

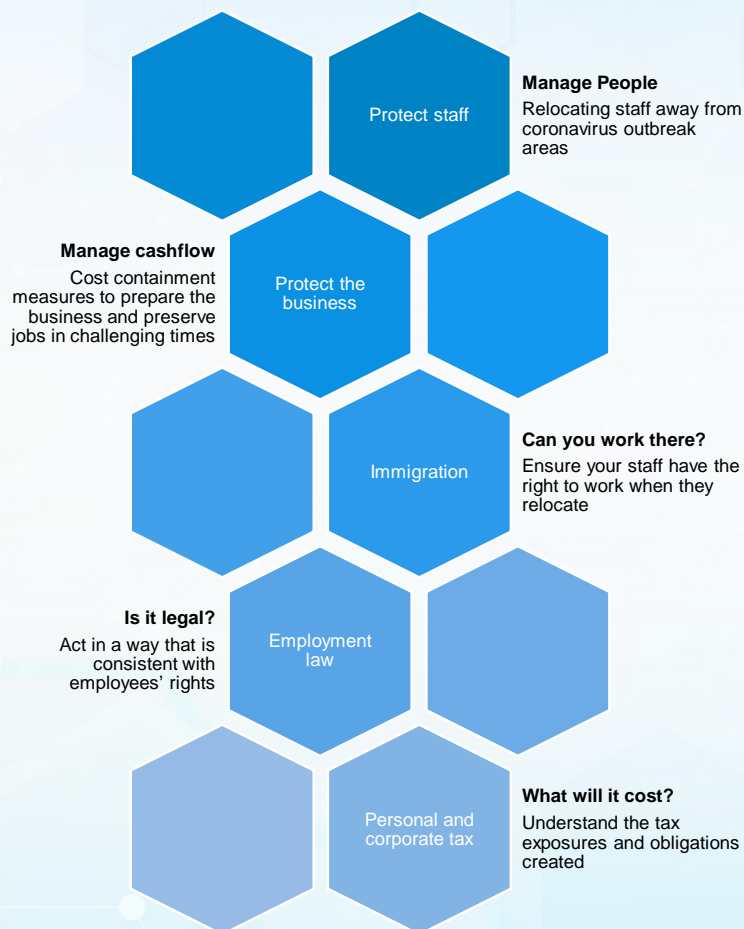


# Coronavirus: Protect your staff and your business

**Tax, immigration and employment law considerations for  
2019-nCoV business continuity plans**

February 2020

# Protect staff and prepare the business



## Meeting the coronavirus challenge

With the spread of the novel corona virus (nCoV) in Mainland China and beyond, businesses are reviewing, and implementing, their business continuity plans (BCP).

Business continuance is the objective – making the safety of your people the first priority. Once that is secured, thoughts need to turn to managing costs to protect the business and preserve jobs through challenging economic times ahead.

These actions impact staff and potentially create a complex web of compliance issues. Businesses will need the support of their human resource (HR) and finance teams to:

- Identify where their people are, and where they need to be to ensure safety and enable business continuity.
- Implement measures to manage future costs for the long term health of the business and job security.
- Address the implications for the business and the individuals involved across:
  - Personal tax, and employer reporting and withholding obligations
  - Corporate tax
  - Immigration
  - Employment law

**Let's start with some key questions that Boards and Senior Management should be asking themselves and their teams.**

# Start the discussion

## Big picture questions

- Where are my employees? Are they safe?
- Who is critical to business continuance? Can they operate effectively from their current location?
- Do we need an alternative work location? Do staff want to relocate?
- Do we have the necessary remote working infrastructure, policies and mechanisms to be compliant?
- What actions do we need to take to protect business and cashflow?

## Managing cross-border workers

### Immigration

- Does the person have the right to work in the location?
- Do they have / need the necessary work permits?

