

PUBLICATION

Coronavirus (COVID-19): What You Need to Know Right Now

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A new coronavirus, COVID-19 is causing an outbreak of respiratory illness that began in the city of Wuhan, Hubei Province, China. The outbreak began in early December 2019 and continues to spread in China and beyond. As of January 28, 2020, Chinese health officials have confirmed 4,565 cases and 106 deaths related to the virus. In addition, there are more than 70 confirmed cases globally, including five confirmed cases in the United States. In an effort to slow the spread of the virus, Chinese authorities are imposing quarantines and restricting travel throughout the country. Hong Kong has closed some of its borders with mainland China and has stopped issuing travel permits to mainland Chinese tourists. Mongolia and Russia (Far East border) have closed their respective borders with China. Mainland Chinese authorities are trying to keep citizens at home by extending the Chinese New Year holiday through February 3, 2020, with some areas (Shanghai, Suzhou, Guangdong Province and Zhejiang Province) extending the holiday through February 9, 2020. While Chinese health officials claim that the virus can spread by a person before symptoms appear by what is known as asymptomatic transmission, the Center for Disease Control in the United States (CDC) and state health officials believe it is unlikely that the virus can be transmitted until an individual appears symptomatic.

Effective January 27, 2020, the CDC raised its travel precaution for China to its highest level – warning travelers to "avoid nonessential travel" to the country. Previously, the CDC recommended that travelers avoid Hubei province, where Wuhan is located.

This is a rapidly developing situation. Therefore, CDC guidance regarding the virus and its transmission, as well as its travel advisory, could change. We advise that you monitor appropriate Chinese government authorities, as well as the CDC and other relevant U.S. government agencies, for important updates.

Impact to Companies with Employees in China

In response to the outbreak, Chinese Ministry of Human Resources and Social Security issued a notice in connection with its efforts to prevent and control coronavirus and labor relations on January 24, 2020 (the Notice). The Notice requires that an employer in China must pay employee wages in accordance with the standard provided in the employment agreement if an employer suspends production within a wage payment cycle. Also, it prohibits the employer from unilaterally terminating an employee who has been diagnosed with the coronavirus, is merely suspected of being infected with the virus, has come in close contact with a coronavirus patient or suspected patient, or is unable to work due to the government quarantine or other government-imposed emergency measures in accordance with Article 40 (unilateral termination of an employee not caused by employee wrongdoing) of PRC Employment Contract Law or from conducting mass layoffs in accordance with Article 41 of PRC Employment Contract Law.

In connection with the Notice, several major economic regions, including Shanghai and Beijing, issued supplemental notices providing for even more employee protections. For example, the Beijing Bureau of Human Resources and Social Security indicated that if an employee needs to take time off work due to an illness and the employee is eligible for statutory medical leave under applicable law, the employer must provide the employee with the leave in accordance with applicable law and the employee's employment agreement. The minimum pay standard in Beijing for medical leave is at least 80 percent of Beijing's minimum wage. The

Shanghai Bureau of Human Resources and Social Security requires employers to pay overtime to employees who work during the extended Chinese New Year holiday. Because Shanghai has extended the Chinese New Year holiday through February 9, many employers will be required to pay employees overtime.

If you operate a company with employees in China, monitor new rules and notices from your local employment bureau. Also, carefully review your Chinese employment handbook and employment agreements with your employees and consult with your counsel before you make any termination decision. Communicate with your managers and employees in China so they know what is going on and what steps you are taking to address the situation. Also, recommend to your ex-patriate employees in China that they leave China for the foreseeable future. If the virus continues to spread, it is very likely that all modes of transportation from China will be blocked.

Impact to Companies that Manufacture or Purchase Goods in China

Due to travel restrictions and the extended Chinese New Year holiday, many workers will not be able to return to their companies for at least the next few weeks. It is very likely that the restrictions will be extended further. Even if the restrictions are lifted, many employees may still wait weeks or months before they deem it safe to travel to return to their jobs. This may cause significant delays in delivery or outright failure to deliver as required under your contract. Even if your supplier returns to full capacity, it is very possible that upstream suppliers may not re-open for weeks or months. Due to the slowing economic conditions in 2019, many small suppliers or upstream suppliers may not be able to withstand the economic blow that a delay may have on their financial health and many may never reopen. Depending on where your product is manufactured in China, there may be significant delays in shipping the product from the factory to the port for delivery to your company.

So, what does this mean? You should review your contracts to determine what rights you may have in the event your supplier is late with delivery or fails to deliver at all. Expect claims to excuse performance by your Chinese supplier under the force majeure provision of your contracts. Efforts to contain the spread of the coronavirus are important state interests, thus it is unlikely that a Chinese court will sanction a Chinese supplier unable to perform in accordance with the terms of any contract. As a result, you should consider alternative sources of supply outside of China, both in the short term and in the long term.

Impact to U.S. Employers

U.S. employers are also in a quandary. Do you accept the CDC's and other health officials' guidance and allow your Chinese workers who have recently returned from New Year's celebrations or business trips in China to go back to work in your plant or office? Should you give them some time off at home instead? If you do require time off, do you need to pay them? And finally, how do you allay the fears of the non-Chinese workers who may fear for their own health from being exposed to a recently-returned worker? There are no easy answers here, but below, we offer some recommendations for you to consider.

