

Legal Commentary

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Labor Management Q&As During the 2019-nCOV Epidemic (III)

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Following our previous general Q&As on labor management issues that may arise during the novel coronavirus pneumonia (“2019-nCOV”) epidemic prevention and control period, we have compiled for your reference additional issues that are of interest to enterprises and prepared interpretations of the policies newly promulgated by the local governments.

During the period from February 3 to February 7, 2020, how are the salaries to be paid to employees who have not provided any labor services?

Enterprises are to pay normal salaries to the employees.

Should the salary standard of the employees that work from home be consistent with that before the outbreak of the epidemic?

The analysis should be made with respect to different stages:

I. During the work postponement period.

At the current stage, most local human resources and social security bureaus have not provided clear guidance on the standard for payment of salaries during the work postponement period. According to the response on matters related to work postponement issued by Shanghai Municipal Human Resources and Social Security Bureau, employees that work from home during the work postponement period as arranged by enterprises in Shanghai shall be regarded as working overtime on rest days, and such enterprises shall grant compensatory time-off or pay overtime salaries to their employees (for employees subject to the standard working hour system, 200% of normal daily salaries shall be paid). The notices issued by the human resources and social security bureaus of Guangdong Province, Suzhou Municipality and Wuxi Municipality provide that enterprises shall pay normal salaries to their employees that work during the work postponement period (no overtime salaries are to be paid, except that enterprises should arrange compensatory time-off or pay overtime salaries at the rate of 200% of normal salaries for employees working on rest days.) For regions without explicit standards for the payment of salaries, enterprises should currently pay salaries according to the normal standards, that is, the salary standard of the employees working from home should be the same as that before

the outbreak of the epidemic.

II. Resumption of work until the end of the epidemic.

In principle, the salary standards of employees working from home after work resumes should remain the same as that before the outbreak, which includes base salary, merit pay, bonuses, etc. Merit pay and bonuses are to be determined in accordance with the agreements concluded between the enterprises and the employees, and the performance of the employees.

Can enterprises validly agree with their employees to forgo the payment of salaries during the period from February 3, 2020 until the end of the epidemic?

Agreements to forgo the payment of salaries are likely to be deemed invalid. According to the notices 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 holidays, shortening working hours, etc., through consultation with the employees. Besides these measures, PRC labor laws stipulate that where a 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. For employees who do not provide regular labor services, the enterprise should pay living allowances in accordance with stipulated local standards. Therefore, even if enterprises and their employees agree on adjusting salaries during such period, the standard should not be lower than the local minimum salary standard. Enterprises should also continue paying social insurance premiums for their employees, unless local governments have issued preferential measures.

Therefore, for enterprises that cannot resume normal work due to the impact of the epidemic, we recommend that the enterprises consult with their employees to conclude salary adjustment agreements or position pending assignment agreements, appropriately adjusting working hours (for employees pending position assignments, no labor services should be provided) and salary standards, and the salary standards may not be set lower than the local living allowances standard. The specific standards for allowances can be referenced in *Labor Management Q&As During the 2019-nCoV Epidemic (II)*.

Enterprises can, upon consultation, sign salary adjustment agreements with their employees who work from home due to the impact of the epidemic. Adjusting employee working hours should also be considered in order to meet daily operating needs.

In addition, the parties can also consult on the decrease or cancellation of bonus payments.

How can enterprises confirm salary arrangements during the period of salary adjustment or the period pending job assignment with the employees?

Salary adjustments and positions pending assignment constitute amendments to employment contracts. Thus, enterprises should confirm salary arrangements with their employees in writing from an administrative perspective. However, considering the special circumstance during the epidemic, enterprises can also confirm such arrangements with their employees via work email or other appropriate

written forms.

Can enterprises arrange for employees to take unpaid leave before the end of the epidemic?

No. In accordance with PRC labor laws and the notice issued by the Ministry of Human Resources and Social Security Bureau, 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 local standards, or pay salaries for positions pending assignment that is not lower than the living allowances standard.

Following issuance by the Beijing Municipal Government of the *Notice on Salaries and Benefits during the Period the Employees Care for Minor Children due to School Postponement Caused by Epidemic Prevention and Control*, each family in Beijing can have one employee care for minor children at home. How should enterprises implement this policy?

