



Employment Advice for Employers in China During the Period of Epidemic Prevention of the Novel Coronavirus

The outbreak of the novel coronavirus recently occurred in Wuhan City, Hubei Province and its surrounding cities and affected dozens of other provinces and cities in China. The Chinese government has taken a series of measures to prevent further spread of the novel coronavirus, including a quarantine of Wuhan City, limiting public transportation, extending Spring Festival Holidays, delaying the resumption of work, etc. The epidemic situation not only affects the public health and safety, but also challenges employers with having to deal with employment matters during this period. This paper was prepared in a Q&A form and intends to provide employers in China with best practices and recommendations for the management of employees during the period of epidemic prevention.

Question 1: How to deal with the problem that employees are unable to provide work during isolation due to coronavirus infection, suspected infection and close contact with the coronavirus?

In accordance with the latest regulation released by the Ministry of Human Resources and Social Security of the People's Republic of China ("PRC MOHRSS")¹, for patients with pneumonia, suspected patients and close contacts with the new coronavirus who are unable to provide normal work during their isolation treatment or medical observation period, or because the government implements isolation measures or takes other emergency measures, the employers shall comply with the following:

- Employers shall pay wages and salary to the said employees according to their normal attendance.
- Employers are forbidden to unilaterally terminate their employment contracts in accordance with Article 40 (expiration of medical treatment period, incompetency or material change of objective circumstance) and Article 41 (redundancy due to financial difficulties) of the *PRC Labour Contract Law*.
- If their employment contracts expire, it shall be postponed to the expiration of the medical treatment period, the medical observation period, the isolation period or the end of the emergency measures taken by the government.

¹ The *Circular on Proper Handling of Employment during the Period of Epidemic Prevention of the Novel Coronavirus* by the General Office of the Ministry of Human Resources and Social Security

Question 2: Shall the aforesaid period be counted as medical treatment period?

Medical treatment period refers to the period during which employer is not allowed to dismiss an employee due to the employee's absence from work to pursue medical treatment or to take rest due to illness or non-work-related injury. The medical treatment period accrues, along with the employee's increased service years and the employee's sick leave consumes the balance of the medical treatment period. For employees not infected by the novel coronavirus, the period of medical observation and isolation shall not be counted as the medical treatment period.

However, for employees whose infection by the novel coronavirus has been confirmed, there are different opinions on whether the period of isolation for treatment shall be counted as the medical treatment period. Some cities in China have clearly prescribed that the period of isolation for treatment shall not be counted as the medical treatment period, such as Tianjin² and Xiamen City³. While other cities like Dongguan City⁴ in Guangdong Province prescribe that, when employees are confirmed to be infected by the novel coronavirus and are absent from work for medical treatment, such employees shall be entitled to the medical treatment period. As employees may be terminated if their sick leave exceeds the statutory medical treatment period, we would suggest that employers in China pay close attention to the latest opinion or notification announced by local governments in different cities and deal with this matter with caution.

Question 3: Are employers obligated to follow governmental orders on the extension of Spring Festival Holiday and postponement of work resumption? Is there any risk if employers do not obey such orders?

In accordance with the *Circular on Extension of the Spring Festival Holidays in 2020*⁵ announced by the General Office of the PRC State Department, the Spring Festival Holidays in 2020 have been extended to 2 February. Afterwards, local governments of different provinces and cities announced local decisions on further postponement of work resumption, successively. According to the *PRC Law on Prevention and Treatment of Infectious Diseases* and the *PRC Law on Emergency Response*⁶, for public health emergencies, the government has the right to take appropriate emergency response measures, and employers shall obey the orders or decisions issued by the government and cooperate with the government in taking emergency response measures. In some cities, such as Shanghai, Jiangsu, Guangdong, Chongqing and Shandong, if the employer is in critical need of resuming work, in advance, for prevention or control of the epidemic situation or for production and business operation, it shall report to authorities according to relevant local regulations.

