

# **10 Questions and Answers re Legal Guidance on Coronavirus Outbreak**

**Provided by Allbrightlaw Offices, China**

Due to the outbreak of a new coronavirus, the PRC State Council announced the extension of the Spring Festival holiday, and many provincial and municipal governments announced suspension of business operation for different period of time. This article aims to provide legal guidance for our clients affected by the coronavirus outbreak through various aspects.

## **Commercial Contracts Affected by Coronavirus Outbreak**

### **1. If the company cannot perform contracts due to the coronavirus outbreak, what can the company do?**

#### **(1) Renegotiate contract terms with the counterparty**

You may argue that the coronavirus outbreak lead to significant changes in the basic conditions of the contract (for example, consideration of the contract) and continued performance of the contract is obviously unfair to you. You may argue for rescission of the contract or change of contract terms (delay of performance, change of price, etc) based on statutory reason of significant changes in the objective environment. If the counterparty agrees, either party may rescind or amend the contract in writing.

#### **(2) Rescind the contract unilaterally based on the statutory ground that the outbreak constitutes force majeure and that the purpose of the contract cannot be achieved**

According to a notice issued by PRC Supreme People's Court and judicial practices regarding the SARS epidemic in 2003, the coronavirus outbreak this year meets the characteristics to be identified as a force majeure event: unpredictable, unavoidable and insurmountable. However, in order to successfully raise force majeure to rescind the contract, you must prove the coronavirus outbreak directly rendered the purpose of the contract to be unachievable, which should be judged on a case-by-case basis according to terms in the contract, nature of the transaction, level of influence of the outbreak, etc.

#### **(3) Argue for exemption from partial or all obligations under the contract based on force majeure**

If the outbreak is considered as a force majeure, you may raise claims of exemption from partial or all obligations under the contract. In practice, such exemption may be interpreted by a judge as changes of contract terms (including payment obligations during the force majeure, postponed delivery, change of price) or exemption from the liability for breach of contract.

### **2. If we successfully raise force majeure or significant changes in the objective environment, does it mean that the company is free from all liability under the contract?**

First of all, according to the principle of autonomy of will, if the parties agree on the legal consequences and liability allocation in the situation of force majeure and changes in objective environment, the parties' agreement should generally prevail. Therefore, the contract shall be carefully reviewed to see whether there is any term agreed by parties.

If there is no such term in the contract or the term is unclear, a judge may consider whether the party who cannot perform their obligations under the contract due to the coronavirus outbreak has performed its statutory obligations under force majeure. Specifically, the party is required to: 1) promptly notify the other party to mitigate the losses that may be caused to the other party, and 2) provide proof of suffering force majeure within a reasonable period. Such proof may be obtained from China Council for the Promotion of International Trade ("CCPIT") or some notarization agencies. In fact, CCPIT has already issued proof of force majeure as the result of coronavirus outbreak, as announced on February 2nd.

Even if the party has performed the above statutory obligations, a judge may still allocate losses on both parties based on the principle of fairness, especially in the situation of changes in objective environment.

### **3. What actions should the company take in terms of commercial contracts during the coronavirus outbreak?**

If you are a party who cannot perform contracts due to the coronavirus outbreak, you should:

- (1) evaluate whether the coronavirus outbreak may affect your performance of any currently valid contracts;
- (2) review terms and conditions of currently valid contracts under performance;
- (3) send prompt notices or make communications with the counterparty. In principle, you should issue a notification within the shortest time after the epidemic occurs. Considering that postal and courier services may be suspended or delayed during the Spring Festival and epidemic, such notification may be sent through electronic communication first;
- (4) take appropriate mitigation measures to prevent further losses of both parties, such as changing the delivery method, extending the delivery period;
- (5) collect evidence to prove the occurrence of the event, including but not limited to notices, announcements and orders from government, news, communication correspondences between parties and proof from CCPIT or notarization agencies;
- (6) pay close attention to the policy issued by government or counterparty that may reduce risks or obligations of your company. Currently financial regulatory authorities such as the People's Bank of China, China Banking and Insurance Regulatory Commission have issued a number of policies and measures to provide policy support to parties affected by the epidemic. In addition, some real estate companies have issued policies to reduce or exempt rent. It is foreseeable that the central and local governments at all levels may further introduce measures to reduce economic impacts brought by the coronavirus outbreak;
- (7) contracts to be signed from now on shall be closely assessed in the situation of outbreak before signing.

If your counterparty cannot perform/is reasonably expected not able to perform the contract, you should:

- (1) evaluate whether the coronavirus outbreak may affect your counterparty's performance of currently valid contracts;
- (2) send prompt notice or make communication with the counterparty to ask whether the counterparty is able to continue performing the contract in a timely manner;

(3) take appropriate mitigation measures to prevent further losses of both parties, such as changing the delivery method, extending the delivery period;

(4) rescind contract in written notice;

(5) If your counterparty's nonperformance may also affect your performance to your clients, you should also take actions mentioned above.

### **Employment Issues During Coronavirus Outbreak**

#### **4. What is the nature of January 31st to February 2nd and shall the salary be paid on these days?**

The original arrangement for Spring Festival is that January 25th to January 27th are statutory public holidays and January 28th to January 30th are rest days/time off in lieu. According to the notice issued by PRC State Council on January 26th, Spring Festival holiday is extended to February 2nd. Therefore, January 31st to February 1st shall be considered as rest day in nature. February 2nd, as a Sunday, should be considered a normal rest day. As a result, employees shall be paid and are not be required to work on these days. Any such work would be considered overtime, with employers having the option of providing employees time off in lieu or overtime pay at the rate of 200%.

