

INTERNATIONAL BUSINESS ALERT

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Chinese employment law guidelines for subsidiaries operating in China during the coronavirus outbreak



On Jan. 30, 2020, the World Health Organization declared the coronavirus a global emergency. The declaration came after China reported its largest increase in deaths in a single day, with the number of confirmed cases across the globe continuing to rise.

In an effort to slow the spread of the virus, Chinese authorities imposed quarantines and restricted travel throughout the country. On Jan. 20, with the approval of the State Council, the National Health and Reform Commission classified coronavirus pneumonia infection as a Category B infectious disease under the Law of the People's Republic of China on the Prevention of Infectious Diseases. The commission additionally adopted prevention and control measures for Class A infectious diseases. On Jan. 24, the Office of the Ministry of Human Resources and Social Security issued a notice on the proper handling of labor relations related to the virus.

Many provincial and municipal governments (including Beijing, Shanghai, Wuhan, Suzhou and Chongqing as well as the Guangdong, Shandong and Zhejiang provinces) have issued stricter rules in accordance with

INTERNATIONAL BUSINESS ALERT

authorizations provided under China's Emergency Response law and other regulations. A first-level response mechanism for major public health emergencies has been launched in all provinces except Tibet.



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National and local rules have imposed significant challenges for companies operating in China, with many now in crisis management mode. This law alert summarizes key Chinese national and local rules governing employer obligations and provides general guidance on how foreign businesses operating in China can comply with the new rules. Because the coronavirus outbreak remains a global emergency, companies are encouraged to check local rules and laws daily to ensure compliance with the latest local regulations.

Are companies barred from resuming work?

The local government of several cities and provinces have issued rules prohibiting people from resuming work prior to specific dates. For example, on Jan. 27, the Shanghai city government issued a notice stating that no employers were allowed to resume work prior to Feb. 10. "Resume work" is not defined in the notice, but deputy director of the Shanghai Municipal Bureau of Human Resources and Social Security, Mr. Yuqing Fei, clarified that "resume work" means when employees may report to work at a physical location. Mr. Fei explained that employees who must work before Shanghai's Feb. 10 return-to-work day should do so from home, instead of merely working remotely where they might be in contact with more people. Subsequent to the Shanghai notice, more than 15 cities and provinces issued notices regarding the resumption of work and provided dates for doing so.

While wording in most of the rules does not appear to be mandatory, companies and individuals could be subject to administrative, civil or

INTERNATIONAL BUSINESS ALERT

criminal liability if harm occurs as a result of noncompliance. Therefore, it is recommended employers strictly abide by national and local rules and not allow employees to return to their physical work locations until the prescribed date. Absent special circumstances, companies should mandate employees work only from home and should issue a written company policy prohibiting employees from returning to the work site.

Resume-to-work exceptions

Under Shanghai's notice, certain employers are exempt from suspending operations, including those necessary:

- to ensure the city's operation.
- for the prevention and control of the coronavirus outbreak.
- for the daily life of residents.

These exemptions are understood to apply to both qualifying public and private employers.

The list was later expanded to permit employers to resume to work for "specific reasons" but would first require approval from relevant industrial parks, sub-districts or town governments. Companies wishing to obtain approval must apply, and applications must include:

- locations visited by employees outside of Shanghai.
- measures taken by the employer to prevent the spread of coronavirus.
- a pledge that no coronavirus cases will result from the employees' return to their work location.

To date, no further information has been publicly released regarding application details or approvals issued. Officials of the Shanghai Municipal Financial Regulatory Bureau expanded the list of exempt employers to include financial institutions, markets and infrastructure-related institutions providing necessary financial services.

Should employees be paid wages if they are affected by coronavirus and absent from work?

According to Article 41(2) of the Law of the People's Republic of China on the Prevention of Infectious Diseases, if a person has a work unit, the unit in which he or she is located shall not stop paying for his or her work

INTERNATIONAL BUSINESS ALERT

during the period of quarantine. Under the Handing Notice issued by the Ministry of Human Resources and Social Security, employers must continue to pay employees who are infected, suspected to be infected, or who have been in close contact with actual or suspected infected persons during their treatment or medical observation.

Employers must continue to pay employees who are otherwise unable to work as a result of government quarantine measures or due to other government-mandated emergency measures. Accordingly, employees who are infected, suspected to be infected, or have been in close contact with actual or suspected infected persons and miss work should not be considered absent. No wage deduction is allowed based on absenteeism, and employees must be paid regular wages, even if they do not perform any actual work during the relevant time period. Employers are further barred from terminating the employment agreement for absenteeism.

