

CORONAVIRUS OUTBREAK: EMPLOYMENT AND CONTRACT LAW ISSUES

March 12, 2020

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OVERVIEW OF EMPLOYMENT ISSUES

- ▶ Safety and health
- ▶ Wage and hour
- ▶ Leave rights
- ▶ Disability and national origin discrimination
- ▶ Advance notice of some layoffs and closings
- ▶ Protected concerted activity

Global Viral Outbreaks Like Coronavirus, Once Rare, Will Become More Common

Urbanization, globalization and increased human consumption of animal proteins are driving a rise in epidemics

By *Jon Hilsenrath*

The rapid and global spread of the deadly new coronavirus caught households, business leaders, investors and policy makers off guard, but health experts and economists who study pandemics say it shouldn't have come as a surprise at all.

Epidemics of infectious diseases have become a regular part of the global landscape in the past quarter-century, thanks in part to economic trends including urbanization, globalization and increased human consumption of animal proteins as society becomes more prosperous, these experts say.

The public needs to prepare for more of them, they add.

THE WALL STREET JOURNAL.

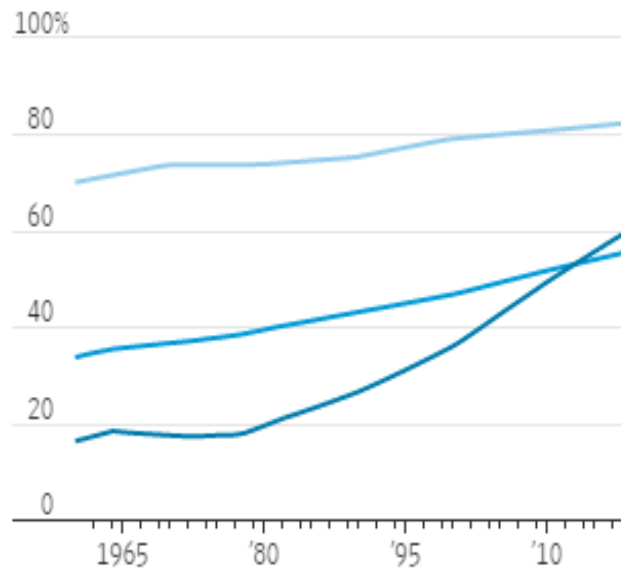
English Edition | March 6, 2020 | Print Edition | Video

Growing Exposure

Epidemics have proliferated as people have moved closer together...

Percentage of population living in urban areas

■ China ■ World ■ U.S.

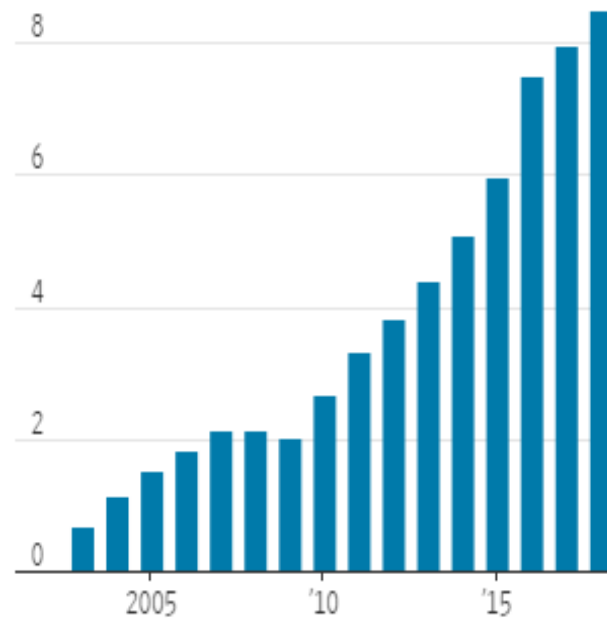


Source: World Bank

...travel globally at a rising rate...

Airline passengers between U.S. and China

10 million



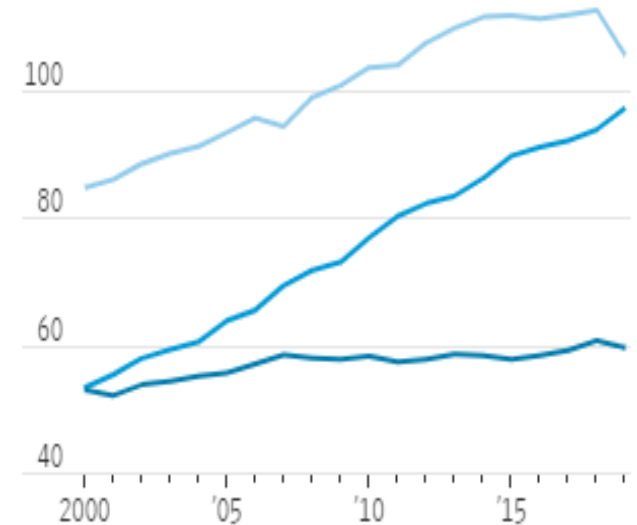
Source: Bureau of Transportation Statistics

...and consume more animal protein.