### Personal and employer taxes

- Will the individual be liable to personal tax in the location?
- Does the employer have registration, reporting or withholding obligations?
- Could social security taxes apply?

### Corporate tax

- Could the individual be creating a sufficient presence (e.g., permanent establishment (PE)) for business registration, corporate income tax or VAT?

## Changes to employment or remuneration terms

### Employment law

- Are the changes proposed legally permitted? What are the employment law implications, and in which jurisdiction?
- Do you need to consult, agree with employees?
- What should be documented?

### Tax / Immigration

- How will any benefits provided or one-off payments be taxed, in which location/s?
- In the event of workforce capacity reduction, are termination payments, or payments to incentivize part-time work, taxable / deductible?
- Is any deferral of employment payment effective for tax?
- Do the changes impact on right to work (e.g., minimum income requirements for work permits, or notifying change of remuneration)

# Protecting staff



# Relocating staff to work

## Issue or circumstance

*Staff may wish to relocate from Mainland China, or the business may wish to move business critical employees to a business continuance centre in a different jurisdiction. It is important to consider and document whether the “relocation” is a secondment to the local entity or working remotely, as the implications are likely to be very different.*

## Personal tax considerations

An individual will likely have a tax liability in the location in which they are working, even if their home or work base is elsewhere.

- The country may have a domestic exemption for short visits. If this is exceeded, or the conditions not met, the individual may be liable to tax on their income, unless a double tax agreement applies.
- If a double tax agreement (DTA) exists between the location and the employee's place of tax residence, relief from tax might be available.
- Whether the individual has a personal tax liability, or not, does the employer have any registration, reporting or withholding obligations?
- Tax residency may be impacted by time in a jurisdiction. Unexpected changes could impact negatively, especially if returning home after only a short period away.
- If staff are stuck unexpectedly in a location, it may be worth checking relevant rules whether there are any exclusions from the normal sourcing (day count) rules for emergency or “act of god” clauses.

## Watch points

- Foreign nationals may not qualify as a “resident of China” for the DTA, as some treaties limit benefits if the employee is only taxable on China sourced income (e.g., through the 6-year expatriate concession). Recharging remuneration costs to an entity in the new location may disqualify the individual from the domestic or DTA exemptions.
- Special consideration will be needed for people who might be, or become, dual tax resident.
- Presence over 183 days is a common threshold for tax residence, and a personal tax liability due to the loss of DTA relief.
  - Exceeding 183 days should be assumed to cause a tax liability until reviewed and confirmed otherwise.
  - Being under the 183-day threshold does not offer comfort that there is no tax liability.
- Some jurisdictions apply an economic employer concept and this can prevent exemptions applying, particularly where a local entity benefits from the employment.
- There is a natural trade off between reducing the personal tax risk and causing a greater PE risk (see Corporate Tax considerations).
- Foreign nationals returning to their “home” jurisdiction may also need to reconsider their tax residency status irrespective of the length of stay. They may need to consider both physical presence and “tax home” tests of tax residence.

*For further guidance on the level of risk of specific locations, refer to the Appendices for a list of jurisdictions that have a DTA with Mainland China and Hong Kong, and some of the domestic exemption thresholds*

# Relocating staff to work

## Corporate tax considerations

An individual operating in another country may trigger tax obligations for the company.

- Does the individual/s presence or activities reach the level at which a corporate tax reporting obligation could arise (e.g., carrying on business in the jurisdiction). What are the local rules to determine this?
- Does a DTA apply, and provide relief from tax in that location?
- A presence in a location, depending on the activities undertaken, might trigger business registration or registration for other taxes, such as VAT/GST.

## Immigration considerations

- Employees carrying on their employment in a location need to have the right to work there. This may come from personal status, e.g., if they are a national/citizen, otherwise a work permit may be required.

## Employment law

- Some jurisdictions do not accept local employment laws from being contracted out. As such, when working in certain jurisdictions, certain aspects of the employment may be governed by the laws of that location, regardless of the law governing the employment agreement.
- Consideration needs to be given to any local law issues when working in the overseas jurisdiction.

