

Employers' Obligations in Relation to the Coronavirus Outbreak

As of 16 March 2020, there were no confirmed cases of coronavirus (officially known as Covid-19) within the British Virgin Islands. As more coronavirus cases are detected outside of China and the first cases have been identified within the Caribbean area, BVI employers should monitor the impact of the outbreak and take steps to protect their employees and their business.

The outbreak of coronavirus raises points of employment law, immigration, and health and safety for BVI employers. Specific legal advice should be sought where necessary, particularly as the situation is changing daily.

General measures

Employers should have regard to the following measures to help them to manage the current coronavirus outbreak:

- Monitor and follow advice and guidance from relevant authorities such as the World Health Organisation, the BVI Health Services Authority, Pan American Health Organisation and the Caribbean Public Health Agency
- Determine protocols for the self-isolation of employees, where deemed appropriate
- Carry out a risk assessment to identify the risks faced by employees and visitors and implement measures to mitigate those risks, paying particular attention to vulnerable persons (such as those with weakened immune systems, older people, and those with long-term health conditions including diabetes, cancer, heart disease, asthma and chronic lung disease)
- Inform employees about any proposed measures to be implemented in the workplace, consulting with employees or employee representatives where appropriate, bearing in mind the need to encourage employee participation
- Review the possibility of flexible working and whether existing employment contracts, policies and working arrangements permit such flexibility. If they do not, consider how such flexibility might be achieved
- Review existing policies governing business travel, vacation leave, sick leave, caring for dependents and working from home. Employers should adopt a reasonable and consistent approach, taking account of risk assessments and official guidance
- Review any relevant insurance policies and guidance issued by insurers, particularly in connection with travel, medical insurance, and business interruption
- Ensure that contact details for employees are up to date, including who should be contacted in the event of an emergency
- Consider how employees who are currently travelling or who have travel plans will be impacted by the current travel restrictions

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- Consider arrangements for dealing with employees who need to travel abroad, who may be at particular risk of contracting coronavirus, or who report symptoms and may have coronavirus

The BVI economy is built on the twin pillars of financial services and tourism, both of which involve significant elements of international travel. Both of these areas of the economy will be impacted to varying degrees by the restrictions on travel and interaction that are being effected by governments around the world.

With the number of confirmed cases in the Caribbean area on the increase, employers need to understand what their obligations are to employees and how they should react to some of the challenges that will be faced. While specific legal advice should always be sought in relation to the coronavirus and its impact upon the workplace, we have endeavoured to cover some of the more common questions and concerns below.

What is an employer's duty of care?

The Labour Code places obligations on employers in relation to health and safety in the workplace. This obligation requires employers to ensure that:

- a safe, sound and secure working environment is provided so far as reasonably practicable
- every reasonable precaution is taken in the circumstances for the protection of workers
- reasonable precautions are taken in the circumstances to protect the general public who come into contact with the workplace
- all applicable standards and policies established by the Labour Department and other relevant agencies of the Government in consultation with stakeholders are complied with. Practically, such agencies would include the BVI Health Services Authority and the Environmental Health Division of the Ministry of Health and Social Development

A breach of an employer's obligations pertaining to health and safety under the Labour Code constitutes a criminal offence. Criminal liability may extend to individuals (including directors and other employees) where a breach of the obligation has been facilitated by their neglect.

The Labour Code requires employers to undertake a suitable and sufficient assessment of the risks to the safety and health of both (i) employees while at work; and (ii) persons who are not employees, but which are impacted in some way by the employer's business. This latter category will capture persons such as customers, visitors, suppliers and persons on secondment. Employers should take the time now to review and update their risk assessment to reflect the challenges faced by the coronavirus outbreak and ensure that any required changes are implemented as soon as possible.

Can an employer expect an employee required to self-isolate to work from home?

This will depend on the circumstances of each case, but is likely to depend on:

- whether the employee is impacted by symptoms of coronavirus – in which case, it is likely that they should not be working and should be on sick leave
- is it a type of job that can be undertaken from home?
- if it is a type of job that can be undertaken from home, does the employer/employee have the systems in place to enable that job to be undertaken from home?

Employers should consider whether they need to take any steps to facilitate working from home. This may include ensuring that employees have a way of logging on to secure systems and can access any necessary materials. The ability to work from home should be assessed for support staff as well as more senior staff. In this

regard, employers should assess the availability of laptops, printers and other devices, the absence of which might prevent employees working effectively from home. Working from home may not be an option for some professions and trades.

The key point is that employers should take steps now to assess the viability of working from home, since the spread of the coronavirus has been unpredictable so far and it is unclear how long the duration of any impact might be. Using other countries that have confirmed cases of coronavirus as examples, it is likely that some workplaces will be closed (either voluntarily or required to close by the authorities) and employers need to make sure that any disruption is limited, to the extent possible.

Can an employer prevent employees travelling abroad on vacation?

