



APAC employment issues arising out of the Coronavirus (AsiaPac)

Employment Alert

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On 29 January 2020, the number of confirmed cases of the rapidly spreading coronavirus in Mainland China officially surpassed the figure seen during the 2002/2003 SARS epidemic.

Multinationals with local operations around the APAC region have been significantly affected. As staff return to the office following the Chinese New Year holiday period, businesses are now considering what they can do to minimise any risk to health and safety and support staff through this challenging period where anxiety and uncertainty is rife, whilst at the same time complying with their employment obligations and maintaining business continuity. Putting in place detailed business and contingency plans and ensuring careful communications with staff to address key topics and concerns is key, as is keeping such plans and communications under frequent review given the fluidity of the current situation.

This alert considers some of the key issues that HR and business leaders should be considering across the APAC region. If you need any specific advice, please contact Helen Colquhoun or David Smail for further details.

1. Health and Safety

Naturally, health and safety is at the front and centre of these concerns. Employers generally have a duty to safeguard the safety and health of their employees, so far as is reasonably practicable. Some countries have extensive legislative frameworks in place, while others impose obligations at common law. Many (including Hong Kong) have specific requirements regarding the prevention of infectious diseases and the steps employers are required to take.

For example, employers are generally subject to a duty to:

- provide information, instruction, training and supervision as may be necessary to ensure the safety and health of employees at work;
- maintain the workplace in a condition that is safe and without risks to health where the workplace is under the employer's control; and
- provide or maintain a working environment for employees that is safe and without risks to health.

The above duties apply to employees but may also apply to other third parties working on or visiting the employer's premises e.g. customers, agency staff, independent contractors and other atypical workers.

Failure to comply with the above duties can give rise to personal (and, in some cases, criminal) liability for managers, directors and other officers if the failure was due to their wilful neglect.

A detailed plan can help employers and managers to comply with these common law and statutory obligations, by evidencing the steps the company has taken to try to protect against an outbreak at work and what steps will be followed if there is an outbreak in order to minimise and mitigate against its impact. Such a plan should, for example, cover:

- flexible working arrangements and quarantine protocols (as discussed below);
- keeping employees fully up to date with the current situation of the virus, any major developments and the contingency plans which are being put in place at any particular stage;
- provision of preventative measures (such as masks and sanitisers, increased cleaning of office premises etc);
- guidance for employees on travel arrangements to/from affected areas, and
- notification procedures and protocols if anyone feels unwell.

Employers should also assess specific governmental guidance in their jurisdictions as to what preventative measures they will be reasonably expected to take.

2. Requiring Employees to Stay at Home and Quarantine

Employees can generally be required not to report for work if they are likely to pose a threat to the health and safety of other staff members. The scale of any threat needs to be assessed on a case-by-case basis, but employers are generally taking greater precautions for staff who have: (i) travelled from/to Wuhan and/or Hubei province; or (ii) been in contact or close proximity with anyone experiencing flu-like symptoms or who are known to have contracted the virus.

During any quarantine period, the starting position is that employers would generally be expected to continue to pay the employee their ordinary wages and contractual benefits – provided they are otherwise ready and willing to work. However, this may depend on the location and whether the office/premises needs to be shut down completely.

In China, for example, in a business closure situation it may be possible to reduce an employee's salary after one salary payment cycle (typically one month) by up to 30% depending on the minimum wage of the applicable city of province.

Similar statutory provisions exist in the case of business closures and business suspensions in Thailand and South Korea respectively. In these cases, however, the closure or suspension must be due to a 'legal necessity' (Thailand) or a reason that is 'attributable to the company' (South Korea). It is unlikely that a closure/suspension due to the coronavirus would fall within this category, and therefore the obligation to pay wages would likely continue.

In Japan, there are conflicting provisions in the Labor Standards Act and the Civil Code as to whether employees should receive 60% of their wages or 100% of their wages in the event of a business closure.

Given the various conflicting regimes, the prudent view for now is generally to continue to pay staff their regular wages during any period of quarantine provided they are otherwise ready and willing to work, and to seek legal advice for the particular office location if any alternatives are being considered.

If the employee has contracted the virus or is unfit to come to work, they would be expected first to utilise their sick leave entitlement – whether statutory or company enhanced.

3. Leave Arrangements

Employers and employees are generally free to take periods of voluntary leave by consent, whether on a paid or unpaid basis. Unpaid leave arrangements have proved popular for some businesses during the recent Hong Kong Government protests, with many staff opting to take time off to spend time with families in returned for reduced

working hours and reduced compensation. This is also an option that many businesses are considering in response to the outbreak of the coronavirus. The arrangement can be beneficial for employers and employees alike, provided the communication is handled sensitively and in such a way as to minimise the risk of any reputational damage. Any agreement needs to be carefully documented to avoid later dispute.