I. Which employees are eligible to remain at home to care for their children?

The following conditions should be met for employees to apply for home childcare in accordance with the notice:

1. The children in need of care are under 18 years of age.
2. Children under 18 years of age in need of care should be students and children that are unable to return to colleges, middle and primary schools, kindergartens due to the impact of the policy on school postponement. The policy therefore excludes infants that do not attend kindergarten, or children under 18 that have dropped out of school, have not attended school or have left school.
3. Other family members of the employee (such as the spouse) cannot provide childcare or have not applied to their employer for home childcare, including spouses that are separated, normally work, are under quarantine, are deceased, etc. This excludes spouses or other family members who have no work or can care for children.

II. What procedures are to be completed for employees applying for home childcare?

Employees should complete leave application procedures in accordance with the enterprise's internal policies, which generally includes submitting a leave application form and other supporting documents, such as documents proving that the spouse cannot provide childcare or is under quarantine, or documents issued by the spouse's employer proving that the spouse has not taken childcare leave.

III. What is the standard for salary payment while employees are on leave for home childcare?

Home childcare should be regarded as a circumstance where an employee cannot provide normal

labor services due to quarantine or other emergency measures implemented by the government. Enterprises should pay employees on leave for home childcare normally in accordance with the employee's work attendance.

IV. Can enterprises terminate employment contracts during home childcare leave?

Enterprises cannot terminate employment contracts during home childcare leave. If the original employment contract expiry date falls within such period, the employment contract is to be extended until the end of the quarantine or emergency measures implemented by the government.

V. Can enterprises arrange for employees on home childcare leave to work from home?

The notice encourages employees on home childcare leave to provide labor services flexibly, such as via telephone or the internet, and encourages employees to take work and rest shifts and to develop a spirit of mutual assistance, in order to ensure the normal operation of work and production. Therefore, enterprises can arrange for such employees to work from home in a flexible manner.

VI. Can enterprises consult with their employees on adjusting salary standards during home childcare leave?

Enterprises and their employees can adjust salary standards in writing, where both parties have reached consensus and necessity so requires. In such cases, enterprises can pay employees their salaries in accordance with the agreed standards. However, such salaries should not be lower than the local living allowances standard, such as local minimum salary standard.

During the period of epidemic prevention and control, do enterprises risk personal privacy infringement by requesting their employees to provide personal health information, including body temperatures, recent itineraries, suspected contact histories and geographical locations? How can enterprises mitigate such risks to the extent possible?

Provisions of PRC law require persons to assist in public health emergency response efforts where necessary, including by reporting suspected infectious disease cases to medical institutions. It is therefore reasonable for enterprises to request personal health information from their employees, because doing so can assist in prevention and control of the 2019-nCoV epidemic. Personal health information may include body temperatures, recent itineraries, suspected contact histories and geographical locations, etc.

At the current stage, the National Health Commission has classified 2019-nCoV as a Class B infectious disease as defined in the Infectious Disease Law, and has taken Class A infectious disease prevention and control measures. The local governments have launched a Class A major public health emergency response and have made it clear that the epidemic constitutes a public health emergency.

Enterprises should also note that, the collection and use of such information should comply with the PRC laws on protection of personal information. According to the *General Provisions of the Civil Law*, an individual's personal information (including an employee's personal information) is legally protected and

may not be unlawfully disclosed to other parties. Presumably, the enterprise's employee handbook will contain consent provisions regarding the collection and disclosure of personal information. It is advisable to obtain express employee consent if such provisions do not cover personal health information in this manner. However, we view the reasonable collection and reporting of employees' personal information in furtherance of the government's epidemic prevention and control measures to be lawful, even without express consent, due to public need as specified, e.g., in the *Information Security Technology – Personal Information Security Specification*.

Based on the above, we provide the following general tips for collecting employee personal information in relation to the prevention and control measures:

1. Employees should be informed that the enterprise will report to the local centers for diseases control or hospital only in the circumstance of existence of risk of infection.
2. Information should be collected with the employees' consent. If an employee refuses to provide such information, the enterprise cannot force the employees to provide it.
3. If it is necessary to regularly report to the employees the epidemic prevention and control situation, it is advisable to remove any personally identifiable information from the report.
4. If suspected infection is found, a report should be made to the local centers for diseases control or hospital.

During the period of epidemic prevention and control, is it legally permissible for enterprises to measure employee temperatures at the entrance of the workplace or regularly monitor the temperatures of employees? Are enterprises entitled to request employees to leave the workplace if an abnormal temperature is discovered?

Under PRC law, enterprises are obligated to participate in epidemic prevention and control activities according to the requests from the governments.