It is unlikely that an employer could prevent an employee from travelling on vacation, even if the proposed destination is considered to be high risk. However, it would be prudent to advise employees against travel to certain areas in accordance with official advice, to ensure that government guidance is accessible to employees and to ask employees to notify the employer if they are intending to travel to affected areas.

Can an employer ask employees to provide cover for those who are unwell or in self-isolation?

Employers should review employment contracts and any relevant policy to determine whether employees can be required to provide cover for other employees who are unable to attend work because of the coronavirus. Employees should be consulted as it may not be appropriate or reasonable for some employees to work additional hours.

In any event, employers should pay close attention to the provisions of the Labour Code as they relate to the requirement to pay premium pay and also in respect of meal and rest periods.

Can an employer prevent an employee who has refused to self-isolate from accessing the workplace to limit the spread of coronavirus?

Employers must bear in mind the duties of care that they owe to other employees and members of the general public that could come into contact with the workplace. If an employer knowingly allows an employee who has been advised to self-isolate to attend the workplace, the employer may be in breach of those duties.

Suspension may be an option where an individual who has been advised to self-isolate refuses to do so, but employers should consider whether they have a right to suspend in these circumstances. Where no express contractual right to do so exists, legal advice should be sought.

Should employees who are required to self-isolate be paid?

Employers are unlikely to be able to insist that employees take vacation leave for any period of self-isolation in the absence of a contractual right to do so where such self-isolation accords with official guidance. As these employees are not "sick", it is unlikely that they will be covered by sick leave. Instead, assuming the employer has instructed employees who according to official guidance should self-isolate to remain away from their place of work, employees are likely to be on a period of leave. This leave is likely to need to be paid, unless an employer has a contractual right to place the employee on a period of unpaid leave. The situation is more nuanced where employees consider they should self-isolate for reasons other than those reflected by official guidance.

Where an employee voluntarily remains away from the workplace due to self-isolation without discussing this with the employer first, or for reasons that are not proportionate or reasonable, there may be more scope for considering such leave to be unpaid, although this will depend on the circumstances in each case.

Are employees with coronavirus entitled to sick leave?

This will depend on an analysis of the employee's employment contract, any relevant policy and an understanding of the statutory position under the Labour Code.

In essence, the Labour Code links the eligibility to sick leave with illness. There could be circumstances in which a person is advised to self-isolate (perhaps because they have been in close contact with a person that has tested positive for coronavirus) but is not actually unwell. In such cases employees may not have a legal entitlement to sick leave under the Labour Code. Where an employee is unwell, the Labour Code entitles that employee to sick leave with pay for a period of not less than twelve working days in any one year, provided the employee has been continuously employed for a period of at least four months.

Employers should consider making exceptions to their usual sick leave policies to ensure that employees do not feel compelled to attend the workplace when in accordance with official advice they should self-isolate to help to contain the spread of coronavirus.

How should an employer deal with incidents of discrimination and harassment?

There have been reports in other parts of the world of racism and prejudice being shown towards persons from certain countries that have been heavily impacted by the spread of coronavirus, particularly China. Employers need to be mindful of the risk of such behaviour occurring in the workplace.

Employers will potentially be liable for harassment or discrimination by their employees towards other employees and should therefore ensure that reasonable steps are taken to prevent such conduct.

Should business travel be curtailed?

Certain countries have imposed travel restrictions, and these are likely to be updated regularly and with little notice. In the BVI, the visa-free initiative for Chinese nationals is currently suspended.

Employers should pay attention to official advice relating to travel restrictions and should also consider implementing policies to minimise the risk of employees catching coronavirus in connection with business-related travel. Measures to be considered should include health screening for employees returning from abroad and delaying or cancelling non-essential business travel and meetings. Employers should also consider contingency planning for the possibility of employees being quarantined or falling ill when travelling abroad. Employers should review their current travel and medical health insurance arrangements to determine if they remain in force and are adequate.

How to deal with employees who are unable or unwilling to attend work?

Some employees may be able but unwilling to attend the workplace because of fears of contracting coronavirus. Where work can be undertaken from home, it may be possible to agree that the employee works from home for a short period.

In other cases, it may be possible to agree that time away is taken as vacation or unpaid leave. However, if an agreed resolution cannot be found and an employee refuses to attend work without good cause, disciplinary action could be considered.

Before acting, employers should ensure that they have undertaken a risk assessment and have taken steps to mitigate any workplace risks which might cause employees concern. Employers should also ensure that they have dealt with requests to remain away from work in a proportionate, reasonable and consistent manner.

Other employees may be willing but unable to work because they are caring for dependents, as a result of closed schools, or transport disruptions. Employers will need to consider the terms of employment contracts and any relevant policies when determining how to respond to requests to be absent from work, bearing in mind that such requests could be made in relation to an extended period of time and by a significant number of employees.

For more information and to discuss these and any other ways in which the coronavirus outbreak may have an impact on your business, please feel free to email us at ghp@ghpbvi.com or reach out to one of our lawyers using the contact details below.

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