² The *Circular on Proper Handling of Employment during the Period of Epidemic Prevention of the Novel Coronavirus* by Tianjin Human Resources and Social Security Bureau

³ *The Policy Guidance on Employment Handling and Salary Payment during the Period of Epidemic Prevention of the Novel Coronavirus in Xiamen City*

⁴ *The Circular on Several Matters Related to Stabilization of Employment during the Period of Epidemic Prevention of the Novel Coronavirus* by Dongguan City Human Resources and Social Security Bureau

⁵ http://www.gov.cn/zhengce/content/2020-01/27/content_5472352.htm

⁶ Article 41 of the PRC Law on Prevention of Infectious Diseases and Article 56 of the PRC Law on Emergency Response

If employers do not obey or cooperate with the emergency measures taken by the state and local governments for epidemic prevention and response to emergencies, and resume work in advance without permission, then according to *PRC Law on Prevention and Treatment of Infectious Diseases* and *PRC Law on Emergency Response*⁷, the following legal liabilities may be assumed:

- **Civil Liability:** If employer's violation of laws and regulations leads to the spread or prevalence of infectious diseases or expansion of the harm, and causes damages to personal rights or property of others, civil liability shall be borne according to law.
- **Administrative Penalty:** Suspension of operation, suspension or revocation of permit or business license may be ordered, and with the fine above RMB 50,000 but less than RMB 200,000; if the situation amounts to violation of security regulation, the public security authority will impose penalties in accordance with applicable law.
- **Criminal Liability:** In accordance with Article 330 of *PRC Criminal Law*, where employer violates *PRC Law on Prevention and Treatment of Infectious Diseases*, fines may be imposed and the responsible person(s) may also be sentenced to imprisonment for 3 to 7 years.

Q4: What is the nature of the extended Spring Festival Holidays and the postponement of work resumption? How should employers pay the salary and wages during these periods?

Regarding the extended Spring Festival Holidays, the *Circular on Extension of Spring Festival Holidays in 2020* provides that, with regards to employees who are unable to take leave due to prevention and control of the epidemic, employers should provide compensatory time off in accordance with the provisions of the *PRC Labour Law*, and the salary and wage of unused leave should be secured and implemented according to relevant policies. Since compensatory time off is only provided to employees who work on rest days, the extended Spring Festival Holidays (i.e. 31 January and 1 and 2 February 2020) should therefore be treated as rest days. If employees work during the extended Spring Festival Holidays, employers need to arrange compensatory time off or pay an overtime salary at the rate of 200% of the employee's normal salary, if compensatory time off cannot be arranged.

As for the delay of work resumption, it is a measure taken by the government to deal with emergencies of public health. However, local governments in different regions have enacted different policies to define the nature of the period of the delayed work resumption (the "**Delayed Period**") and how salaries should be paid during the Delayed Period.

- Under the Shanghai government's decision, the Delayed Period is treated as rest days, and the employer should pay salary to the employees who take rest during the Delayed Period in accordance with the standard agreed in employment contracts, and should additionally arrange

⁷ Article 77 of the *PRC Law on Prevention of Infectious Diseases* and Articles 64, 66 and 67 of the *PRC Law on Emergency Response*

compensatory time off or pay overtime salary at the rate of 200% of normal salary, to employees who work during the Delayed Period⁸.

- Under the government decisions of Guangdong Province⁹ and Shandong Province¹⁰, the Delayed Period is considered as suspension of work and operation, and employers should pay normal salary to employees if the suspension does not exceed one wage payment cycle.
- In Suzhou City¹¹ and Wuxi City¹², during the Delayed Period, it is viewed that employees are providing normal work, and therefore employers should pay normal salary to the employees for their work in the Delayed Period.

Unlike Shanghai, so far, no other provinces and cities require employers to provide compensatory time off or pay double salary to the employees who work during the Delayed Period.

Q5: Can employers arrange for employees to work at home during the Delayed Period? Are employees entitled to overtime compensation under different working hour systems?

