Key Things Employers in China Should Know Regarding Reopening Amid COVID-19 (II)

by Ray Liu Esq.

This article is a follow-up to the article published on March 6, 2020, which will shed light on the payroll standards during the anti-virus period, the special protections enjoyed by employees affected by the COVID-19 outbreak, issues around layoffs due to financial difficulties or restructuring, and the supportive measures implemented by the Chinese government to help companies withstand the epidemic.

6. What are the applicable payroll standards during the period when a company's operation is affected by the COVID-19 outbreak?

Due to the rapid evolvement of the COVID-19 outbreak during the Chinese New Year, many companies' business schedules have been disrupted. While certain healthcare and daily supplies providers operated day and night during the holiday, most other companies had to wait for an extended period of time until they might resume their operations. As a result, many employers are confused about the payroll standards applicable during the COVID-19 outbreak. The table below provided a brief summary regarding the complex rules for salary calculation in Shanghai, Beijing and Guangdong under different circumstances commencing from the first day of the Chinese New Year (i.e., January 24, 2020).

	Jan. 25 – Jan. 27	**Jan. 24 & Jan. 27 – Feb. 2**	**Feb. 3 – Feb. 9**	**Feb. 10 – Reopening Date**
Shanghai	**Category**: Public Holiday • **Where no work was assigned to employees**	**Category**: Rest Days (including the extended holiday from Jan. 31 – Feb. 2)	**Category**: Rest Days[17] • **Where work was assigned to and performed**	**Category**: a special time period during which special payroll rules may apply

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	: regular salary should be paid • **Where work was assigned to and performed by employees**: OT Pay = 300% x hourly salary rate x hours performed	• **Where no work was assigned to employees**: regular salary should be paid • **Where work was assigned to and performed by employees**: either to provide compensatory time-off or OT Pay (200% x hourly salary rate x hours performed)	**by employees**: either to provide compensatory time-off or OT Pay (200% x hourly salary rate x hours performed) • **Where no work was assigned to employees**: regular salary should be paid	• **Where no work was assigned to employees**: Employers may arrange for employees to use their annual leave or other contractual leave benefits on workdays. If employees cannot return to their regular work after exhausting their leave benefits, employers may consider suspending their business operations (“停工停产”) by following relevant requirements under applicable laws and regulations (the “Suspension Period”).

				During the first salary payment cycle (i.e. one month) in the Suspension Period: Employers will need to pay regular salary to employees as agreed in their employment contract. **During the second payment cycle in the Suspension Period**: Employers may only provide a "life-supporting fee" to off-duty employees, which is usually the local minimum salary or a lower amount depending on the locations. For employees who need to perform certain amount of work during the Suspension Period, employers may

				contract a new salary standard with them based on consultation, which shall not be lower than the local minimum salary. • **Where work was assigned to and performed by employees**: Regular salary should be paid for work performed during regular working ours. If employees work extra hours on workdays, rest days or public holidays, the statutory rules for overtime benefits will apply.
Beijing and Guangdong			**Category**: a special time period during which special payroll rules may apply • **Where no work was assigned to**	

			employees: Employers may arrange for employees to use their annual leave or other contractual leave benefits on workdays. If employees cannot return to their regular work after exhausting their leave benefits, employers may consider suspending their business operations (“停工停产”) by following relevant requirements under applicable laws and regulations (the “Suspension Period”). **During the first salary payment cycle (i.e. one month) in the Suspension Period**: Employers will need to pay	

			regular salary to employees as agreed in their employment contract. (Even assuming an employer decided to suspend its operations, this seven-day period would fall within the first salary payment cycle, and therefore regular salary should be paid to employees for such period.) • **Where work was assigned to and performed by employees**: Regular salary should be paid for work performed during regular working hours.[18] If employees work extra hours on workdays or rest days, the statutory rules for overtime benefits will	

			apply.	

Notes:	• According to the opinions issued by the Ministry of Human Resources and Social Security ("MHRSS"), if a company encounters difficulties in its operations or productions due to the epidemic, based on consultation with the employees, it may adjust their salary, arrange for them to work in shifts or reduce their working hours. Therefore, if a company is having operational difficulties as a result of the COVID-19 outbreak, it may lower employees' salary based on mutual agreement. • According to the opinions issued by the MHRSS and its local counterparts, for (1) confirmed COVID-19 patients under medical treatment, (2) suspected COVID-19 patients under medical treatment or observation, (3) those having close contact with confirmed or suspected COVID-19 patients who are under medical observation, and (4) those who cannot return to work due to any quarantine or other emergency measures implemented by the government (collectively as the "Four Protected Groups"), where these people are under the medical treatment or restrictive measures stated above, it should be deemed that the affected individuals have performed work and employers must pay regular salary to them during such period. Also employees under the Four Protected Groups are protected from termination based on certain reasons, which will be discussed in detail in Section 7. • The rules summarized in this table only apply to employees working under the standard working hour system. For those working under the flexible or comprehensive working hour systems, different rules may apply. The labor authorities in several places (including Beijing, Wuxi and Suzhou) have issued notices allowing companies affected by the COVID-19

	situation to apply for the comprehensive working hour system, which could enable companies to implement more flexible working schedules among their employees. • A company should carefully check the local rules in the place where it is located to ensure compliance with any specific local requirements.