Global meat consumption

■ Beef ■ Chicken ■ Pork

120 million metric tons



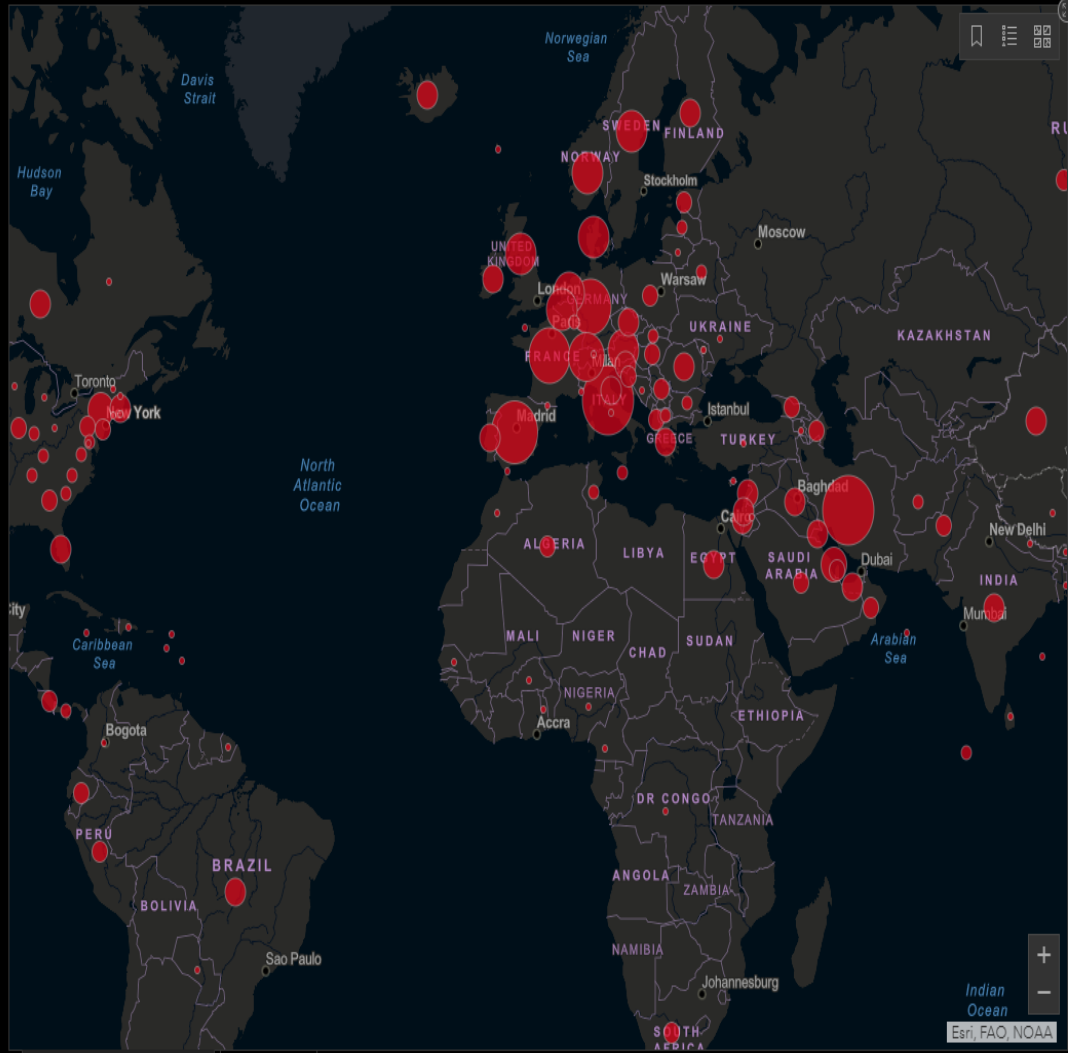
1 metric ton = 2,204.62 pounds

Source: U.S. Department of Agriculture

Total Confirmed
121,545

Confirmed Cases by Country/Region

80,967	China
10,149	Italy
9,000	Iran (Islamic Republic of)
7,755	Republic of Korea
2,174	Spain
1,784	France
1,629	Germany
1,040	US
696	Others
613	Switzerland
581	Japan
503	Netherlands
477	Sweden
440	Norway
382	UK
340	Denmark
314	Belgium
206	Austria
189	Bahrain



Total Deaths

4,373

3,046	deaths	Hubei China
631	deaths	Italy
354	deaths	Iran (Islamic Republic of)
54	deaths	Republic of Korea
47	deaths	Spain
33	deaths	France
23	deaths	Washington US
22	deaths	Henan China
13	deaths	Heilongjiang China
12	deaths	...