On January 30, 2020, the working group of the State Council issued the *Notice on the Issuance of the Public Venue Health Protection Guide for 2019-nCoV*, which specifies the preventive measures that should be taken in public places and workplaces, such as offices buildings where gatherings frequently take place, including strengthening the health monitoring and registration of visitors. Besides this, local governments (such as Beijing Municipality, Jiangsu Province, and Guangdong Province) have also issued relevant notices, requesting enterprises to strengthen health monitoring and protection for employees that normally report for work in such workplaces. To comply with these requirements, enterprises can measure temperatures at workplace entrances or regularly monitor the temperatures of employees.

If an employee has an abnormal temperature, the enterprise is entitled to request the employee to leave the workplace to prevent the potential risk of infection, provided the salaries of the employee are normally paid. Meanwhile, in accordance with the provisions of the *Law on the Prevention and Treatment of Infectious Diseases*, only governments are authorized to impose quarantine measures, and only medical institutions are authorized to provide treatment to persons under quarantine. Thus, enterprises themselves cannot request or force employees to be quarantined, but can merely request them to leave

the workplace.

How should enterprises pay social insurance premiums until the end of the epidemic?

We recommend enterprises to pay the social insurance premiums timely, and to avoid late payments or underpayments. If enterprises are unable to pay social insurance contributions timely due to the impact of the epidemic, postponements can be made in accordance with relevant provisions of the central or local governments, and the enterprises can make up the payments within the prescribed period after the epidemic. Enterprises and individuals that participate in the social insurance scheme are permitted to postpone the handling of business, and postponing payments will not affect social insurance benefit credits of participants, according to the *Notice on Handling Social Security Matters During the Period of Epidemic Prevention and Control* (Ren She Ming Dian [2020] No. 7) issued by the Ministry of Human Resources and Social Security on January 30, 2020. Any contributions unpaid during this period are to be completed within three months after the end of the epidemic.

- Guangdong Province. Employers that cannot timely pay premiums for employee pension insurance, unemployment insurance, and work-related injury insurance due to the impact of the epidemic can defer the payment for up to three months after the end of the epidemic; no fines for late payments will be charged during such period. *Notice on Social Insurance Payments and Benefits Matters During the 2019-nCoV Epidemic Prevention and Control Period* (Yue Ren She Han [2020] No. 24) issued by the Human Resources and Social Security Department of Guangdong Province and Guangdong Provincial Tax Services, State Taxation Administration.
- Suzhou Municipality. Due to the impact of the epidemic, small- and medium-sized enterprises that are facing temporary production and operation difficulties and cannot pay the full amount of social insurance premiums, after obtaining permission, can postpone for up to six months the payment of premiums for pension insurance, unemployment insurance, and work-related injury insurance. After the end of the deferment period, the enterprises' full payment of the deferred amount of social insurance premiums will not affect the rights and interests of social insurance participants. *Ten Policy Opinions on Coping with the Epidemic Caused by the 2019-nCoV and Supporting the Small and Medium-Sized Enterprises to Overcome Difficulties* (Su Fu [2020] No. 15) issued by Suzhou Municipal Government on February 2, 2020.
- Shanghai Municipality. Due to the impact of the epidemic, enterprises participating in social insurance, freelancers, and urban and rural residents who fail to complete the social insurance registration or pay social insurance premiums in a timely manner are allowed to make up the process when the epidemic ends. Enterprises that cannot pay the social premiums timely will be exempted from fines for late payments, provided that the enterprises have filed a report with the social insurance handling organization. The rights and interests of the participants of social insurance will not be affected. The make-up procedures must be completed within three months after the end of the epidemic. *Notice on Proper Handling of Social Insurance during the 2019-nCoV Epidemic*, issued by Shanghai Municipal Human Resources and Social Security Bureau on February 3, 2020.
- Beijing Municipality. An extension is provided for the collection of social insurance premiums payable

in January and February to the end of March, and to the end of July for enterprises that have been hit hard by the outbreak of epidemic in the industries like tourism, accommodation, catering, exhibition, trade circulation, transportation, education, training, cultural performances, film, and ice-snow sports, as confirmed by the competent authority of the relevant industry. During such period, no late payment penalties will be charged, and the rights and interests of the participants of social insurance will not be affected. *Several Measures on Further Supporting the Fight against 2019-nCOV Epidemic* (Jing Zheng Ban Fa [2020] No. 5), issued by Beijing Municipal Government.

What regions have issue policies on relieving the burden on enterprises?