## Watch points

- If a DTA is available, there may be some protection from corporate income tax in the short term. If not, local rules will prevail and may have a lower threshold to trigger reporting obligations and a tax liability.
- Presence over 183 days increases the likelihood of having a PE. In some circumstances there is an explicit threshold; in others, it may just be a guideline as to the “degree of permanence” of the place of business.
- Some activities are more likely to trigger a tax liability. Be cautious of revenue generating activities. High risk activities include habitually signing contracts, or rendering services for more than 183 days.
- Disciplines should be in place to prevent such activities where possible.
- Documentation of the role, responsibilities and the entity that enjoys the benefit of the services being performed may help to mitigate the risk.
- If a work permit is required, there may be a period of several weeks before the individual can start to work. A contingency plan may be required in the interim.

# Protecting the business

AIU	1.822	12.349.000
EJK	3.680	238.681.000
HPL	1.062	85.678.000
KEE	485	8.369.000
NAH	8.569	189.301.000
QGP	6.602	102.698.000
TIK	890	24.697.000
WIG	6.280	74.002.000
AHB	2.436	57.610.000



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# Changes to secondment arrangements

## Issue or circumstance

*Secondment arrangements are often implemented to cater for temporary assignments. In an epidemic or other crisis, employers or secondees may wish to make changes to the secondment arrangement to ensure the health and safety of the secondee.*

## Personal tax

- End of secondment payments, and reimbursement of costs, may be triggered. The tax implications and reporting requirements of these should be determined if not already known.
- Repatriation may trigger departure reporting or exit tax filing obligations, and commencement notification/registration requirements.

## Immigration

- Leaving employment in a jurisdiction may trigger cancellation or de-registration requirements. If a foreigner is leaving Mainland China permanently, deregistration is required.

## Employment law

- If the secondment is to be terminated, the termination clause in the secondment agreement should be followed. In many cases, terms of termination of secondment by employer or employee may be different. If the clause does not set out post-termination responsibilities (such as rental and repatriation costs) clearly, the parties should seek to negotiate and resolve these issues in the form of a settlement agreement.
- If the request for repatriation comes from multiple secondees, care must be taken to avoid discrimination.
  - In Mainland China, five categories of employment discrimination are recognized, namely, gender, ethnicity, disability, individuals with infectious diseases, and rural migrants.
  - In Hong Kong, the recognized discrimination categories are: sex, marital status, pregnancy, disability, family status and race.

# Unpaid or part paid leave

## Issue or circumstance

*One possible way of reducing costs during turbulent times is to put staff on unpaid or part paid leave. If used appropriately, employers can reduce costs while eliminating the need for termination and sourcing for talent once the business environment returns to normal.*

## Personal tax

- Generally, unpaid or part paid leave should not have significant tax implications other than reducing taxable income in line with the reduced remuneration.
- Depending where the leave is taken, tax liabilities could be triggered in the location of the leave as if the employee is working there. Refer to “Relocating staff to work” section.

## Immigration

- If leave is taken overseas, and work is conducted during the leave period, the employee may need a work permit. Refer to “Relocating staff to work” section.
- Changes to employment terms might also need to be checked to ensure they do not need to be reported to the immigration authority or breach the conditions of issue of an exiting work permit.

## Employment law

### Mainland China

- Unpaid or part paid leave are not types of leave recognized in Mainland China. They may therefore only be utilized if agreed by the employee. In some cases, even if the employee agrees to take unpaid or part time leave, that agreement may not be enforceable if taken to court.
- In the event an employee is willing to take unpaid or part paid leave, all correspondence should be documented and the parties should enter into an agreement to avoid disputes.