Total Recovered

66,234

49,134	recovered	Hubei China
2,959	recovered	Iran (Islamic Republic of)
1,282	recovered	Guangdong China
1,249	recovered	Henan China
1,195	recovered	Zhejiang China
995	recovered	Hunan China
984	recovered	Anhui China
932	recovered	Jiangxi China
726	recovered	Shandong China
724	recovered	...

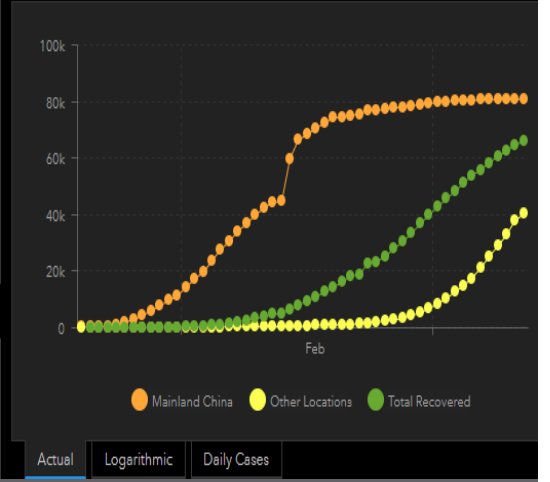
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Cumulative Confirmed Cases

118
countries/regions

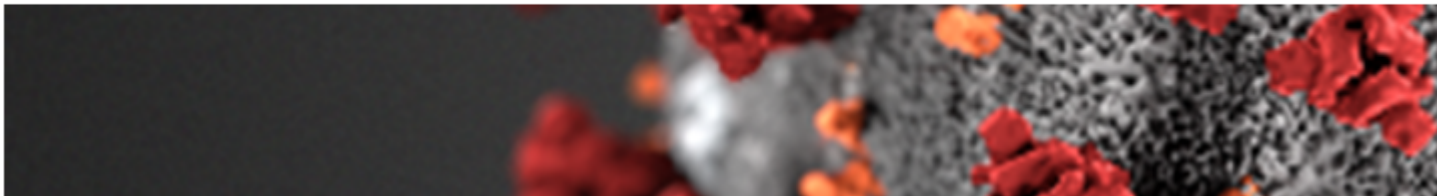
Lancet Inf Dis Article: [Here](#). Mobile Version: [Here](#). Visualization: JHU CSSE. Automation Support: Esri Living Atlas team and JHU APL. Data sources: WHO, CDC, ECDC, NHC and DXY and local media reports. Read more in this [blog](#). Contact US. Downloadable database: [GitHub](#): [Here](#). Feature layer: [Here](#). Confirmed cases include presumptive positive cases. Point level: Province/State level - China, US, Canada, Australia; Country level - other countries. All points shown on the map are based on geographic centroids, and are not representative of a specific address, building or any location at a spatial scale finer than a...



SAFETY AND HEALTH

- ▶ OSHA webpage on COVID-19 went up in January 2020
 - ▶ Links to applicable standards and directives
 - ▶ ... recommendations for some industries
 - ▶ ... OSHA and CDC resources

COVID-19



Standards

This section highlights OSHA standards and directives (instructions for compliance officers) and other related information that may apply to worker exposure to novel coronavirus, COVID-19.

There is no specific OSHA standard covering COVID-19. However, some OSHA requirements may apply to preventing occupational exposure to COVID-19. Among the most

SAFETY AND HEALTH

- ▶ OSHA published 32-page booklet on March 9, 2020
 - ▶ Describes “lower exposure,” “medium exposure,” and “high or very high exposure” risk occupations
 - ▶ ... and precautions employers can take to protect employees at each level

Guidance on Preparing Workplaces for COVID-19

U.S. Department of Labor
Occupational Safety and Health Administration

Introduction	3
About COVID-19	4
How a COVID-19 Outbreak Could Affect Workplaces	6
Steps All Employers Can Take to Reduce Workers’ Risk of Exposure to SARS-CoV-2	7
Classifying Worker Exposure to SARS-CoV-2	18

