

Legal Commentary

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Labor Management Q&As During the 2019-nCoV Epidemic (I)

Authors: Will HUANG | Yina LIU | Xiu PEI | Chen WANG | Yuchun TANG | Qiuqi ZHANG

A flurry of regulatory documents has been promulgated in response to the recent large-scale spread of the novel coronavirus (“**2019-nCoV**”), many of which substantially impact the rights and interests of enterprises and their employees. We have prepared the following Q&As on labor management issues for enterprises to better navigate the handling of paid leave, payment of salaries, and other labor matters which may arise during the 2019-nCoV epidemic prevention and control period.

What is the nature of the three-day holiday extension decided by the State Council (from January 31, 2020 to February 2, 2020), and what is the standard for payment of salaries during this period?

According to the original holiday arrangements, the Spring Festival holiday ends on Thursday, January 30, with January 31 (Friday) and February 1 (Saturday) as regular work days, and February 2 (Sunday) as a non-work day. Since the Spring Festival holiday has been extended until February 2 (Sunday), February 2 remains a non-work day while January 31 and February 1 are now regarded as special holidays arranged by the State.

During this period, enterprises are required to pay the full amount of salaries to their employees. For employees that cannot take leave due to epidemic prevention and control, the enterprises should arrange compensatory time-off or pay overtime salaries at the rate of 200% of normal daily salaries.

Labor management during work postponement periods required by local governments

I. Are enterprises required to comply with work postponement notices?

Local governments have the authority to take measures during emergency response operations, based on the *Law of the People’s Republic of China on the Prevention and Treatment of Infectious Diseases and the Emergency Response Law of the People’s Republic of China*. Thus, enterprises are required to comply with notices on work postponement, since the current purposes the postponement of work requested by local governments (such as Shanghai Municipal Government and Zhejiang Provincial Government) are to reduce the size of public gatherings and to interrupt transmission of 2019-nCoV, which do not contravene the foregoing laws. However, certain enterprises are requested to resume

work in advance and not to implement work postponement arrangements, namely enterprises in industries such as those ensuring the operation of the municipalities (including water supply, gas supply, electricity supply, communications and other industries), those ensuring epidemic prevention and control (including the industries of production and sale of medical equipment, pharmaceuticals, protective equipment, etc.), those ensuring people's daily life (including supermarkets, food production and supply industries, etc.) and other relevant enterprises that are involved in national economy and people's livelihoods.

II. Is it permissible to arrange for employees to work from home?

Yes. Local governments have required enterprises not to resume work in advance, which is considered from the perspective of limiting employee gatherings. However, this does not entirely prohibit all flexible work arrangements. We observe that the responses on matters related to postponement of work issued by Shanghai Municipal Human Resources and Social Security Bureau on January 28, 2020 mentions that “enterprises are encouraged to arrange for employees to work from home”. Therefore, for enterprises in the internet and other industries that are more able to implement flexible working arrangements, we are of the view that arranging for employees to work from home based on operating needs is not explicitly prohibited by law. We also recommend that enterprises issue written notices on such arrangements to their employees, clarifying the rights and obligations of both parties.

III. Is it permissible to arrange for employees to take paid annual leave?

Employees will be entitled to take leave on additional non-work days specified by local governments during the work postponement period, and enterprises will not be allowed to arrange for their employees to take paid annual leave on such days. In the absence of local regulations on postponement of work, we believe that enterprises can coordinate and arrange for the taking of annual leave on the basis of specific conditions of work and their employees' individual preferences.

How should annual leave days be handled for annual leave that employees had applied for before the Spring Festival holiday that fall within: (i) the extended three-day holiday period as decided by the State Council, or (ii) the work postponement period required by a local government?

For the extended leave decided by the State Council, since February 2 falls on a non-work day, January 31 and February 1 should be regarded as special holidays, and these two days cannot be used to offset annual leave. Employees who had requested annual leave for these days are entitled to withdraw their requests.

Controversy remains as to whether employees are entitled to withdraw annual leave requests for days during a work postponement period. We are of the opinion that, if the local government has confirmed that the work postponement period constitutes “rest days”, employees should be allowed to withdraw their requests, and the days during this period cannot be used to offset annual leave. In the absence of local regulations or clarity on the nature of the work postponement period, we recommend that enterprises allow employees to withdraw their applications based on the principle of fairness and reasonableness.

What is the standard for payment of salaries during the work postponement period?

