

# **Legal considerations for businesses during the unfortunate coronavirus outbreak**

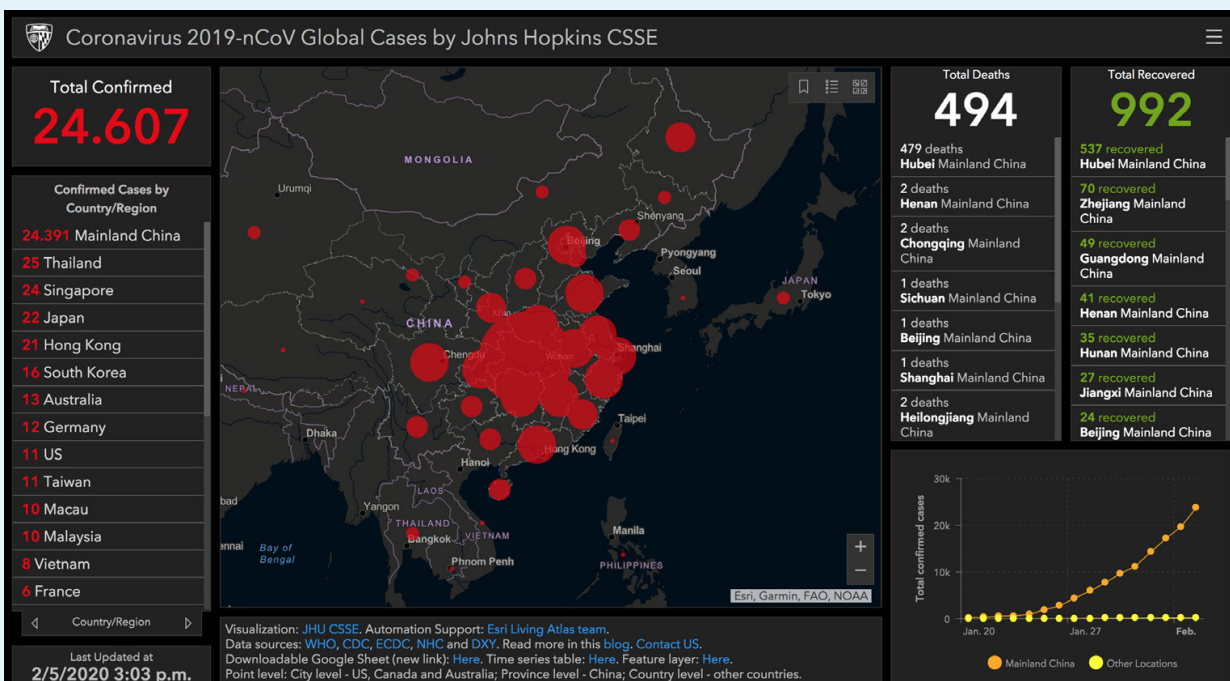
A concise Q&A



As the coronavirus is increasingly spreading, the priority for companies is of course the safety of their employees and of society at large. Also important to take into account however are certain legal considerations. For instance with regard to absence protocols, health related data of employees and obligations and liabilities under commercial contracts of your business. This comprehensive guide includes the most pressing questions with answers in light of the current situation from an employment, privacy, tax, insurance, commercial contracts, real estate, listed companies, director's liability and administrative law perspective.

We can imagine that you may have further questions regarding the legal requirements in relation to the coronavirus outbreak and are of course available to assist you. For more information, please visit our website or contact your trusted L&L advisor.

1. [Privacy & Employment](#)
2. [Insurance](#)
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**INTERACTIVE DATA VISUALIZATION (LIVE STREAM).**

Credit: Coronavirus 2019-nCoV Global Cases by Johns Hopkins CSSE

[Link >](#)

*Click here to see an up to date overview of Coronavirus cases globally.*

# 1. Privacy & Employment

## 1.1 Can you require employees to tell you whether they have travelled or plan to travel to coronavirus affected destinations?