SAFETY AND HEALTH

- ▶ OSH Act Section 5(a)(1) requires each employer to keep workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees”
 - ▶ “General duty clause”
 - ▶ COVID-19 is potentially such a hazard, depending on an employer’s risk exposure
 - ▶ Employer can be cited under GDC if there are feasible means to abate a serious hazard that it doesn’t use

SAFETY AND HEALTH

- ▶ In COVID-19 context, abatement measures include:
 - ▶ Following OSHA's control and prevention recommendations

Control and Prevention

Measures for protecting workers from exposure to, and infection with, the novel coronavirus, COVID-19 depend on the type of work being performed and exposure risk, including potential for interaction with infectious people and contamination of the work environment. Employers should adapt infection control strategies based on a thorough **hazard assessment**, using appropriate combinations of engineering and administrative controls, safe work practices, and personal protective equipment (PPE) to prevent worker exposures. Some OSHA

SAFETY AND HEALTH

- ▶ Following CDC's Interim Guidance for Businesses and Employers

Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), February 2020

This interim guidance is based on what is currently known [about the coronavirus disease 2019 \(COVID-19\)](#). The Centers for Disease Control and Prevention (CDC) will update this interim guidance as needed and as additional information becomes available.

CDC Industry Guide

- [Resources for Airlines](#)

SAFETY AND HEALTH

- ▶ Providing information about virus to employees, for example, by posting CDC and SCDHEC fact sheets about symptoms and how to prevent transmission

COVID-19
CORONAVIRUS DISEASE

Share Facts About COVID-19

Know the facts about coronavirus disease 2019 (COVID-19) and help stop the spread of rumors.

FACT 1 Diseases can make anyone sick regardless of their race or ethnicity.

People of Asian descent, including Chinese Americans, are not more likely to get COVID-19 than any other American. Help stop fear by letting people know that being of Asian descent does not increase the chance of getting or spreading COVID-19.

FACT 2 The risk of getting COVID-19 in the U.S. is currently low.

Some people who live in or have recently traveled to places where many people have gotten sick with COVID-19 may be monitored by health officials to protect their health and the health of other people in the community.

FACT 3 Someone who has completed quarantine or has been released from isolation does not pose a risk of infection to other people.

For up-to-date information, visit CDC's coronavirus disease 2019 web page.

FACT 4 You can help stop COVID-19 by knowing the signs and symptoms:

- Fever
- Cough
- Shortness of breath

Seek medical advice if you

- Develop symptoms

AND

- Have been in close contact with a person known to have COVID-19 or if you live in or have recently been in an area with ongoing spread of COVID-19.

FACT 5 There are simple things you can do to help keep yourself and others healthy.

- Wash your hands often with soap and water for at least 20 seconds, especially after blowing your nose, coughing, or sneezing; going to the bathroom; and before eating or preparing food.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Stay home when you are sick.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.

For more information: www.cdc.gov/COVID19

COVID-19

If you have recently traveled to an area that has COVID-19 transmission and are experiencing symptoms mentioned below, call ahead to your health care provider before seeking medical care.

What is it?

- A new respiratory virus first identified in Wuhan, China
- It has the potential to cause severe illness and pneumonia in some people

How is it spread?

- Through the air by coughing and sneezing
- Close personal contact, such as touching or shaking hands
- Touching an object or surface with the virus on it, then touching your mouth, nose, or eyes

Who is at risk?

- Travelers to and from certain areas are at increased risk as are the close contacts of those who are ill
- Current risk to the general public is low

See travel guidance from the Centers for Disease Control and Prevention www.cdc.gov/coronavirus/2019-ncov/travelers/index.html

What are the symptoms?

Illnesses can be mild, or in some cases be severe enough to require hospitalization. Symptoms of this respiratory illness primarily include:

- Fever
- Cough
- Shortness of Breath

How is it prevented?

Similar to prevention of other respiratory illnesses, including the flu:

- Wash hands often
- Avoid touching eyes, nose, or mouth with unwashed hands
- Avoid contact with sick people
- Stay home while you are sick; avoid others
- Cover mouth/nose with a tissue or sleeve when coughing or sneezing

Visit scdhec.gov/COVID19 for more information.