#### **5. What is the nature of business suspension period implemented by local governments? Can the company request employees to work during such period?**

Most local governments have announced suspension of work and business before February 10th and some places even announced resumption of work after February 14th or February 15th. The business suspension period notified by the local governments shall, in nature, belong to emergency measure of "suspension of work, business and school classes" in accordance with *Law of PRC on Prevention and Treatment of Infectious Diseases*.

Without special reasons or approval from local government, companies must suspend business operation during the period required by each local government and is not allowed to request the employees to work on-site. Companies in violation of suspension period may be ordered to suspend operation by local government. In addition, the legal representative and main responsible person may be subject to administrative detention or even criminal liabilities. However, some local governments allow employees to work from home. In such case, salaries shall be paid to employees.

#### **6. How should salaries be paid during the business suspension period?**

According to the notice newly issued by Ministry of Human Resources and Social Security of PRC on 7th February, for companies who cease the operation during the business suspension period and employees cannot work from home, companies shall negotiate with employees to use annual leave (either statutory or additional leave offered by each company).

Our conservative interpretation is that for companies 1) cease the operation during the business suspension period from February 3rd to February 9th; and 2) continue to cease the operation from February 10th (due to lack of approval from local government) and employees who are not able to work from home: companies shall negotiate with employees to use their annual leave first. If employees do not agree, salary (living expenses) shall be paid according

to the standard of ceasing production. Such living expenses shall be ordinary salary during the first payment cycle and local standard starting from the second payment cycle (for example, minimum local wage in Shanghai, 80% minimum local wage in Wuxi).

Currently payment during business suspension period are quite a mess and causes confusion due to inconsistency in notices issued by Ministry of Human Resources and Social Security in different levels. We expect that local governments will further issue notices on this issue and companies shall pay close attention to interpretations of local government.

### **7. What if the employee is not able to return to work because of the coronavirus outbreak after business suspension period ends?**

According to notices issued by Ministry of Human Resources and Social Security of PRC, employer shall continue to pay ordinary salary and shall not terminate the labor contract with any employees who cannot provide labor services due to the reason that he/she is 1) infected with coronavirus, a suspected patient, isolated or under medical observation, or 2) because of the quarantine measures or other emergency measures issued by the government.

We understand that some employees may not be able to provide services due to the reasons listed above even after the business suspension period ends. In such cases, companies shall 1) keep close communication with employees regarding their health conditions; 2) request evidence of the employees' situation.

### **8. What can the company do if it falls into operational difficulties due to the coronavirus outbreak?**

Companies who cease operation due to the coronavirus outbreak shall still continue to pay ordinary salary to employees during the first payment cycle. Starting from the second payment cycle, the companies shall pay employees who provide labor services salaries no less than local minimum wages. For employees who do not provide labor services, living expenses shall be paid to employees according to local standards. For example, the standard of living expenses in Beijing is 70% of the local minimum wage.

Companies who fall into operational difficulties shall also take the following actions:

(1) Negotiate with employees to adjust salary, shift work, shorten working hours and so on to maintain normal operation. In such case, it is advisable to reach supplemental labor contract with employees.

(2) Apply for government subsidy according to local government's policy.

### **Other Issues During the Coronavirus Outbreak**

#### **9. Will the litigation appeal deadline, evidence submission deadline and litigation activities be postponed during the business suspension period?**

The Spring Festival holiday has been extended to Feb 2nd, 2020. If the last day of the litigation appeal deadline and evidence submission deadline falls within the holiday, such deadline shall be postponed accordingly. However, the business suspension period issued by various governments is not a statutory holiday, but rather emergency measures containing the spread of the epidemic. In theory, the restriction policy does not necessarily affect the relevant litigation periods.

Litigation activities may be affected based on local courts' policies. According to our observation, although courts in Shanghai open from February 3rd, we have been continuously receiving notices from courts to postpone litigation activities during the business suspension period.

**10. The local government asks the company to sign guarantee letter for operation after the business suspension period, what shall the company do?**

Some companies have already received notices from local government to sign guarantee letters for operation after the business suspension period. Companies are required to: 1) file a list of employees who will start to work after the business suspension period and their travelling history in the previous month; 2) promise that employees who travelled outside of the city, potentially had contact with infected individuals or who have fever, cough or other symptoms shall be accurately reported to government; 3) establish internal special committee responsible for the control of the coronavirus outbreak; 4) prepare enough supplies for coronavirus control, such as masks, disinfectants, temperature measurement equipment.

You should ensure: 1) all the information submitted to the government shall be true and accurate; 2) local government's requests and standards on coronavirus control shall be strictly followed; 3) any potential issues regarding coronavirus spread shall be timely reported to local government. It is also advisable for you to mitigate company's liability by requesting employees to guarantee that the information they provide to the company (like travelling history, symptoms of fever or cough, etc.) are true and accurate, either through email, wechat or in writing. In addition, you should also request suppliers or contractors who provide on-site services to sign a guarantee letter with the same requirements and standards as the government requested your company to follow.