On the basis of the Dutch Civil Code (**DCC**) an employer may instruct its employees to notify the employer of any trips made or planned to coronavirus affected destinations. However, if the employee fails to mention a stay in a coronavirus affected destination, the employer cannot impose any sanction unless the employer can prove that the employee acted in violation of a specific policy.

From a privacy perspective, it is worth noting that simply asking for the information *without* documenting the answers, is not subject to the applicable privacy laws in the Netherlands. Privacy requirements (including the General Data Protection Regulation (**GDPR**)) only become relevant when the employer decides to record, document, store, share or otherwise process the obtained information about travel destinations. Employers will then at least need to take the following into account:

- There should be a real need to document and process the information (for example because the size or nature of the organization requires that the obtained information is documented to be able to keep track of possible risks, or because the employer would be required to provide travel information to government agencies or health care providers);
- there is an overriding legitimate interest of either the employer itself or of (other) employees within the company to process the travel related information. For example where documenting the information is needed to be able to decide on preventive measures, to protect other employees within the organization, or for good employment practices.
- It is not required to ask for the employees' consent for collecting the required information and employers should refrain from doing so.
- Employers need to inform their employees (prior to collecting the information) about the fact that they will document, record or otherwise process the information and for what purposes they will do so. If the information will be shared with third parties, the employees need to be informed thereof as well.

## 1.2 Can you prohibit employees to travel to coronavirus affected destinations?

Employers must take proportionate action to protect employees from infection with the coronavirus, which may include cancelling business trips to destinations where governments and insurance guidelines advise not to travel to. Though they may advise against it, employers are not allowed to prohibit employees from visiting coronavirus affected destinations in their private life. This being said, an employer has a legitimate aim to protect all its staff and – as indicated under question 1 – may ask its employees to notify them if the employee stayed in a coronavirus affected area.

## 1.3 Can an employer ask its employees questions about any coronavirus related symptoms or diagnoses?

The GDPR does in general not prohibit an employer from asking such questions. Furthermore, the GDPR does not apply when the employer is only collecting information orally (without the intention to document it). Privacy related restrictions will however apply if the employer decides to record, document, store, share or otherwise process the obtained information about symptoms or diagnoses. Such information is sensitive, health related, data and under the GDPR, it is in principle prohibited to process such data. In the Netherlands, an exception to this prohibition applies for employers who have compelling business reasons to process health related personal data of their employees for the purpose of (in short) the prevention of health damage or to protect public health (for example if there is a real risk of an employee infecting others with the coronavirus).

#### 1.4 Can an employer screen its employees for fever and/or oblige the employee to go to the (company) doctor before allowing them in the office?

The Dutch Data Protection Authority indicated on its [website](#) that employers should not take upon the role of a (company) doctor upon (themselves) by drawing conclusions on individual employees, for instance based on their travel details or by asking their employees to take their temperature.

However, given that the employer has an obligation to take reasonable measures to ensure the health and safety of its employees, and also taking into account good-employership, we believe that it is a legitimate requirement to ask employees to visit the company doctor to have their temperatures taken in case there is a direct threat of coronavirus infection at the workplace (e.g. the employee has visited a coronavirus affected area or has had close contact with a person affected with the coronavirus). This will particularly be the case in the event that an employer has compelling business reasons to have established whether or not an employee has the coronavirus (e.g. to protect public health if an employee works in the healthcare sector).

An employee may refuse to be examined if he/she is of the opinion that such a test is an invasion of privacy. The request not to enter the company premises can be considered a justified work instruction.

To avoid that privacy requirements become applicable, the employer should in any event refrain from documenting or otherwise processing personal data of its employees in this context, including the results of the screening and information about doctors' visits.