SAFETY AND HEALTH

- ▶ Abatement measures may also include:
 - ▶ Restricting business travel
 - ▶ Providing PPE if needed
 - ▶ Requiring employees to stay home for 14 days upon return from travel to restricted areas



Travelers from Countries with Widespread Sustained (Ongoing) Transmission Arriving in the United States

SAFETY AND HEALTH

- ▶ More abatement measures
 - ▶ Requiring employees to stay home for 14 days if had close contact with co-worker who tests positive
 - ▶ Requiring employees to stay home if sneezing and coughing or showing other symptoms until can provide return-to-work release
 - ▶ Decontaminating affected workspaces
 - ▶ Training on how to avoid transmission of infectious diseases

SAFETY AND HEALTH

- ▶ OSH Act Section 11(c) prohibits retaliation against employee for raising workplace safety concerns
- ▶ Section 13(a) states employee may refuse to work if he/she has good faith belief there is imminent danger of death or serious injury
 - ▶ Includes if there is “reasonable expectation ... health hazards are present, and exposure to them will shorten life”

SAFETY AND HEALTH

- ▶ So be careful when responding to employee safety concerns related to COVID-19
- ▶ What if employee refuses to come to work because of fear of infection?
 - ▶ Is there a realistic threat?
- ▶ What if employee refuses to travel as part of job duties?
 - ▶ Is employee older or pregnant?
 - ▶ Review CDC, State Department, and DHS travel guidance with employee

SAFETY AND HEALTH

- ▶ OSHA's PPE Standard requires providing protective equipment, clothing, and barriers when necessary to prevent employees from being exposed to environmental hazards
- ▶ In COVID-19 context, may include:
 - ▶ Gloves, eye and face protection, and respirator for some healthcare workers
 - ▶ Same for workers using some hazardous chemicals for cleaning
 - ▶ But facemasks not needed for workers who are well, even when working close to others, per CDC and WHO

SAFETY AND HEALTH

- ▶ OSHA's Recordkeeping Regulation requires most employers to keep record of most work-related injuries and illnesses on OSHA 300 log and 301 incident report
- ▶ OSHA specifically exempts recording common cold and flu
- ▶ But COVID 2019 "is a recordable illness when a worker is infected on the job"
- ▶ Reporting requirements may apply

WAGE AND HOUR

- ▶ W&H Div. webpage on “Pandemic Flu and the FLSA”
 - ▶ Issued in 2009 during “swine flu”/H1N1 pandemic



Wage and Hour Division

[DOL Home](#) > [WHD](#) > [FLSA](#) > Pandemic Flu and FLSA

Pandemic Flu and the Fair Labor Standards Act

Questions and Answers

How many hours is an employer obligated to pay an hourly-paid employee who works a partial week because the employer's business closed?

The Fair Labor Standards Act (FLSA) generally applies to hours actually worked. It does not require employers who are unable to provide work to [non-exempt employees](#) to pay them for hours the employees would have otherwise worked.

WAGE AND HOUR

- ▶ W&D Div. webpage on “COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers”
 - ▶ Published March 9, 2020
 - ▶ Reaffirms and updates 2009 guidance



U.S. DEPARTMENT OF LABOR

Wage and Hour Division

COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers

WAGE AND HOUR

- ▶ Employers affected in different ways:
 - ▶ Some slowing production and reducing hours or laying off employees because of either supply chain disruptions or falling demand
 - ▶ Others asking employees to work from home for public health reasons
 - ▶ Others asking employees to work longer hours because of increased demand for their products

WAGE AND HOUR

- ▶ Non-exempt employees
 - ▶ Paid for time worked
 - ▶ Minimum wage plus overtime
 - ▶ Not paid for time not worked
 - ▶ So if employee not at work because hours reduced or laid off, don't have to pay
 - ▶ But if employee works from home, have to pay for hours worked

* Under FLSA; check state and local laws outside SC and applicable contracts

WAGE AND HOUR

- ▶ Employees who meet EAP or OS “white collar” exemptions
 - ▶ Paid on salary basis regardless of number of hours worked
 - ▶ General rule: if employee performs any work during week, must be paid full week’s salary
 - ▶ “Any work” includes answering e-mail or phone call
 - ▶ But if completely relieved of duty for week, don’t have to pay for week
 - ▶ Can require employee to use up accrued vacation or PTO for days when off

*Under FLSA; check state and local laws for employees outside SC and applicable contracts

WAGE AND HOUR

- ▶ Exceptions: don't have to pay for ...
 - ▶ Full-day absences for sickness or disability if employer has paid sick leave policy
 - ▶ Full-day absences for personal reasons other than sickness or disability
 - ▶ Full-day or partial-day absences taken as unpaid leave under FMLA

*Under FLSA; check state and local laws for employees outside SC and applicable contracts

WAGE AND HOUR

- ▶ Partial-week reductions in salary not allowed
 - ▶ But can make future decreases in salary that correspond to reduced hours if practice is occasional and due to long-term business needs—with assistance of counsel

*Under FLSA; check state and local laws for employees outside SC and applicable contracts