Employers should, however, be mindful that any pre-booked annual leave which takes place during a business closure due to the coronavirus may not be viewed as annual leave – as strictly speaking, the leave needs to be in respect of the day on which the employee was actually required to report for work. This is the case, for example, in Hong Kong, Japan and Thailand. In China, much would depend on the dates the national government has declared as extended holiday or that the local government has declared workers should not return to work yet, as well as the specific wording of the local regulation.

4. Flexible Working

During the SARS epidemic, the Hong Kong Labour Department issued a set of guidelines that encouraged employers to devise contingency plans and to allow staff in special risk categories, such as pregnant employees and employees with family members infected with the disease, to work from home or take leave. Although the guidelines were non-binding, we anticipate that the Labour Department and the Hong Kong Government would take a similar approach to the coronavirus – and it may well be that they issue similar guidelines in due course.

In the interim, the prudent approach is to adopt a flexible approach, particularly for those who are able to work from home and/or are in non-critical business positions. This approach is of course generally easier for larger business and those in the services sectors, while smaller business and those in e.g. F&B, retail and hospitality are likely to find it more difficult to do so.

If staff are being allowed to work from home, they should be advised to keep in regular contact with their supervisors and/or HR, and to notify the business in advance.

5. Visa and Non-essential Business Travel

Many countries have now suspended issuing new travel visas to PRC residents. This may cause business disruption for any new hires/candidates who are based in the PRC, and any existing visa or work permit applications that are currently on foot are likely to be delayed due to the backlog in processing.

Employers should factor in additional time to the onboarding process as a result. They may also want to consider whether candidates who are based in the PRC can start providing services offshore on a short-term basis – for example, under a consultancy agreement that serves to ‘bridge’ the gap between the commencement date and approval of the visa/work permit. However, such arrangements can be complex to administer and would be subject to a number of cross-border risks including: permanent establishment tax risks, business registration requirements and compliance with immigration laws.

For other business travellers, generally speaking any non-essential travel to and from the Mainland is generally being dissuaded by most employers in the region. Employers should ensure that their list of regular business travellers and contact details is accurate and up-to-date. Clear communication channels should be established (both during and outside office hours) as part of the business contingency plan.

6. Employee Relocations

Many employees are asking to work from other office locations overseas. Subject to any particular contractual arrangements, employers are not generally obliged to permit an employee to perform their duties from another location, either on a temporary or permanent basis. For many employers, such requests cause challenges around business continuity, ability of employees to perform their duties from different time zones, and/or perceptions of unfairness if certain categories of employees are permitted to do so while others are not. Longer term arrangements also carry the risk of unforeseen consequences such as tax liabilities (both on the individual employee and the company), visa issues and dual employment rights in both the original and new place of work.

It is prudent to consider the likelihood of such requests as part of business continuity planning and to have protocols in place as to which roles will be considered and what the expectations are around working arrangements during any period of overseas working. Employers should also analyse on a case by case basis whether there are likely to be any tax or other issues arising out of the change in working location, and ensure the arrangement is properly documented to minimise the risk of later disputes and legal risk.

7. Discrimination

Employers do need to be mindful that they do not breach any discrimination laws in their handling of staff during the outbreak. For example, in Hong Kong 'disability' is defined extremely widely and would likely include the coronavirus. In such cases, an employer would be under a duty not to subject the employee any less favourable treatment as a result of their condition.

However, a number of defences or exemptions are often available and typically these will include cases where a discriminatory action was taken that was reasonably necessary to protect public health. This would include: (i) complying with quarantine measures; and (ii) taking precautions against the spread of infectious disease.

As with any risk of discrimination (or perceived discrimination), it is key for employers to develop a contingency plan that applies equally to all staff regardless of any underlying protected characteristics and to ensure the policy is implemented consistently.

8. Employees' Compensation and Insurance

In countries with statutory workplace injury regimes, it may be possible for an employee to claim compensation if they have contracted the virus in the course of performing their employment duties. Such claims are usually settled through mandatory employees' compensation insurance.

In Hong Kong, although the coronavirus is not currently classified as an 'occupational disease' within the meaning of the legislation, this could change in the future – and in the meantime employees may be able to bring a claim within the context of personal injury.

Employers should speak with their insurance providers to check that any claims related to the coronavirus would be covered. Following the SARS epidemic, many insurers made significant pay-outs to insureds, and are generally now more cautious in the scope of insurance coverage that they provide in respect of communicable diseases and business interruption. Event organisers are particularly at risk when seeking to insure against the financial effects of the outbreak of disease.

9. Mental Health

Workplace mental health is an increasingly important topic for employers. The effects of contracting the virus and supporting family members who have done so is likely to create stress and anxiety. Employers should ensure they have in place an effective Employee Assistance Programme, and that all staff are reminded to know how to access it, as well as being notified as to whom internally they can share any concerns with.

Careful communication plans can address common FAQs and help to address some employee queries and concerns about both what the company is doing and what the expectations are of them during this period.

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