The purpose of the Delayed Period is to effectively reduce the concentration of people and to block the spread of the epidemic. We believe that arranging for employees to work from home does not violate the original intention of taking the measure of Delayed Period, so we consider that the risk of violating the epidemic measures is not high. We point out that the labour administration departments in Beijing and Shanghai even encourage employees to work from home.

However, local regulations are different as to whether overtime compensation is required for employees working from home during the Delayed Period. According to the Beijing regulation, employers are required to pay normal salary to employees who work from home during the Delayed Period¹³, while the rules in Shanghai stipulate that employers should provide compensatory time off or pay overtime compensation to employees who work during the Delayed Period¹⁴. Suzhou and Wuxi also stipulate that employers should pay normal salary in full and on time to employees who work during the Delayed Period and encourage employers to provide additional rewards to the employees in an appropriate manner. If the delayed Period involves a rest day, it shall be implemented in accordance with relevant national regulations. (i.e. provide compensatory time off or pay overtime salary for work on rest days)¹⁵.

⁸ *The Authoritative Answers to the Questions on Delay of Work Resumption from Shanghai Municipal Human Resource and Social Security Bureau* by Shanghai Municipal Human Resource and Social Security Bureau

⁹ *The Answers to the Questions on the Salary During the Extended Spring Festival Holidays, the Period of Delayed Work Resumption and the Isolation of Novel Coronavirus Infected Patients, Suspected Patients and People in Close Contact with Patients* issued by the Human Resources and Social Security Department of Guangdong Province

¹⁰ *The Interpretation of the Provincial Policies on Employment Relationship During the Period of Postponing Work Resumption* issued by Human Resource and Social Insurance Bureau of Shandong Province

¹¹ *The Circular on Implementing the Matters relating to Human Resources and Social Security During the Prevention and Control of Epidemic* Issued by Suzhou Human Resources and Social Security Bureau

¹² *The Circular on Implementing the Matters relating to Human Resources and Social Security During the Prevention and Control of Epidemic* Issued by Suzhou Human Resources and Social Security Bureau

¹³ *The Circular on Further Implementing the Matters relating to Human Resources and Social Security During the Prevention and Control of Epidemic* issued by Beijing Municipal Human Resource and Social Insurance Bureau

¹⁴ See 8

¹⁵ See 11 and 12

In summary, we recommend that if the employer arranges for employees to work from home during the Delayed Period, for employees under standard working hours, they should first pay wages in accordance with the regulations of the local labour administration. If however, the relevant regulations have not been issued locally, the employer may temporarily refer to the principle of “normal pay on weekdays and pay off or overtime on rest days” in order to pay employees; explain the situation to them; and execute reissuance or adjustment according to the new regulations issued by the government.

For employees under flexible working hour systems, since they are not applied to standard working hours system, employers are not required to pay overtime salary to employees if they work during the extended Spring Festival Holidays and the Delayed Period.

For employees under comprehensive working hour systems, employers need to determine employees’ working hours during the extension of the Spring Festival and the Delayed Period and should pay them overtime compensation at the rate of 150% of normal salary for the work hours that exceeded the statutory standard working hours.

Q6: Can employers arrange for employees to take annual leave during the Delayed Period?

As mentioned above, due to different interpretations of the nature of the Delayed Period in different cities, we suggest that local regulations should prevail as to whether employers may arrange for employees to take annual leave. We believe that in Shanghai, Suzhou and Wuxi, where the days in the Delayed Period are regarded as rest days or "normal working days" employers cannot therefore arrange for employees to take annual leave during the Delayed Period. However, the Delayed Period is defined as a “shutdown period” in Shandong and Guangdong province. Thus, we are of the view that, upon the consent of the employees, employers in these two provinces may arrange for employees to take annual leaves during the Delayed Period without violating mandatory requirements.

Q7: If employees fail to resume work on time due to the epidemic, what should employers do?