WAGE AND HOUR

- ▶ Reductions in pay require seven days' advance written notice under SC Payment of Wages Act
 - ▶ Check state and local wage payment laws in other states
- ▶ If having to ask employees to work extra hours, no limit in number of hours per day or week employees can be asked to work
 - ▶ As long as employees are 16 years old or older
 - ▶ But consider morale and PR implications
 - ▶ And check wage and hour laws in other states

LEAVE RIGHTS

- ▶ Issued by W&D Div. on March 9, 2020
 - ▶ “COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers”
 - ▶ <https://www.dol.gov/agencies/whd/fmla/pandemic>



U.S. DEPARTMENT OF LABOR

Wage and Hour Division

COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers

LEAVE RIGHTS

- ▶ Coronavirus-related leave requests may or may not be covered by FMLA
- ▶ Issue is whether employee or family member has serious health condition or just wants to stay home to avoid getting sick
- ▶ Check mini-FMLA's and paid sick leave laws outside SC and company policies
- ▶ Even if not legally required to, employer can voluntarily offer unpaid leave

SC QUARANTINE LEAVE LAW

- ▶ SC Code Ann. Sec. 44-4-530(E)
 - ▶ Employer may not “fire, demote, or otherwise discriminate against an employee complying with an isolation or quarantine” ordered during declared public health emergency
 - ▶ Employer may require employee to use available annual or sick leave to comply with the order
- ▶ Similar laws in some other states

DISABILITY DISCRIMINATION

- ▶ EEOC Pandemic Preparedness Technical Assistance Document
 - ▶ From 2009 at time of H1N1 flu pandemic
 - ▶ Reaffirmed in EEOC news release on March 4, 2020
 - ▶ ADA does “not interfere with or prevent employers from following” CDC guidance



PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT

A. PURPOSE

This technical assistance document provides information about Titles I and V of the [Americans with Disabilities Act](#) (ADA) and pandemic planning in the workplace.⁽¹⁾ It identifies established ADA principles that are relevant to questions frequently asked about workplace pandemic planning such as:

DISABILITY DISCRIMINATION

- ▶ Addresses whether employer can take temperature of employees at work to determine if they are infected
- ▶ Q: “During a pandemic, may an ADA-covered employer take its employees’ temperatures to determine whether they have a fever?”
- ▶ A: “Generally, measuring an employee’s body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus [], or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.”

DISABILITY DISCRIMINATION

- ▶ Under ADA, medical exams are not allowed unless they are
 - ▶ Job-related and consistent with business necessity, or
 - ▶ Employer has reasonable belief employee poses direct threat to him/herself or others
- ▶ So normally cannot require employees to submit to temperature checks, but it should be OK if and when coronavirus becomes widespread in community and guidance from the CDC or DHEC indicates this should be done

DISABILITY DISCRIMINATION

- ▶ Also addresses when employer can and cannot exclude employees with disabilities from workplace
- ▶ Q. “May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?”
- ▶ A. “Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or ... the illness were serious enough to pose a direct threat.”

DISABILITY DISCRIMINATION

- ▶ ADA prohibits employers from excluding employees with disabilities from workplace for health or safety reasons unless they pose “direct threat” to themselves or others (significant risk of substantial harm even with reasonable accommodation)
- ▶ EEOC TAD shows employers have more leeway in deciding when employees pose direct threat in health emergency
- ▶ Follow guidance of federal, state, and local officials and make decisions based on objective factors

DISABILITY DISCRIMINATION

- ▶ Reminder about ADA confidentiality requirement from TAD:
 - ▶ “Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.”

NATIONAL ORIGIN DISCRIMINATION

- ▶ When implementing health and safety measures, base decisions on objective factors like recent travel to high-risk area, not protected characteristics like national origin
- ▶ From CDC 2/05/2020 Fact Sheet: “DO NOT show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have [COVID-19].”

ADVANCE NOTICE OF SOME LAYOFFS AND CLOSINGS

- ▶ If forced to suspend operations because of COVID-19, is it necessary to provide advance notice?
- ▶ WARN Act requires 60 days' advance notice of "mass layoff" or "plant closing"
 - ▶ Applies to businesses with 100 or more full-time employees
 - ▶ Notice to employees and government entities required if 50 or more employees at a single site will experience an "employment loss" (layoff of six months or longer)
 - ▶ Partial exceptions for "unforeseeable business circumstances" and "natural disasters"
 - ▶ Some states (not SC) have "mini-WARN" laws with additional requirements