7. Who may enjoy special protections during the virus fight?

Individuals within the Four Protected Groups described under Section 6 are protected from terminations based on grounds enumerated by Article 40 and Article 41 of the ECL.[19] Among others, these two articles allow employers to terminate an employee based on performance and health issues or material changes to the objective circumstances (such as company relocation, merge and acquisition, transfer of assets, etc.), or to conduct a mass layoff as a result of business restructuring or transformation. However, these grounds for termination are not applicable to employees under the Four Protected Groups during the period of medical treatment, medical observation, quarantine or emergency measures taken by the government (the "Protective Period").[20] In addition, if the term of their employment contract expires during the Protective Period, such term shall be automatically extended until the end of the Protective Period.[21]

It should be noted that the scope of protected employees may be further expanded by local rules. For example, the labor authorities in Beijing issued a notice on January 31, 2020 ("January 31 Notice"), under which one of the parents in each household may stay home to take care of a minor whose classes have been delayed due to government's order.[22] According to the January 31 Notice, a caregiving parent falls within the scope of the Four Protected Groups, and employers shall continue to pay regular salary to him/her and may not terminate his/her employment until the minor is permitted to go to school by the government. Although the labor authorities in Beijing issued another notice on February 12, 2020 ("February 12 Notice") clarifying that employees must follow certain procedures for leave application in order to stay home and take care of their children, it is unclear under the February 12 Notice whether employers are required to provide such leave to employees and whether the caregiving parents may continue to enjoy the protection against termination.[23] Based on the oral reply by the labor authorities in Beijing through its consultation hotline (+86 12333), the February 12 Notice only requires an employee to timely inform the employer about his/her needs to take care of his/her child at home, which needs (if true) must be satisfied and the employer must comply with the requirements under the January 31 Notice. Employers should pay attention to and comply with the requirements of protections provided to employees under applicable local rules.

Despite the protections stated above, employers may still terminate an employee if, among others, he/she violates applicable laws and/or company policies regarding disease prevention or control (e.g., where the employee intentionally concealed information regarding his/her infection of COVID-19 or his/her contact with any COVID-19 patients). However, before making a termination decision, employers should carefully evaluate the facts and supporting documents to reduce the legal risks of wrongful termination.

8. Whether employers may lay off employees due to financial difficulties or business restructuring?

Because of the strong impact of the COVID-19 outbreak, many companies in China might have lost business or otherwise suffered losses. Reducing costs via workforce restructuring is a commonly used method to help companies get through difficult times. Currently, there is no rule or policy issued by the government prohibiting employers from reducing their workforce, although the government encourages employers to avoid or reduce layoffs to the extent possible. The following issues are noteworthy to employers planning to cut their headcounts.

a. Employers should assess the costs and benefits for keeping their employees before determining whether to implement a layoff plan.

Both the central government and its local counterparts in China released a number of policies to help enterprises overcome difficulties at this special time period and reduce unemployment rate. These supporting policies will be discussed with more details in Section 9. Please note that some of the benefits (such as the refund of unemployment insurance contributions) may only be available to employers who do not conduct mass layoffs. Therefore, employers should carefully examine and balance the costs and benefits of retaining employees based on the local policies when formulating a layoff plan.

b. Mutual separation should still be the first choice.

Although the COVID-19 outbreak is a very special situation that might constitute a "material change to the objective circumstances based on which the employment contract is concluded" stipulated under Article 40 (3) and Article 41 of the ECL, a unilateral termination or mass layoff pursuant to these articles might still involve significant uncertainties and challenges.

For example, in order to invoke Article 40 (3) of the ECL, in addition to the existence of the material change to the objective circumstances, an employer must also prove that such material change has made it impossible for the parties to perform the employment contract. Moreover, the employer must consult with the employee to amend the employment contract and may only proceed with unilateral termination where no agreement can be reached with the employee.