#### 1.5 Can the employer notify its staff about a co-worker who has been diagnosed with the coronavirus?

On the basis of the Working Conditions Act (*Arbeidsomstandighedenwet*), the employer is obliged to ensure that workers are informed effectively of the work to be carried out, the risks arising therefrom, and of the measures intended to prevent or reduce such risks. When evaluating whether and how to notify other employees about an ill co-worker, employers should take due consideration of applicable privacy requirements. The employer should for example only notify its staff about the illness if there is a real risk of infection and even then, the employer should share as limited details of the co-worker as possible. Only in very exceptional cases it may be permitted to disclose the co-worker's name.

#### 1.6 Can the employer send employees home if they show coronavirus-like symptoms and if so, must the employer continue remuneration for sick leave?

If an employee displays coronavirus-like symptoms, the employer may send the employee to the company doctor to establish whether the employee is indeed sick. If the employee is indeed sick, the employer may, on the grounds of being a good-employer, demand that the employee stays at home until the company doctor has confirmed that the employee is better. An important legitimisation is that the employer is also responsible to protect the wellbeing of its entire staff.

Workers affected by the coronavirus outbreak will have the same protection as any sick worker. For Dutch employees this means that their salary must be continued for a maximum of 104 weeks. The salary due depends on what parties have agreed upon, but is at least 70% of the employee's gross monthly wage, capped at the maximum daily wage.

#### 1.7 Must the employer continue to pay remuneration to employees who have been put in quarantine?

In case the employer instructs the employee to stay at home after traveling to an affected area, then this is in any event a circumstance which should be attributed to the employer and the remuneration of the quarantined employee should be continued. However, the employer may consider putting in place policies which provide that where personal holidays to "at risk" areas are booked, any subsequent 14-day isolation period should, to the extent possible, be taken as annual leave. This approach would need to be handled with caution.



## 1.8 Can employees demand to work from home because they fear a coronavirus infection?

In case an employer has taken all reasonable measures to provide for the health and safety of its employees, including the measures advised by the National Institute for Public Health and the Environment (*RIVM*), an employer can in principle legally require an employee to attend the workplace. Non-attendance can in principle be sanctioned with appropriate disciplinary measures (please note that for North Brabant other rules apply - see Q&A 10). Furthermore it is advisable to discuss with the company doctor where employees with delicate health should perform their work.

## 1.9 What general health and safety requirements should employers observe in the wake of the coronavirus outbreak and can any preventive measures be taken?

The Working Conditions Act and the employer's general duty of care towards employees requires employers to provide a safe working environment for employees which includes protection against infectious diseases.

It also follows from the Working Conditions Act that the employer should take specific measures with respect to specific threats to the health of its employees, such as strengthened hygiene rules (i.e. good ventilation, providing hand soap and face masks when necessary etc.). It is in any event recommended to consult the company doctor and/or arbo-service (*arbodienst*) regarding appropriate company specific measures. In addition the employer could consider more general measures such as promoting teleworking, limiting unnecessary meetings and travel, eliminating business trips to risk areas or modifying the workplace of workers at risk in order to protect the company's staff.

## 1.10 Has the RIVM, as the number of new patients increases daily, make social distancing recommendations such as working from home and visiting public places?

Yes, the RIVM provided special rules in this regard. In the Netherlands, the advice for everyone is to stop shaking hands to prevent the spread of the coronavirus.

For the inhabitants of North Brabant specific rules apply. The RIVM advises all inhabitants of North Brabant to work from home – as far as possible – at least until 16 March 2020. Employers are requested to spread the working hours. Furthermore, inhabitants of North Brabant who have a cough or a fever are advised to avoid contact with others as far as possible. Employers in North Brabant and employers employing employees living in North Brabant must inform their employees hereof.

## 1.11 Any further questions?

Should you have any additional privacy and / or employment related questions relating to the coronavirus please contact our [Data Protection & Privacy team](#) and/or our [Employment team](#).