### Hong Kong

- In contrast, Hong Kong has a history of employers offering unpaid or part paid leave. The arrangement should be set out in a contract to avoid disputes.
- When choosing employees to take unpaid or part paid leave, the employer should take care to avoid discrimination. In Hong Kong, the recognized discrimination categories are: sex, marital status, pregnancy, disability, family status and race.
- If employees are forced into unpaid or part paid leave, employees may sue the employer for breach of employment contract and/or constructive dismissal.

# Deferral of employment and/or payments

## Issue or circumstance

*During turbulent times, employers generally stop expanding their workforce. However, in extreme cases, employers might take action to defer offers, or even payment of wages and other remuneration.*

## Personal tax

- Generally deferral of employment or remuneration should also defer the tax obligations. However, there could be exceptions. For example, if the employee is entitled to the income it might be considered derived for tax purposes. In Hong Kong, there is a deferral of the tax until receipt of the income, but this is not always clear cut.
- Deferring remuneration for mobile employees may give rise to questions about the sourcing of income, i.e., its allocation to different locations that the person has worked.

## Corporate tax

- Deferral may also defer deductibility, or raise questions about which entity should incur the cost if an employee transfers during the deferral period.

## Employment law

### Mainland China

- Most offer letters contain a commencement date, once signed by both parties, it will be extremely difficult for the employer to defer the commencement of employment. Unilaterally imposing a deferral may result in a claim by the employee.
- Late payment of wages is a violation of the labour laws. Employees may be entitled to unilaterally terminate the employment contract on late payment of wages.
- Employees may potentially agree to late payment of wages, but it does not absolve the liability of the employer.

### Hong Kong

- Late payment of wages is a similar consideration in Hong Kong as set out above.
- Deferral of employment in Hong Kong is quite common during difficult times. Employees are free, however, to reject the request for deferral of employment.
- If an employee agrees to late payment of wages, the parties should enter into an agreement to avoid future disputes.

# Layoffs and termination of employment

## Issue or circumstance

*As a last resort in difficult economic times, employers may consider layoffs and termination of employees. In addition to the operational challenges this may present, both at the time and in the future when circumstances improve, this can have employment law, tax and immigration implications.*

## Personal tax

- End of employment notifications and reporting needs to be considered.
- The tax treatment of termination payments will vary from jurisdiction to jurisdiction and depend on the nature of the payment. Therefore, termination agreements should be properly documented.
- Cross-border taxation issues should also be considered

## Immigration

- Employers may be required, or recommended, to notify the local immigration authority of the termination of employment.
- Termination of employment can also impact on the employee and their family's right to remain in the location.
- In Hong Kong, cessation of employment does not terminate the right to remain in Hong Kong (this continues to the end of the current visa term), but new employment cannot be taken up without a proper extension of stay (notifying the change of employer).

## Employment law

### Mainland China

- An epidemic or other factors leading to downturn of business is not a legally recognized reason for layoffs and termination. Mass layoffs require prior approval of the local labour bureau.
- Terminations in Mainland China generally must be with cause. Wrongly dismissing an employee may result in the employee being reinstated or severance payments to be made.
- Just because an employee is on probation, it does not mean the employer can freely terminate the employee. Reasons must be provided as to why the employee does not pass probation.

### Hong Kong

- Termination of employees must be carried out in accordance with the termination clause in the employment contract.
- For employees in senior positions, always enter into settlement agreements to avoid disputes. Disputes usually surround enforceability of restrictive covenants.
- While employers may terminate employees in Hong Kong without cause, employers need to be mindful of unlawful terminations.
- Severance payments may be payable for qualifying employees who are made redundant. Employers cannot avoid payment of severance payment by labelling a redundancy as termination without cause.

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# Common DTAs with Mainland China

Mainland China has DTAs with 110 jurisdictions. Some of the more common home locations for foreigners seconded to Mainland China are below.

