols are expected to be more stringent.

There is no one-size-fits-all solution. COVID-19 safety protocols will vary according to the institution. The Occupational Safety & Health Council has provided a [pictorial leaflet](#) illustrating sample arrangements for residential care homes (elderly or person with disabilities) that may be a good reference for additional precautions. The Centre of Health Protection has also provided a [comprehensive guide](#) on the prevention of Covid-19 in Residential Care Homes for the Elderly or Persons with Disabilities.

6. As an organization, do we have a duty of care towards our beneficiaries and other stakeholders (e.g. contractors, visitors) to ensure they are protected from Covid-19? If so, what is the extent of that duty? For example, is the organization obligated to provide masks, hygiene products to beneficiaries and other stakeholders? What if we cannot fulfill such obligation (i.e. unable to source masks)?

You have a duty of care towards beneficiaries and other stakeholders to ensure that they are not unreasonably exposed to Covid-19 when they are on your premises. This duty is imposed by the Occupiers Liability Ordinance (Cap. 314), which states that an occupier of a premises owes the duty to take reasonable care to ensure the safety of its visitors using the premises.

What is “reasonable care”? This will depend on various factors and circumstances, such as the type of visitors, the nature and purpose of the premises and the risk of infection. Industry standards and recommended practices by the Centre for Health Protection are also relevant.

Currently, reasonable care includes but is not limited to:

- temperature taking;
- provision of hand sanitizers;
- maintaining hygiene and regular disinfection of areas frequently accessed by the public; and
- ensuring that visitors on the organization’s premises adhere to social distancing guidelines and wear surgical masks (“PPE”).

You should check the up-to-date government guidance to inform your decision-making. Ultimately, the key consideration is whether you are capable of operating or rendering services safely and if not, to limit or cease services where necessary.



In respect of PPE, many businesses and organizations make it a requirement that visitors (including stakeholders/contractors) wear PPE before they are permitted to enter the premises. In circumstances where a visitor arrives without PPE, the cautious approach would be to either provide them with PPE, or, if that is not possible, deny entry. Technically, if you are unable to fulfil certain obligations (for example due to shortages of PPE), there is arguably no liability if you can show that you had reasonably attempted to obtain PPE but were unable to do so. However, this is untested, and the safer course of action is to insist that PPE is worn when visitors are on-site.

7. Our organization had booked flights and hotels to attend events, which have now been cancelled as a result of Covid-19. If we are not able to get refunds from the airlines and the hotels, are we able to claim the cost from travel insurance?

If losses cannot be recovered from the airlines and the hotels, the organization may be able to claim the cost from travel insurance. Your ability to recover a cancellation cost from a travel insurance policy will depend on the precise terms of the policy which you have obtained. However, please refer to the below points for some general guidance:

- Make sure you have the complete copy of your insurance policy. Insurers often focus on policy “summary” or “schedule” document when you receive your insurance documentation. However, the policy summary will not include all the information that you need. The full policy, with all the terms and conditions, should have been included in the documents you were given, otherwise contact your insurer to request the full policy.
- Before making an insurance claim, you must first limit your losses by trying to seek a refund from the relevant airlines and hotels.
- You should save copies of all receipts and communications with airlines/hotels, as most insurers will require evidence that a refund could not be obtained.
- You should check the specific terms of the “Exclusions” section of your policy. Even if you obtained the insurance policy before the start of the Covid-19 pandemic, your policy may not cover:
  - a cancellation caused by a pandemic/epidemic/government travel bans, regardless of when the flight/airline booking was made; or
  - bookings which you made after the Covid-19 pandemic was a “known event” and/or after countries implemented travel restrictions. Your insurer may have published information (e.g. on its website) explaining certain “cut-off” dates after which no cover is available for certain bookings (e.g. bookings for travel to China may not have been covered since January 2020).
- Even if you are able to make an insurance claim, you should check your policy to see if it refers to:
  - a “deductible” or “excess” for claims. This is an amount which you, as the policy holder, will be required to pay before the insurer will make any payment. For example, in the case of car insurance, if there is damage of HKD 10,000 but the insurance policy has an excess of HKD 1,000, then the insurers will only pay out HKD 9,000.



- the maximum amount that the insurer will pay for (a) an individual loss (e.g. a single flight or hotel booking), and (b) total (or “aggregate”) losses (e.g. multiple cancellations). If you have cancelled a single flight and hotel, then you are unlikely to exceed the maximum amount under your policy. However, if you are trying to claim for the cancellation of multiple bookings, the payment by the insurance company may be capped at this maximum amount.
  - If it is not possible to make a claim under the insurance, but you have paid for the service on a credit card, you should contact your credit card provider to request a “credit card chargeback” on the ground that the service has not been provided. This means the credit card provider will reverse the disputed transaction. There are time limits for making this type of request, so you should contact your credit card provider shortly after failing to get a refund from the airline or hotel.
  - Check if there are any timing requirements for when you must make a claim. For example, does the claim require “immediate notification”?
  - Check if there are any other specific procedural steps which must be taken when making a claim (for example, it may be necessary to supply certain information and documents). If you do not follow the right procedure, this may give an insurer a valid reason to reject the claim.
8. Our organization had booked flights and hotels to attend events which have NOT been cancelled, but our staff do not feel comfortable proceeding with the plan, are we able to cancel the flights and hotels and claim the cost from travel insurance if we cannot get a refund?
- Generally, the cost of a voluntary cancellation will NOT be recoverable from an insurer. Insurers categorize this as “disinclination to travel”.
  - You should check the terms of your policy to confirm:
    - what causes of loss are recoverable - does it include voluntary decisions not to travel;
    - if the insurance has a “disinclination to travel” clause which explains that voluntary cancellation is not recoverable.
  - You should contact the airlines and the hotels first to discuss refunds before contacting insurers in the case of a voluntary decision not to travel. If the airline / hotel will not offer you a refund for a voluntary cancellation, they may allow you to reschedule the booking for a later date, which may be a better outcome than cancellation and no refund.
9. Our organization has suffered a loss in income because of the Covid-19, to what extent would that loss be covered by our insurance policy?