According to the regulations of Beijing, Henan and Hainan provinces, enterprises can give priority to the arrangement of annual leave for employees; according to the regulations of Guangdong, Zhejiang and Shandong provinces, enterprises can give priority to the arrangement of paid annual leave for employees after consultation with the employees for their consent and agreement. Beijing also stipulates that in case of long-term inability to return to work after being affected by the epidemic and long-term failure to return to work, the employer may arrange for employees to “wait for work” after consultation with the employees. During the period of “waiting for work”, the employer shall pay the basic living expenses according to no less than 70% of the minimum wage standard of Beijing.

According to *PRC Regulations on Paid Annual Leave for Employees*, employers shall arrange annual leave for employees based on specific conditions of production and work and take into account the wishes of the employees. Therefore, we believe that for employees who are unable to

return to work on time due to the impact of the epidemic, the employer can arrange for annual leave in advance, after communicating with the employees. However, when employees fail to return to work for a long period of time, in the situation of epidemic prevention and control, it is not appropriate to directly identify employees for absenteeism. Instead, they should work with the employees to negotiate and adopt measures such as “waiting for work” or suspension of employment contracts.

Q8: If employees are suspected of new coronavirus infection, what should employers do?

According to the provisions of Article 31 of *PRC Law on Prevention and Treatment of Infectious Diseases*, employers or individuals who discover patients with infectious diseases or suspected patients with infectious diseases, shall promptly report to the nearby disease prevention and control institutions or medical institutions. Therefore, employers shall immediately report to the nearby disease prevention and control institution or medical institution when they learn that an employee is suspected of having been infected with the new coronavirus. Then, according to the provisions of Article 39 of the aforesaid law, professional medical institutions shall take measures, such as isolating suspected patients and requiring close contacts to submit to medical observation and related measures in designated places.

Q9: What measures can be taken if employers cannot maintain normal operations or have difficulty operating due to the epidemic?

Where employers have difficulty with maintaining their business operations or productions due to the epidemic, it is advisable to take the following measures, so as to lower costs and in order to manage and pull through:

- Based on consensus between employers and employees, employers may adjust salary, rotate duty and shorten working hours.
- Qualified employers can apply for post stabilisation allowance. According to the applicable regulation¹⁶, for employers that meet with certain requirements, the corresponding local government may grant allowance for post stabilisation equal to no more than 50% of the total amount of unemployment insurance contribution paid by the employer and its employees in the previous year.
- Employers may also shut down operations. Where employers shut down operations within a salary payment cycle, they shall pay employees the normal salary as stipulated by the employment contracts. Where employers suspend operations for more than one salary payment cycle, if employees provide normal work, employers shall pay employees their salary, and at a rate which is not otherwise lower than the local minimum wage standard; or if employees do not work, employers shall pay the employees' basic living expenses equal to 70%

¹⁶ The *Circular Relating to Unemployment Insurance Supporting Companies to Stabilize Positions* by Ministry of Human Resources and Social Security, Ministry of Finance, National Development and Reform Commission, Ministry of Industry and Information Technology

to 100% of the local minimum wage, based on the regulations of different cities.

Q10: During the special period, what else can employers do to avoid the spread of the epidemic and ensure the safety and health of the employees?

To avoid the spread of the epidemic, protect the safety and health of the employees and to create a safe and hygienic environment for work, employers may take the following measures during the period of epidemic prevention:

- Request and collect information about the health and travel status of their employees. Employers can require all employees to confirm their health status and whether they have had close contact with infected patients or have traveled to the areas affected by the outbreak. For employees who have symptoms such as cough or fever, employers may arrange for them to work from home or take sick leave, depending on employees' application and specific conditions. For employees with a history of travel in epidemic areas or who have had close contact with infected patients, employers may arrange for them to work from home.
- Ensure sanitary conditions within the workplace. Employers may distribute face masks to employees, check employees' temperatures before work and sterilise the office regularly.
- Develop emergency plan. In case of new coronavirus infection or suspected infection, the employer shall take actions in accordance with the emergency plan, immediately.

Zhong Lun attorneys are available to assist you with these and other workplace issues. For more information, visit www.zhonglun.com.