Also, in order to proceed with the mass layoff under Article 41 of the ECL, employers must prove that at least one of the four enumerated circumstances (restructuring based on bankruptcy law; significant operational difficulties; production switch, technological innovation or business transformation; material changes to objective circumstances) exists. In addition, the number of impacted employees must reach the statutory threshold (at least 20 persons or 10% of the company's total workforce), and the employer has to go through certain procedures including explaining the layoff plan to the trade union or all employees 30 days in advance, considering comments from the trade union or employees and reporting the layoff plan to the local labor authorities.

In light of the foregoing, companies may still want to proceed with mutual separation first for layoffs amid the COVID-19 outbreak so that it may settle all claims employees may have in connection with their employment through a mutual separation and release agreement and minimize the legal risks.

c. When planning for the restructuring, special care should be given to those within the protected categories.

As noted above, in addition to the protected categories (including but not limited to those suffering work-related injury or occupational disease, during medical treatment or during pregnancy, confinement or nursing period) provided by Article 42 of the ECL, certain other employees described under Section 7 of this Article may also be protected from termination based on the grounds under Article 40 or 41 of the ECL or due to the expiration of the employment contract. When formulating a layoff plan during the COVID-19 outbreak, employers should carefully check if any employees fall under the protected categories (especially the Four Protected Groups) and map out separate strategies for protected employees.

9. What policies have been implemented by the Chinese government to support enterprises to get through this difficult time?

The government at both national and local levels in China have released a number of supportive policies aiming to help enterprises (whether domestic or foreign-invested) in China to withstand the epidemic and stabilize employment. The following paragraphs summarized certain key incentives provided by the government in employment-related or other aspects that business entities in China may enjoy during this special time period.

a. Employment-related Policies

i. Reduction and Exemption for Social Insurance Contributions

On February 20, 2020, the MHRSS, the Ministry of Finance ("MOF") and the State Taxation Administration jointly issued a notice on reduction and exemption of social insurance contributions[24], the benefits under which have been summarized in the table below.

Policy Benefits	**Eligible Entities**	**Applicable Time Period**
Exemption of employer's portion of contributions for Pension Fund,	Medium-size, small-size or micro-size entities ("MSM Entities") in any province	No more than 5 months starting from February 2020

Unemployment Insurance and Work-related Injury Insurance (the “3 Types of Contributions”)	or municipality other than Hubei Province	
Reduction of the employer’s portion of the 3 Types of Contributions by 50%	Large-size entities (excluding government departments or public institutions (机关事业单位)) in any province or municipality other than Hubei Province	No more than 3 months starting from February 2020
Exemption of the employer’s portion of the 3 Types of Contributions	Any types of entities in Hubei Province (excluding government departments or public institutions (机关事业单位))	No more than 5 months starting from February 2020
A grace period during which enterprises may delay paying social insurance contributions without any late payment surcharges	Enterprises encountering significant difficulties in their operation or production due to the impact of the epidemic at any location in China may apply for the grace period	In principle, the grace period shall not exceed 6 months

Currently, the standards and requirements for social insurance contributions vary from place to place. The employer’s portion of the 3 Types of Contributions usually amounts to 15% - 17% of each employee’s salary subject to local variances, and thus the exemption or reduction of which could help enterprises save considerable payroll costs. Government authorities at the local level are responsible for implementing specific rules regarding social insurance exemption or reduction based on their own situations. Therefore, enterprises are recommended to check the local rules regarding the applicable benefits as well as the conditions and procedures for same.

ii. Grace Period for Housing Fund Contribution

On February 21, 2020, the Ministry of Housing and Urban-Rural Development issued a notice together with the MOF and the People’s Bank of China regarding the temporary supportive policies in connection with housing fund contributions.[25] According to this notice, enterprises impacted by the COVID-19 outbreak may also apply for a grace period to delay the housing fund contributions for employees until June 30, 2020. Enterprises from locations hit hard by COVID-19 may even cease to make the housing fund contributions or apply lower payment standards until June 30, 2020, based on consultation with their employees. Similarly, detailed implementation rules are to be formulated by the local governments and employers should pay attention to the local policies in this regard.

iii. Incentives for Retaining Employees for MSM Entities

Local governments in various locations (including but not limited to Beijing, Shanghai, Guangdong, Jiangsu and Zhejiang) have rolled out incentive plans for MSM Entities committed to retaining employees during this special time period.[26] In those places, MSM Entities whose layoff rate is lower than the threshold designated by the local government may receive a partial refund of the unemployment insurance contributions it made in the previous calendar year.[27] Companies in certain areas may enjoy additional benefits for retaining employees. For example, in Beijing, certain MSM Entities may receive a one-off subsidy equal to a certain proportion of the social insurance contributions it made in a 3-month period if the monthly average number of employees enrolled by such entity in the unemployment insurance plan as of April 2020 is no less than the monthly average number for same in 2019.[28]

b. Other Supportive Policies

In addition to the employment-related incentives, many local governments have also implemented various supportive measures in other respects to help enterprises through this difficult time, which usually involve tax reduction or exemption, extension of tax filing deadlines, assistance in procurement of disease prevention supplies, rent reduction for properties leased by government or state-owned enterprises, extension or interest reduction for bank loans, etc.[29] Notably, the local government in Shandong province released a series of measures to facilitate business reopening by foreign-invested companies and to attract foreign investment on February 11, 2020, which measures have covered many of the supportive policies mentioned above and have been recommended and circulated on a national scale by the Ministry of Commerce.[30]

