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Novel Coronavirus (COVID-19) Outbreak in China – What You Need to Know Right Now

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As the coronavirus outbreak continues to have significant impacts globally, companies face issues that will affect their supply chains, cybersecurity, and workforce.

Companies that Manufacture or Purchase Goods in China

Although China has begun allowing companies to reopen, some workers cannot return to work due to travel restrictions, or they may be too afraid to return to work. Due to concerns of igniting/reigniting a coronavirus hotspot by permitting companies to reopen, many provinces, local government authorities, and even landlords are imposing requirements on companies before they are permitted to reopen. The bottom line is that many Chinese workers may be out of work for weeks or months, potentially causing significant delays in delivery of contracted goods to the U.S.

Once your supplier returns to full capacity, their upstream suppliers may be facing the same obstacles to full production. Large companies are the first to be allowed to reopen, so SMEs may not reopen for some time. Smaller suppliers or upstream suppliers already impacted by the 2019 economic slowdown may never reopen.

Companies awaiting goods from China should review contracts to determine what rights you may have if your supplier delivers late, or not at all, or if your customer refuses to accept delivery of your goods. Expect claims to excuse performance by your Chinese supplier or customer under the force majeure provision of your contracts or applicable law. The China Council for the Promotion of International Trade has established an application process by which a Chinese party may obtain a force majeure certificate. The certificate alone, however, is not sufficient to excuse performance. The supplier or customer must still demonstrate that the particular case warrants application of force majeure under applicable law or contract. Due to the overriding state interest in keeping businesses open and citizens employed, it is unlikely that a Chinese court or arbitrator will sanction a Chinese supplier or customer unable to perform in accordance with the terms of any contract or enforce a foreign judgment holding a supplier or customer liable for breach of a supply contract. Consider reaching a settlement of the dispute and/or secure an alternative supply source outside of China.

Companies should also be aware of an increase in instances of fraud, with suppliers asking for deposits for new orders when they are not open for business or have closed permanently. Some suppliers are using the deposit money to launch a new company elsewhere in China.

Cybersecurity Concerns

Attackers are exploiting the COVID-19 outbreak by sending malicious health information emails. Based on recent reports, the attack includes a malicious Microsoft Word document that exploits an old vulnerability and installs AZORult, an information stealing malware. Security experts are advising that recipients of COVID-19 related emails treat them with extreme caution before opening the emails or attachments.

Impact to Companies with Employees in China

China has enacted strict new laws impacting Chinese employers. Individual provinces have also issued their own employee-protection laws. Companies with Chinese operations should monitor their local employment

bureau for new rules and notices. Carefully review your Chinese employment handbook and employment agreements and consult with your attorney. Communicate with your managers and employees in China regarding steps you are taking. Also, recommend to your ex-patriate employees in China that they leave China for the foreseeable future.

Impact to U.S. Employers

Effective February 5, 2020, President Trump signed an executive order suspending entry into the U.S. of all foreign nationals who have visited China at any time during the 14 days prior to arrival in the U.S., except immediate family members of U.S. citizens. In addition, all U.S. citizens entering the U.S. after visiting Hubei Province in China at any time during the 14 days prior to their arrival in the U.S. are subject to a mandatory quarantine of up to two weeks.

Unless the individual was on business travel at the time they were denied entry into the U.S. or was subject to a mandatory quarantine, in which case the U.S. company would likely be required to continue to pay them, there is really no employment protection for affected individuals. Absent an employment or collective bargaining agreement, employers may terminate these individuals for missing work. If the individual is subject to an employment or collective bargaining agreement, it is possible, but highly unlikely, that the agreement defines "cause" to include missing work under these circumstances. In addition, it is unlikely that a court or arbitrator would permit an employer to take such drastic measures under these circumstances.

Symptomatic Employees

If a worker who recently returned from any area with confirmed cases of the virus exhibits symptoms (which include fever, nausea, vomiting, diarrhea, shortness of breath, runny nose, and cough), immediately call the Communicable Disease section of your state department of health. Many such agencies are staffed to accept calls 24/7. If health officials believe there is a possibility that the worker has the coronavirus, they should arrange to have the worker tested.

Asymptomatic Employees

Subject to the new travel restrictions and quarantine, individuals who have recently returned from China who are asymptomatic can be allowed to return to work if health officials have not recommended otherwise. However, a worker may not show symptoms until later, by which point they may have exposed others in your workforce to the disease.

You may consider asking the worker to stay home for a few days until the incubation period (10 – 14 days) has passed. The risk here is that a worker forced to stay home might make a "regarded as" disabled claim, alleging that you perceived the worker had a disability that prevented him or her from performing his or her job in violation of the Americans with Disabilities Act (ADA). But if your decision is based on the employee's travel history, and not on whether you believe the person to be ill, you should be able to defend against such a claim.

Avoid claims of discrimination based on national origin by selecting employees to sit out based on their travel history, not their national origin. Communications with these workers should make clear that your actions are based on their travel history. Apply this restriction to all workers who have traveled in China. To avoid liability, pay these workers so they do not suffer damages because of their exclusion from work. When they return, make sure they are reintegrated into the workforce effectively.

Even absent any legal protections for employees in this unusual situation, employers should remain accommodating toward employees prevented from working by the travel restrictions or the quarantine. Even if

an employer has the right to terminate an employee for attendance, a bit of understanding goes a long way toward building employee loyalty and preventing bad publicity and a negative jury verdict from a termination.

Workers Restricted in China

If you have an employee who cannot leave China to return home, you would not be required under U.S. law to continue paying that worker (unless they are performing work for you in China), nor is there any prohibition preventing you from charging the employee's absences against their attendance record. Given the severity of this situation and the fact that it is outside your workers' control, you would be well justified in repatriating them to your workforce after their return, with pay and without attendance points.

Other Workers Concerned About Their Safety

Coworkers of recently returned employees from China may express concerns about the spread of the disease. A pregnant employee or immunocompromised employee may ask to avoid the returned co-worker. Address these situations on a case-by-case basis, considering the proximity of the workers to each other, the amount and type of contact they have, and other factors. Consider options such as making temporary accommodations or allowing some employees to work from home. Consult with counsel for specific requests but be open to creative solutions that may protect your employees' physical and psychological safety.