- Suzhou Municipality. The municipality is providing measures for financial support, employees stability, and enterprise burden cuts, including preferential measures such as ensuring the outstanding balance of loans to small and micro enterprises shall not fall, ensuring the financing costs of small and micro enterprises shall not increase, implementing position stability policies, deferred payment of social insurance premiums, reducing or exempting housing rent and tax, supporting entrepreneurial parks, etc., in order to develop an important role played by small- and medium-sized enterprises during epidemic prevention and control, and to support such small and medium-sized enterprises to overcome difficulties. *Ten Policy Opinions on Coping with the Epidemic Caused by the 2019-nCOV and Supporting the Small and Medium-Sized Enterprises to Overcome Difficulties* (Su Fu [2020] No. 15), issued by Suzhou Municipal Government on February 2, 2020.
- Shanghai Municipality. The local human resources and social security bureau announced four measures to reduce the financial burden on enterprises on February 3, 2020, including refunding unemployment insurance premiums paid, delaying the adjustment period of social insurance contribution base, extending the social insurance payment period, and providing training subsidies.
- Beijing Municipality. Measures have been introduced with five aspects, namely, further optimizing administrative approval services, increasing the support of funds for prevention and control, ensuring services for enterprises, developing the role of technological innovation in supporting the epidemic prevention and control, and strengthening the guarantee of municipality operation services, which include policies on relieving the burden on enterprises, such as assisting enterprises to stabilize production and operation, properly resolving the financing of enterprises with difficulties, delaying payment of social insurance premiums, and encouraging the operators of commercial buildings, shopping malls, markets to offer moderate rent reductions or waivers to small, medium-sized and micro tenants. *Several Measures on Further Supporting the Fight against 2019-nCOV Epidemic* (Jing Zheng Ban Fa [2020] No. 5), issued by Beijing Municipal Government.

We anticipate that the central and other local governments will soon promulgate additional preferential policies to relieve the burden on enterprises.

During the period of epidemic prevention and control, what are the issues that enterprises should consider when downsizing their workforces?

Where enterprises have production and operation difficulties due to the impact of the epidemic, job

positions can be stabilized upon consultation with employees by adjusting salaries, rotating holidays, shortening working hours, etc., in accordance with the *Notice on the Proper Handling of Employment Relationship Matters during the Period of 2019-nCoV Epidemic Prevention and Control* by the General Office of the Ministry of Human Resources and Social Security (Ren She Ting Ming Dian [2020] No. 5) and the relevant notices issued by local governments. Enterprises are to refrain from layoffs or downsizing, to the extent possible.

I. Circumstances under which layoffs are not permitted.

Besides circumstances where employees cannot be terminated as specified in Article 42 of the *Employment Contract Law of the People's Republic of China* and other relevant laws and regulations, the recently issued notices issued by the Ministry of Human Resources and Social Security and local governments also explicitly emphasize that the enterprises cannot terminate employees through mass layoffs who become infected with or are suspected of being infected with 2019-nCoV, employees that have been in close contact with 2019-nCoV in the quarantine or medical observation period, and the employees that cannot provide normal labor services due to quarantine measures or other government-implemented emergency measures.

II. Due Process.

Article 41 of the *Employment Contract Law of the People's Republic of China* provides that, if it is necessary to reduce the workforce by 20 persons or more, or fewer than 20 persons but accounting for 10% or more of the total number of employees of the employer, the employer may only do so after it has explained the situation to the labor union or to all of its employees 30 days in advance, considered the opinions of the labor union or the employees, and has submitted its workforce layoff plan to the labor administrative department. To mitigate legal risk to the extent possible, enterprises should pay attention to due process and ensure compliance, and timely report the layoff plan and process to the local human resources and social security bureau, so as to avoid the liability for wrongful termination due to procedural flaws.

III. Timely payment of salaries and severance.

Enterprises should timely pay the full amount of salaries to the employees, and pay severance for termination of employment contracts in accordance with PRC law.

IV. Avoidance of gatherings and mass events.

During the layoff process, enterprises shall fully listen to the opinions of the employees, and try to communicate with the employees through telephone, WeChat, or email, in order to preserve written records, as well as to avoid the risk of infection caused by the employee gatherings. Meanwhile, enterprises should also pay special attention to placate employees, and prepare contingency plans and prevention and control responses, avoiding mass events or other situations that affect social stability.

Due to the constant changes in policies, 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 their interpretations. If there are any conflicts between the newly issued policies and this series of Q&A, the newly issued policies shall prevail.

Important Announcement

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