PROTECTED CONCERTED ACTIVITY

- ▶ What if employees object to travel on behalf of others or in a group?
- ▶ NLRA Sec. 7 protects employees from discipline for engaging in “protected concerted activity for mutual aid or protection”
 - ▶ Two or more employees acting together to improve terms and condition of employment
 - ▶ Or individual action expressly taken on behalf of co-workers
 - ▶ Includes talking with co-workers about working conditions
 - ▶ And “participating in concerted refusal to work in unsafe conditions”

OVERVIEW OF CONTRACT ISSUES

- ▶ Contract Issues
 - ▶ COVID-19 and its Impact on the Global Supply Chain
 - ▶ Returning to Work and “Supply Chain Resilience”
 - ▶ Force Majeure Concepts
 - ▶ Choice of Law: Common Law vs. Civil Law
 - ▶ Some common elements as well
 - ▶ Forum Selection
 - ▶ Force Majeure Certificates

CHINA IS BACK TO WORK – SORT OF

- ▶ Over half of China was subject to travel restrictions of some kind.
- ▶ Resumption of activity has been slow – but steady.
- ▶ Within the past few weeks:
 - ▶ 43% of small and midsize enterprises in China's manufacturing sector had resumed production.
 - ▶ More than 60% of people have returned to their workplace in China's 100 biggest cities.

CHINA IS BACK TO WORK – SORT OF

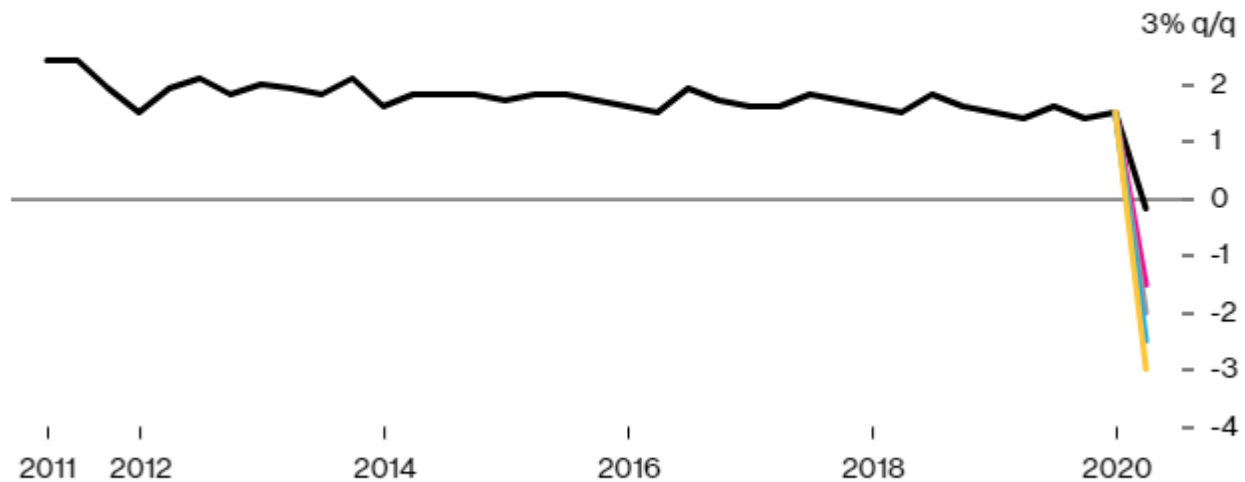
- ▶ Many multinationals have restarted operations.
- ▶ Coal consumption is at its highest rate in a month
- ▶ Property sales growth has restarted – slow but steady
- ▶ But a long way to go:
 - ▶ Manufacturing Purchasing Manager's Index down from 50 to 35.7 in February.
 - ▶ GDP in first quarter may shrink by @2.5%

CONTRACTION FORECAST

Contraction Forecast

China's economy may slip into contraction this quarter

■ GDP growth rate (and median forecast for first quarter) ■ Standard Chartered ■ ANZ
■ Nomura ■ Bloomberg Economics



Source: Bloomberg survey, various reports

Note: Median forecast is as of Feb. 26, other forecasts from Feb. 29 or March

IMMEDIATE ISSUES

- ▶ Significant Logistics Issues in China
 - ▶ Considerable congestion at Chinese ports
- ▶ Challenges as the virus has spread to other major trading partners: Korea, Japan and the EU
- ▶ Continued Travel Bans and Restrictions

SILVER LINING

SUPPLY CHAIN RESILIENCE

FORCE MAJEURE

- ▶ An Act of God
 - ▶ “An act occasioned exclusive by violence of nature without the interference of any human agency.”
- ▶ STEP ONE: ANALYZE THE CONTRACT
 - ▶ Is an Act of God defined? Does it include an epidemic or a pandemic, and does it reference a particular standard (e.g. WHO or CDC)? Is there a distinction between naturally occurring disasters and governmental actions in anticipation or response? Does the force majeure provision cover supply chain disruptions?