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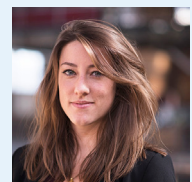
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## 2. Insurance

### 2.1 Can a company claim for insurance coverage in case it has to close down because of the coronavirus, or the production declines as a result of having to send a large number of employees home?

In case the company has to close down because of the coronavirus, or the production declines as a result of having to send (all) employees home, a loss of profits will most likely be suffered. A business interruption insurance (*bedrijfsschadeverzekering*) is commonly taken out by companies in the Netherlands.

A business interruption insurance provides, briefly put, coverage for the decrease of gross income resulting from a decline in production or the standstill of the company. The most common business interruption insurances only provide coverage if the decline in production or the standstill of the company is caused by damage or loss of buildings or goods in the buildings. Business interruption damage due to personal injury is not covered under most business interruption insurances. A large-scale outbreak of diseases, such as coronavirus, does not lead to damage to or loss of buildings or goods. Damages resulting from a decline in production or the standstill of the company will therefore not be covered under the most common business interruption insurances.

### 2.2 What in case a company that organizes a big event, such as a congress, has to cancel the event due to the coronavirus?

Due to the coronavirus, lots of congresses, sport matches, concerts and other events have been cancelled out of precaution. This could lead to losses for the companies organizing these events. The policies most commonly taken out with respect to cancellation risks do not apply in the event of epidemics and pandemics. Therefore, costs resulting from cancellations due to the coronavirus are not covered by such insurance policies.

### 2.3 What about the wages for the employees who caught the coronavirus? And how about the wages for employees who were sent home as safety precaution?

In case an employee falls ill, the employer is legally obliged to continue paying the wages for 104 weeks. In case an employer has taken out a sick leave insurance (*ziekteverzuimverzekering*), the employer can, under the most common sick leave insurances, claim the costs resulting from his obligation to continue to pay wages under the sick leave insurance with the exception of the agreed upon waiting days. For most sick leave insurances the fact that an employee is ill suffices. The reason why the employee is sick is irrelevant. As such, an employer will in general be able to claim the costs resulting from his obligation to continue to pay wages to the employees that caught the coronavirus under his sick leave insurance. In general, sick leave insurances do not specify whether or not wages paid to an employee sent home as safety precaution are covered under the sick leave insurance. As long as the employee is not actually sick, the insurer could argue that there is no coverage for a continuation to pay wages. However, depending on the specific circumstances, it could be argued that the costs involved with sending the employee home as safety precaution are covered as being costs of taking measures to prevent that other employees get ill.

## 2.4 Any further questions?

Should you have any insurance related questions relating to the coronavirus, please contact our [Insurance team](#).

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### 3. Commercial Contracts

#### 3.1 Is a company liable for the damages suffered by its counterparty in case it breached its contractual obligations due to coronavirus?

If many of a company's employees, or a certain employee with specific knowledge and skills, are caught with coronavirus, this could lead to a situation in which the company cannot, or cannot timely, perform its obligations under its contracts. Contracting parties could argue that they are entitled to compensation due to a breach of the obligations under the contract. Can a company be held liable for these costs?

Briefly stated, pursuant to Dutch law, a party cannot be held liable in case of 'force majeure'. Force majeure is considered present if the breach is not the result of a fault of the party, nor the result of circumstances that are for the risk of this party. In general, the bar to successfully invoke 'force majeure' is high.

In case the agreement itself contains a clause specifying in which case force majeure is present and what the consequences thereof are, the agreement itself will prevail. In case your contracting party claims compensation because you breached your contractual obligations, first check the agreement on force majeure clauses.

Whether a plea of force majeure will be successful highly depends on the circumstances concerned. It could for example be relevant whether there are possibilities to hire other personnel that could have performed the duties of the employees who caught coronavirus, as in general a plea of force majeure fails if performance against higher costs is possible.

If you foresee that you will not be able to perform obligations under a contract, it can be considered to enter into discussions with the contracting party as timely as possible to avoid any possible claims.