Calculation of wages for work performed between Jan. 31 and Feb. 2

According to the Notice of the State Council on the Extension of the Spring Festival Holiday, Jan. 31 – Feb. 2 was the Spring Festival holiday. To clarify whether these days are statutory national holidays or normal rest days is important for wage calculation. If Jan. 31 – Feb. 2 was a statutory holiday, employees working on those dates are entitled to triple wages. If those days were rest days, employees are entitled only to double wages.

Under Article 2 of the Measures for Holidays on National Holidays and Anniversaries, the first, second and third days of the Lunar New Year are statutory national holidays. Article 3 of the Notice of the State Council, employees who cannot take leave because of epidemic prevention and control shall make up their leave in accordance with requirements of the Labor law. Wages and remuneration for the non-leave period shall be guaranteed according to relevant policies. Article 44 of the Labor law states if an employee works overtime on a rest day, the employer shall arrange for him or her to make it up. If the employer cannot arrange a rest break, it shall pay double the remuneration of the employee's salary.

Since make up for leave for statutory national holidays is not available, it is reasonable to infer that only the first, second and third days of the Lunar New Year should be classified as statutory holidays and employees who worked during that period should be entitled to triple wages. Employees who worked between Jan. 31 and Feb. 2 are entitled to double wages.

INTERNATIONAL BUSINESS ALERT

Calculation of wages for work performed after Feb. 2

More than 15 cities and provinces have issued notices setting forth dates when employees may resume working. Each local rule is different so it is important to check with authorities where the company is located to ensure compliance.

Shanghai's local rule expressly states that Feb. 2-9 are rest days with the resulting compensation requirements of time off in lieu of 200 percent overtime pay. However, some local jurisdictions have adopted different compensation requirements. The Beijing Municipal People's Social Security Bureau states that enterprises that require employees to work from home must pay the same wages they would normally pay. Similarly, notices issued by authorities in the cities of Suzhou, Nanjing and Wuxi only require employers to pay normal wages for work performed Feb. 3-7. In other words, in these cities, those days are not treated as rest days with corresponding overtime compensation requirements.

Can extended holidays between Jan. 31 and Feb. 2 be offset with paid annual vacation days?

The extended holiday between Jan. 31 and Feb. 2 is considered a special national holiday. Without prior arrangements, employers should not unilaterally offset an employee's paid annual leave or treat the national holiday as other leave.

May employees who do not work from home after Feb. 3 be placed on annual leave?

As a general matter, unless local rules provide otherwise, the delayed resumption of work issued by local authorities should be considered emergency measures and not an extension of holiday in the legal sense. The Regulations on Paid Annual Leave for Employees provide that paid annual vacation days shall be used in an integrated manner with the working day by an employer in accordance with the individual circumstances of the employee. Employers are allowed to use annual vacation days to offset the time period between Feb. 3 and the date the employee resumes work unless local rules provide otherwise.

INTERNATIONAL BUSINESS ALERT

May an employer be held liable for causing the spread of coronavirus?

An employer causing the spread of coronavirus can be held both civilly and criminally liable. The Law of the People's Republic of China on the Prevention of Infectious Diseases imposes civil liability on the legal entity and any individual, which could include the legal representative and general manager, for causing the spread of infectious diseases and the resulting physical harm or property loss to others. Additional civil liability could be imposed under tort liability law.

The Criminal Law of the People's Republic of China provides that a legal entity that violates the Law on the Prevention of Infectious Diseases by causing the spread or a great risk of a Class-A infectious disease, which may include coronavirus, could be subject to fines. Senior management, which could include legal representatives and managers, could also be held criminally liable if their legal entity commits a violation.

Punishment includes imprisonment of up to three years or criminal detention. If the consequences are especially serious, the imprisonment could be three to seven years. Moreover, individuals who refuse to implement disease prevention and control measures could be subject to fines and imprisonment of up to seven years.

How to best address prevention and control after returning to work

The coronavirus outbreak is expected to continue for an extended period of time. Employers are encouraged to distribute adequate masks, gloves, disinfectants and thermometers to all employees upon their return to work. Employers should also regularly measure employees' temperature and disinfect office space. It is also important to timely process and report to relevant agencies any abnormal situations. Employers should, however, always consider privacy laws and not disclose confidential information.

For more information please contact [Yuanyou Yang](#) or any member of Porter Wright's [International Business & Trade Practice Group](#).