In a nutshell, a number of supportive measures in different respects have been implemented by the Chinese government at both national and local levels to provide a buffer to employers who suffered losses during the COVID-19 outbreak and help offset the adverse impacts caused to them by the epidemic. As many of the above mentioned incentives offered by the government will only be made available to companies where applications are filed, business operators in China are recommended to carefully review the rules and requirements for applicable incentives and timely complete the steps required to enjoy the benefits under relevant supportive policies.

Although positive progress has been made in containing COVID-19 as of the date of this Article, it is still too early for companies and employees to let down their guard. It is of great importance to take adequate precautions to prevent virus transmission among employees and make plans for potential virus infection at workplace. Our team will closely monitor the evolvement of the COVID-19 situation and keep you posted on any important development with our recommendations.

[17] IMPORTANT: A senior government official from the Human Resources and Social Security Bureau in Shanghai interpreted these seven days as rest days in a media conference dated January 28, 2020. (*See* https://m.hexun.com/events/2020-01-29/200118263.html). However, many legal practitioners and scholars questioned such interpretation and urged the labor authorities in Shanghai to clarify this issue in writing. We recommend that employers in Shanghai keep a close eye on this issue and reconfirm with the local labor authorities before processing the salary payments for these days.

[18] Unlike Beijing, where businesses may resume their operations but are encouraged to have employees work from home from February 3 to February 7, in Guangdong Province, technically, most businesses are not allowed to resume their operations during this period. However, the local labor authorities in Guangdong held the view that where employers had their employees work from home during their regular working hours on any of these days, employers only need to pay regular salary to such employees, which practice is consistent with the one in Beijing.

[19] *See* 《人力资源社会保障部办公厅关于妥善处理新型冠状病毒感染的肺炎疫情防控期间劳动关系问题的通知》

[20] *Id.*

[21] *Id.*

[22] *See* 《北京市人力资源和社会保障局、北京市教育委员会关于因防控疫情推迟开学企业职工看护未成年子女期间工资待遇问题的通知》

[23] *See* 《北京市人力资源和社会保障局、北京市教育委员会关于对《关于因防控疫情推迟开学企业职工看护未成年子女期间工资待遇问题的通知》有关问题说明的通知》

[24] *See* 《人力资源社会保障部、财政部、税务总局关于阶段性减免企业社会保险费的通知》

[25] *See* 《关于妥善应对新冠肺炎疫情实施住房公积金阶段性支持政策的通知》

[26] *See* 《北京市人力资源和社会保障局 北京市财政局关于应对疫情影响支持中小微企业稳定就业岗位有关问题的通知》；上海市《关于做好疫情防控期间本市稳就业工作有关事项的通知》；广东省人民政府关于印发《应对新型冠状病毒感染的肺炎疫情支持企业复工复产若干政策措施》的通知；《江苏省人民政府关于应对新型冠状病毒肺炎疫情影响推动经济循环畅通和稳定持续发展的若干政策措施》；《浙江省新型冠状病毒感染的肺炎疫情防控领导小组关于支持小微企业渡过难关的意见》

[27] *Id.*

[28] *See* 《北京市人力资源和社会保障局 北京市财政局关于应对疫情影响支持中小微企业稳定就业岗位有关问题的通知》

[29] *See* 《北京市人民政府办公厅关于应对新型冠状病毒感染的肺炎疫情影响促进中小微企业持续健康发展的若干措施》；上海市《关于支持新型冠状病毒感染的肺炎疫情防控减轻企业负担若干政策的通知》；广东省人民政府关于印发《应对新型冠状病毒感染的肺炎疫情支持企业复工复产若干政策措施》的通知；《江苏省人民政府关于应对新型冠状病毒肺炎疫情影响推动经济循环畅通和稳定持续发展的若干政策措施》；《浙江省新型冠状病毒感染的肺炎疫情防控领导小组关于支持小微企业渡过难关的意见》

[30] *See* 《商务部办公厅关于推广山东省加快外商投资企业复工复产推进外商投资若干措施的函》