#### 3.2 Any further questions?

Our [Commercial Contracts team](#) is of course happy to provide you with all advice needed in respect of such potential breach of contract and claims related thereto.

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## 4. Tax

### 4.1 Are you active in the leisure industry, travel business or event management and have you charged a cancellation or termination fee due to cancellations in view of the coronavirus?

Note that such cancellation or termination fee may be free of VAT if such fee constitutes a compensation of damages. If VAT has already been paid to the tax authorities, a VAT refund may be obtained. Whether an actual VAT benefit exists ultimately depends on what has been agreed upon with your client.

### 4.2 Are you an employer and have you incurred cancellation costs for cancelling a personnel event or outing?

Please be informed that such costs will probably not be taxed under the Employment Costs Scheme (*werkkostenregeling*). In addition, the position can be taken that no VAT correction should be made for private use of business goods and services (*BUA-correctie*).

### 4.3 Do you have any employees working cross border and have their travel schedules been changed due to travel restrictions?

If employees stay in another country for a longer or shorter period of time due to travel restrictions, this might affect to what extent a country has the right to levy taxes and change the avoidance of double taxation. In some cases, the right to levy taxes can even switch from one country to another. Therefore, it is advisable to notify employees to keep proper records of their stay in another country. Please note that a change of stay may also have consequences for the residence- and work permits of your employees and for the obligation to report seconded employees.

### 4.4 Any further questions?

Should you have any additional questions relating to tax in relation to the coronavirus, please do not hesitate to reach out to our [Tax team](#).

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## 5. Administrative law

### 5.1 What tasks and competences do governmental bodies have with respect to the coronavirus?

Certain governmental bodies in the Netherlands have tasks and competences concerning infectious disease control. In general the task to implement measures regarding infectious disease control applies to the Municipal Executives of the Dutch municipalities. However, as the coronavirus is qualified as a so-called type A infectious disease, the task to implement measures applies to the Boards of the Safety Regions (*Bestuur van de Veiligheidsregio*). This task includes amongst other things that the Board of the Safety region should take preventive measures.

The power to hospitalize a person for isolation applies to the Chairman of the Safety Region (*de voorzitter van de veiligheidsregio*). The Chairman of the Safety Region may only use this power after they have obtained the advice of the Municipal Health Service (*Gemeentelijke Gezondheidsdienst, GGD*). After the Chairman of the Safety Region decided to hospitalize an individual, the Chairman should ensure that this decision is presented to a judge in order to confirm the decision (or perhaps refuse).

### 5.2 What measures can be taken in relation to buildings, goods and means of transport?

In case of a suspicion of infection, the Chairman of the Safety Region can examine sites, buildings, means of transport, and goods for the presence of the coronavirus. Furthermore, in case of an infection, the Chairman of the Safety Region may (i) impose technical-hygienic requirements and (ii) disinfect sites, buildings, means of transport or goods, including the destruction of courses.

More specifically, we note that the Chairman of the Safety Region may also (i) close buildings and/or areas, (ii) prohibit the entering of a vehicle and (iii) destroy goods, in case there is a serious threat to public health. However, as the coronavirus appears to spread from person-to-person, it is unlikely that such measures will be taken with respect to this virus.

### 5.3 Any further questions?

Should you have any additional questions relating to public and administrative law in relation to the coronavirus, please do not hesitate to reach out to our [Public & Administrative Law team](#).

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## 6. Real Estate

### 6.1 Does the coronavirus constitute a defect to the leased space?

Most leases under Dutch law are based on the ROZ template. In the general terms and conditions pertaining to these ROZ templates (**GTC**), and also in Dutch tenancy law, it is stipulated that a tenant does not have the right to suspend its rental payments without a court ruling.