## Resident status (excluded if only taxable on China income)

- Australia
- Belgium
- Denmark
- Finland
- France
- Germany
- Hong Kong SAR
- New Zealand
- Netherlands, The
- Russia
- Switzerland
- Taiwan
- United Kingdom

Note: this is not an exhaustive list – 33 more jurisdictions include this provision, with an additional 2 not yet in force.

## Resident status (without limitation due to scope of income taxed)

- Brazil
- Canada
- Italy\*
- Japan
- Korea
- Malaysia
- Norway
- Singapore
- Spain\*
- Sweden
- Thailand
- USA

\*Changed in new treaty (signed but not yet in force)

Note: this is not an exhaustive list – 50 more jurisdictions include this provision.

# Jurisdictions with DTA with Mainland China

Albania	Canada	India	Malta	Seychelles	Turkmenistan
Algeria	Chile	Indonesia	Mauritius	Singapore	U.K.
Angola	Croatia	Iran	Mexico	Slovakia	U.S.A.
Argentina	Cuba	Ireland	Moldova	Slovenia	Uganda
Armenia	Cyprus	Israel	Mongolia	South Africa	Ukraine
Australia	Czech	Italy	Morocco	Spain	United Arab Emirates
Austria	Denmark	Jamaica	Nepal	Sri Lanka	Uzbekistan
Azerbaijan	Ecuador	Japan	New Zealand	Sudan	Venezuela
Bahrain	Egypt	Kazakhstan	Nigeria	Sweden	Viet Nam
Bangladesh	Estonia	Kenya	Norway	Switzerland	Zambia
Barbados	Ethiopia	Korea	Oman	Syria	Zimbabwe
Belarus	Finland	Kuwait	Pakistan	Taiwan	
Belgium	France	Kyrgyzstan	Papua New Guinea	Tajikistan	
Bosnia and Herzegovina	Gabon	Laos	Poland	Thailand	
Botswana	Georgia	Latvia	Portugal	The Netherlands	
Brazil	Germany	Lithuania	Qatar	The Philippines	
Brunei	Greece	Luxembourg	Romania	The Republic of Congo	
Bulgaria	Hong Kong SAR	Macao SAR	Russia	Trinidad and Tobago	
Cambodia	Hungary	Macedonia	Saudi Arabia	Tunis	
	Iceland	Malaysia	Serbia and Montenegro	Turkey	

# Jurisdictions with DTA with Hong Kong

## DTA available with HK

Austria	Ireland	Pakistan
Belarus	Italy	Portugal
Belgium	Japan	Qatar
Brunei	Jersey	Romania
Cambodia	Korea	Saudi Arabia
Canada	Kuwait	Spain
China, Mainland of	Latvia	Switzerland
Czech	Liechtenstein	Thailand
Estonia	Luxembourg	United Arab Emirates
Finland	Macao SAR	United Kingdom
France	Malaysia	Vietnam
Guernsey	Malta	
Hungary	Mexico	
India	Netherlands	
Indonesia	New Zealand	

## Personal tax exemption requiring tax paid in Hong Kong

The following DTAs include in the personal services article a requirement that tax has been paid in Hong Kong to qualify for the exemption:

- Belgium
- France
- Guernsey
- United Kingdom

# Assessing personal tax risk by location

## 60 Days

- Hong Kong
- Indonesia
- Malaysia
- Singapore

## 90 Days

- Mainland China
- India
- New Zealand (92 days)
- Taiwan
- USA (less than \$US 3,000 income from US services)

## No minimum threshold

- Australia
- Cambodia
- Canada
- France
- Germany
- Japan
- Korea
- Philippines
- Switzerland
- Thailand
- United Kingdom
- Vietnam

When working in these countries, even for a short period, a DTA is needed to provide an exemption from income tax.

Additional information on thresholds and tax rates for various countries can be found in KPMG's *Thinking Beyond Borders* country profiles for business travel issues at: <https://home.kpmg/xx/en/home/insights/2012/11/thinking-beyond-borders.html>

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