Where an enterprise's shutdown or production halt occurs within one salary payment period, the enterprise should pay salaries to its employees based on the standard stipulated in the employment contracts. Where such shutdown or production halt lasts more than one salary payment period and the employees provide regular labor services, the employer should pay salaries not lower than the local minimum salary standard. If the employees do not provide regular labor services, the enterprise should pay living allowances in accordance with the standards stipulated in the relevant provisions promulgated by provinces, autonomous regions, and centrally-administered municipalities.

The salary standard for employees who are arranged to work from home during the work postponement period should be implemented in accordance with the regulations promulgated by the local human resources and social security bureau. For example, the responses issued by Shanghai Municipal Human Resources and Social Security Bureau provide that, “[t]he postponement of work is due to the need for epidemic prevention and control, and these days shall be regarded as holidays. For employees that are taking leave, the enterprises shall pay salaries according to the standards agreed in their employment contracts; employees that undertake tasks such as security shall be regarded as working overtime on holidays, and the enterprises shall grant compensatory time-off or pay overtime salaries.” That is to say, employees who work from home or in any other non-group manner as arranged by enterprises in Shanghai during the work postponement period should be regarded as working overtime on a holiday. These enterprises should either arrange compensatory time-off or pay overtime salaries at the rate of 200% of normal daily salaries.

Where the local human resources and social security bureau has not issued express regulations in this regard, we recommend for enterprises that arrange for employees to work from home during the work postponement period to make reference to the responses issued by Shanghai Municipal Human Resources and Social Security Bureau, and arrange for such employees to take compensatory time-off or pay overtime at the rate of 200% of their normal daily salaries.

How are employment relationships to be handled for 2019-nCoV patients, suspected patients, and persons in close contact during the isolation treatment period or medical observation period, or for employees who cannot provide normal labor services due to isolation measures or other emergency measures implemented by the government?

Enterprises cannot terminate labor contracts with such employees based on Article 40 (no-fault dismissal) or Article 41 (mass layoff) of the *Labor Contract Law of the People's Republic of China*. If the original contract expiry date falls within such period, the employment contract is to be extended until the expiry of the medical treatment period, medical observation period, isolation period or the end of the emergency measures implemented by the government.

How are salaries of employees infected with 2019-nCoV to be paid?

The analysis should be made with respect to different stages of infection:

- Enterprises should pay salaries to their employees during the isolation treatment period or medical

observation period. Beijing, Shanghai, Shenzhen, and other municipalities have further stipulated that enterprises are to regard such employees as providing regular labor services and are required to pay salaries according to the standard of the normal working period.

- After the end of isolation treatment, except for medical personnel, where other employees are infected with 2019-nCoV, the enterprise should determine their medical treatment period in accordance with statutory standards and local regulations, and pay the sick leave salaries during the medical treatment period. Medical personnel infected with 2019-nCoV are to be treated as suffering from work-related injuries and entitled to benefits such as paid leave.

How will situations be handled where an enterprise cannot pay salaries timely due to the epidemic?

We believe that the 2019-nCoV epidemic cannot be considered to constitute force majeure in all circumstances. With respect to the view that “[t]he epidemic constitutes force majeure and can serve as a basis for the delayed payment of salaries after the prescribed payment time”, analysis should be made on a case-by-case basis. Where an enterprise has difficulty paying salaries timely due to the extended bank holiday, we recommend that the enterprise temporarily delay the payment of salaries by giving prior written notice to all employees, and initiate the payment immediately upon the reopening of the banking system; where the enterprise cannot pay salaries timely due to its own reasons, such as cash flow difficulties, the enterprise may temporarily delay the payment of salaries upon obtaining permission from the employees’ labor union.

What measures may enterprises implement where they have difficulties in production and operation due to the epidemic?

According to the notice issued by the Ministry of Human Resources and Social Security, where enterprises have difficulties in production and operation due to the impact of the epidemic, job positions can be stabilized by adjusting salaries, rotating holiday, shortening working hours, etc., through consultations with their employees. Enterprises are to refrain from layoffs or downsizing, to the extent possible. Eligible enterprises can receive subsidies for stabilizing positions in accordance with relevant regulations.

Due to the particularity and urgency of the regulatory documents published in a short time period, certain issues are open to different interpretations and await further clarification. We will continue to monitor for the latest updates from central and local governments and human resources and social security bureaus, and continue to provide updates on notices and guidelines on labor and employment management during the epidemic prevention and control period.

Important Announcement

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If you have any questions regarding this publication, please contact:

Wei (Will) HUANG

TEL: +86 21 6080 0967

Email: will.huang@hankunlaw.com