Similar to travel insurance (see questions 7 and 8), your ability to claim for a loss of business income will always depend on the precise terms of your specific insurance policy.

Insurance which is referred to as “business interruption”, “BII” or “revenue protection” insurance is designed to (a) cover loss of income and/or (b) additional business expenses caused by an insured event. However, at present there is no guarantee that business interruption policies will cover loss arising from the Covid-19 pandemic.



This issue is receiving attention from regulatory authorities worldwide. It is likely that the Courts in certain jurisdictions will be asked to consider cases that concern the scope of business interruption insurance and as a result more guidance on this issue may be available in the future.

Here is some general guidance which will assist you when you are looking at your existing policy:

- Make sure you have the complete copy of your insurance policy. Insurers often focus on policy “summary” or “schedule” document when you receive your insurance documentation. However, the policy summary will not include all the information that you need. The full policy, with all the terms and conditions, should have been included in the documents you were given, otherwise contact your insurer to request the full policy.
- Check if your policy includes “business interruption” coverage - this may appear as an additional document (which may be described as an “endorsement”) at the end of a wider main policy.
- Your business interruption insurance will describe certain types of “trigger” or “contingency” events, where loss of income arising from those events is recoverable. You should check to see if your policy includes any trigger events which cover the Covid-19 situation. For example:
  - does the policy refer to cover for physical damage? If your organization’s property was contaminated with coronavirus in a manner which required specialist decontamination services, this may constitute physical damage. However, this legal position has not been fully tested and there may be difficulties in proving that contamination actually occurred (as opposed to a fear of contamination).
  - Does the policy refer to cover for the consequences of certain infectious diseases, (e.g. the inability to use your organization’s premises due to the occurrence of an infectious disease)?
    - After the SARS epidemic in 2003, certain insurers started to refuse to cover for loss caused by infectious diseases, so you should check the “Exclusions” section of the policy.
    - If cover for infectious disease is included, cover may be restricted to a specific list of infectious diseases - in which case, Covid-19 will likely not be listed.
    - Alternatively, cover may be restricted to a general category of infectious diseases which are “notifiable”, meaning that they must be notified as a matter of law. If you have this type of clause in your policy, your policy may only cover losses after 8 January 2020, (this was the date when the Hong Kong government classified Covid-19 as a statutorily notifiable disease).
      - Check whether the cover extends to a general occurrence of an infectious disease, or whether the infection disease must be found to exist at your organization’s premises.
  - Does the policy refer to cover for losses arising from government restrictions e.g. forced closure by a relevant public authority?



- Whether the policy refers to “denial of access” cover, which could cover the closure of a premises for reasons beyond your control.
  - Importantly, if it is possible for you to make a claim for loss of income, you should think about how to best preserve any evidence you would need to prove (a) the loss of income and/or (b) any additional costs of working which were caused by Covid-19.
  - As with other types of insurance, there may be a maximum amount which the insurer will pay out. There may also be a “deductible” or “excess”, which is an amount that will not be covered by the insurers. For example, in the case of car insurance, if there is damage of HKD 10,000 but the insurance policy has an excess of HKD 1,000, then the insurers will only pay out HKD 9,000.
  - Check if there are any timing requirements for when you must make a claim. For example, does the claim require “immediate notification”?
  - Check if there are any other specific procedural steps which must be taken when making a claim (for example, it may be necessary to supply certain information and documents). If you do not follow the right procedure, this may give an insurer a valid reason for rejecting the claim.
10. In the event of another wave of Covid-19 or other pandemic in the future, what can our organization do to mitigate any risks/ liabilities that may arise? Can you suggest some practical steps?

While we can have some idea of what a further wave of Covid-19 might look like (for example, the relevant symptoms, the number of days it may take for symptoms to show how the infection spreads), it is harder to predict what steps may make sense for a future epidemic of a different infectious disease. However, some practical steps include:

- Provide adequate protective equipment for use by staff and/or visitors, such as hand soap, disinfectants, face masks, hand gloves etc.
- Regularly check the Covid-19 website published by the Centre of Health Protection (<https://www.coronavirus.gov.hk/eng/index.html>) for any new information about the Covid-19 pandemic.
- Regularly check the various Covid-19 Guidelines which are published on the Centre for Health Protection website (<https://www.chp.gov.hk/en/features/102742.html>). Some of the guidelines are designed for specific contexts, e.g. food preparation, which could be relevant to your organization’s activities.
- Regularly check the Department of Health’s website for any updated guidance regarding the appropriate response to infectious diseases (for example, the guidance on maintaining a clean and healthy work environment by cleaning and disinfecting office premises regularly).
- Consider whether to prepare a formal infectious diseases policy for your organization. This would include clear directions about your organization’s immediate response to an outbreak and guidance on business continuity measures as an outbreak progresses. For example, steps could include:



- significant reduction of non-essential travels and meetings and prioritization of the use of telephone conferencing where possible;
- providing health guidelines to staff through internal communications and/or trainings, etc.; and
- explaining to staff who they should inform if they have recently travelled to a country experiencing an infectious pandemic.

A “[Guide on Formulating Business Continuity Plan](#)” is available on the website of the Centre for Health Protection.

Organizations may also turn to the [guideline](#) published by the Department of Health that was devised back in April 2013. It is the same guideline that they published on 12 May 2020 about how the employers could prepare themselves for influenza.