What to Do If an Employee is Symptomatic

If you have a worker recently returned from China or some other area with confirmed cases of the virus who exhibits symptoms (which include fever, nausea, vomiting, diarrhea, shortness of breath, runny nose, and cough), you should take immediate action. Do not take that worker to a walk-in clinic. Such clinics do not have the ability to test for the coronavirus and you may inadvertently expose a lot more people to the disease by doing so. Instead, immediately call the Communicable Disease section of your state department of health. Many such agencies are staffed to accept calls 24/7 regarding such concerns. If you describe the worker's symptoms and travel history, and your state's department of health officials believe there is a possibility that it is the coronavirus, the department of health officials should arrange to have the worker tested at one of the hospitals they work with, after that hospital takes appropriate precautions.

Asymptomatic Employees – Return Them to Work? Or Make Them Stay Home?

With regard to individuals who have recently returned from affected areas of China or other locations who are asymptomatic, you certainly can return those employees to work as usual; doing so should not subject you to liability since the health officials have not recommended otherwise. Of course, the potential downside of doing this and then having a worker who exhibits symptoms after a few days and may have exposed tens or hundreds of your other workers to this disease is sobering. So, some companies may want to take a more aggressive approach.

You may consider asking the worker to stay home for a few days until the incubation period has passed. Unfortunately, that incubation period can be quite long – about 10 – 14 days. From an employment law perspective, this course of action is not without risks. One risk would be that a worker who is forced to stay home might make a "regarded as" disabled claim, alleging that you perceived that the worker had a disability that prevented him from performing his job in violation of the Americans with Disabilities Act (ADA). Your response would be that you did not regard the worker as "disabled;" rather, you regarded him or her as someone who could potentially transmit a deadly virus to your other workers. You would also argue that even if you regarded this worker as disabled, the worker's alleged disability posed a direct threat to your workplace, which is a defense to an ADA claim. We view the risk of a worker prevailing against you in such a lawsuit as low, particularly given the legitimate fears due to the serious nature of this disease.

Another potential legal challenge to excluding your workers from the workplace until the incubation period has passed would be a claim that you are discriminating against these workers on the basis of their national origin, a violation of Title VII of the Civil Rights Act of 1964. Because of that possibility, we would suggest you be selective about the workers you require to sit out – choose them based on where in China they traveled. If they traveled in or from Wuhan Province or nearby provinces where the coronavirus is currently most widely spread, you would certainly want that employee to sit out. Workers who have traveled to and from the Xinjiang or Jilin Provinces (where the virus is currently not prevalent) may not need to be excluded from the workplace – although of course, that situation may change. Ensure that when you communicate with these workers, you tell them that you are excluding them because of their travel history, not because they are Chinese. Of course, many companies have Americans who have traveled to China; these workers, too, should be excluded for the appropriate period of time, which should defeat a claim that the exclusion is based on their national origin. And finally, a best practice to avoid legal claims would be to pay the workers who are sitting out so they do not suffer any damages as a result of their exclusion from work, to make sure you catch them up on any training they may miss while they are out once they return, and to make sure there is no mistreatment or shunning of the workers by their coworkers.

Workers Restricted in China

If you have workers currently in China who wish to return to the U.S. and return to work after the Chinese New Year, unless those workers are subject to either Chinese or American travel restrictions, we do not recommend you alter their travel plans or force them to remain in China. After all, doing so could potentially expose that worker to the virus as they remain in the country. If you have a worker who is forced by the government to remain in China for several weeks, you would not be required under U.S. law to continue paying that worker (unless they are performing work for you in China), nor is there any prohibition preventing you from charging the employee's absences against his or her attendance record. Legal requirements aside, given the severity of this situation and the fact that it is completely outside of the control of your workers, you would be well justified in repatriating them to your workforce after their return, with pay and without attendance points.

Other Workers Concerned About Their Safety

You may have coworkers of recently returned workers from China who express concerns about whether the recently returned worker is a threat to their health. Perhaps you have a pregnant employee or an employee with a compromised immune system who asks not to be around the returned worker, even though he or she did not come from an area of China where the virus is present. What do you do in that situation? You will have to address these on a case-by-case basis, looking at the proximity of the workers to each other, the amount of contact they have throughout the workday, and other factors. If the pregnant or immune-compromised worker can be allowed to work in a different area for a few days or weeks, or even to work from home, you may want to consider that option. If the pregnant worker were to bring in a note from her physician stating that she needs to work from home for a period of time, you may want to accede to this request given the circumstances – without considering whether this is truly required under the ADA or corresponding state laws protecting pregnant workers. We recommend you consult with counsel for specific requests but be open to thinking creatively about solutions that will offer those concerned workers physical safety, as well as psychological peace of mind.

Based on reporting to date, many experts are predicting that the situation is likely to worsen before it improves. Therefore, the best advice is to follow reliable news sources regarding the situation, to monitor your local labor bureau for employment updates if you have employees in China, to communicate with your employees regarding the situation, and to use your best judgment when deciding the appropriate course of action based on the best information available.

Please contact [Martha Boyd](#) if you have any questions or concerns regarding your specific operations.