Under Dutch tenancy law, a tenant may claim rent reduction before a court in case of a “defect” (*gebrek*) to the leased space. In the GTC, it is however stipulated that a defect will not lead to any claim for rent reduction, except in case of a serious breach which is attributable to the landlord or failure of the landlord to remedy such defect in a reasonable period of time. A “defect” qualifies as a condition or feature of the leased space or another circumstance which is not attributable to the tenant, and as a result whereof the tenant does not have the enjoyment of the leased space that they were entitled to expect. Something can be attributable to the tenant due to a fault of the tenant, pursuant to law, a legal act or in case something is generally considered to be for the account of the tenant (*naar verkeersopvattingen*). Recession, an economic crisis and “acts of God” are in principle considered circumstances which should be taken into account by tenants when concluding a lease and do not qualify as a “defect”. Such circumstances are generally considered to be part of the normal entrepreneurial risk of a tenant as the absence thereof cannot be reasonable expected by the tenant. (If the government were to order the closing of the leased premises due to a contamination with the coronavirus, in principle this would in our view not qualify as a defect either, as it would not be considered attributable to the landlord.

### 6.2 Do a landlord or the tenant have any obligations in respect of the coronavirus?

The GTC do not impose any active obligations on a landlord to take preventive measures in case of virus contaminations. In light hereof however, it is important to note that both landlord and tenant have the obligation to act as a “good landlord” and a “good tenant” vis-a-vis each other, in accordance with the requirements of reasonableness and fairness that apply to all contractual relationships governed by Dutch law. It can therefore reasonably be required from a landlord to inform its tenants (specially in case of “multi-tenant use”, or when a leased premises generally attracts a lot of visitors, such as shopping centres, hotels and restaurants) of any relevant measures prescribed by the government through the National Institute for Public Health and Environmental Protection (*Rijksinstituut voor Volksgezondheid en Milieu*) and to take the (precautionary) measures prescribed by the same institution. Reciprocally, we also deem it reasonable that the landlord demands from its tenants that they take adequate measures to prevent or limit (the spread of) the coronavirus and note in this respect that the GTC (and the law) stipulate that a tenant may not do harm to the building, other tenants or third parties.

We do note that recent case law does not provide for a precedent in this type of situations. We shall therefore keep monitoring the developments closely, and provide any update available.

### 6.3 Any further questions?

Should you have any additional Real Estate related questions relating to the coronavirus please contact our Real Estate team.

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## 7. Listed companies

### 7.1 Is there a disclosure obligation for listed companies?

Companies that have securities listed on a European exchange should monitor developments and provide adequate disclosures to the market if and when needed. Pursuant to the Market Abuse Regulation, listed companies have an obligation to publicly disclose inside information without delay, subject to certain possibilities to postpone disclosure. Determining whether the impact resulting from the coronavirus indeed has a significant effect on the prices of the financial instruments or on the price of related derivative financial instruments of a company is not clear cut. It is therefore advisable to seek counsel in order to determine whether an announcement needs to be made or may be delayed, including notification to competent authorities (if applicable).

### 7.2 Any further questions?

Should you have any additional questions relating to the coronavirus in relation to listed companies, please contact our [Corporate team](#).

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## 8. Director's liability

### 8.1 What are director's liability aspects in relation to the coronavirus?

Managing directors have joint responsibility for the company's day-to-day business and general policy, which means that managing directors are – in principle – jointly and severally liable to the company for shortcomings in the performance of management duties. Managing directors should carry out their duties 'properly' and will only be liable in the event that "serious culpability" (*ernstig verwijt*) can be attributed to them. Within the context of the coronavirus, this could imply that managing directors should take precautionary measures which are in the (best) interest of the company to ensure the continuity of the day-to-day business. The management board should take the interests of all stakeholders into account in the performance of their duties, also whilst addressing measures regarding the coronavirus.

### 8.2 Any further questions?

Should you have any additional questions relating to the coronavirus in relation to listed directors liability, please contact our [Litigation & Risk Management team](#).

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