SPECIFIC FM CLAUSE APPLICABILITY

- ▶ STEP TWO: Broad catch-all language or list of specific instances that include/might cover COVID-19
- ▶ In this Clause [], "Event of Force Majeure" means an event beyond the control of the Authority and the Operator, which prevents a Party from complying with any of its obligations under this Contract, including but not limited to:
 - ▶ 1.1.1 act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods);
 - ▶ 1.1.2 war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition, or embargo;
 - ▶ 1.1.3 rebellion, revolution, insurrection, or military or usurped power, or civil war;
 - ▶ 1.1.4 contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly;
 - ▶ 1.1.5 riot, commotion, strikes, go slows, lock outs or disorder, unless solely restricted to employees of the Supplier or of his Subcontractors; or
 - ▶ 1.1.6 acts or threats of terrorism.

SPECIFIC FM CLAUSE APPLICABILITY

- ▶ Common Force Majeure Terms:
 - ▶ Civil disorder or disturbance;
 - ▶ Natural disaster of overwhelming proportions;
 - ▶ Disruptions in the supply chain, or materials shortages;
 - ▶ Strikes, lockouts, work stoppages;
 - ▶ Actions of Competent Authority;
 - ▶ Epidemic, plague or other natural calamities and acts of God.

SPECIFIC FM CLAUSE APPLICABILITY

- ▶ STEP THREE: Calendar notice requirements and delineated remedies.
 - ▶ Relieved of obligations? vs. Endeavor to perform so far as reasonably practical?
 - ▶ Allocation of additional costs? Extended time for completion?
 - ▶ Extension of entire contract? Continuation of FM event for a period of ___ days?
- ▶ Unlikely to cover situations where performance is merely (1) more difficult, (2) more expensive, and/or (3) less profitable?

COMMON LAW VS. CIVIL LAW

- ▶ In the absence of a contract force majeure provision, the legal definition of an Act of God may be determined by the governing law of the contract.
- ▶ Force majeure is a recognized doctrine in civil law systems (China and some members of the EU) but not in common law jurisdictions (UK, USA and Hong Kong).
- ▶ **Common thread of unforeseeability, and a causation nexus.**
- ▶ **Common requirements of a severe impact and a duty to mitigate.**

FORUM SELECTION – CHINESE EXAMPLE

- ▶ On February 10, 2020, a spokesperson of the Legislative Affairs Commission of the Standing Committee of the National People's Congress stated that the COVID-19 outbreak, and the government's mitigation measures, constitute force majeure to contracting parties that cannot perform a contract because of those measures.
- ▶ The Hubei Provincial High Court – at the epicenter of the outbreak – recently advised its lower courts that COVID-19 (and, importantly, related governmental measures) constitute force majeure.

FORCE MAJEURE CERTIFICATES



FM CERTIFICATES



中国贸促会商事认证平台

“Force majeure factual proof refers to the factual proof related to force majeure issued by the CCPIT and its authorized branches to the applicant upon application by the applicant, which is a factual proof act in the field of international commercial affairs. The certificate itself will not directly determine that the company encountered a force majeure situation, but will prove that objective facts such as delayed resumption of work and traffic control occurred.”

FM CERTIFICATES

- ▶ Basis is: "Article 8 (6) of the Articles of Association of the China Council for the Promotion of International Trade approved by the State Council stipulates that, as an independent third party, CCPIT can issue all kinds of commercial certificates, including force majeure certificates, and has been widely used and fully proven in practice. In line with international trade practices."
- ▶ "Whether the parties can be completely or partially exempted from liability in the end requires that the parties to a specific contract prove the relationship between the "outbreak and its prevention and control measures" and "the enterprise's failure to perform the contract normally" according to the applicable law of the relevant contract, the specific agreement of the contract, and the specific objective circumstances."

FM CERTIFICATES

Online filing; minimal documentation -
<http://www.rzccpit.com>

FRUSTRATION OF PURPOSE/CONTRACT DOCTRINE

- ▶ Frustration of Contract doctrine provides, generally, that where existence of a specific thing is, either by terms of contract or in contemplation of the parties, necessary for performance of a promise in the contract, duty to perform promise is discharged if thing is no longer in existence at the time for performance.
- ▶ Frustration of Purpose Doctrine excuses a promisor in certain situations when the objectives of contract have been utterly defeated by circumstances arising after formation of agreement, and performance is excused under this rule even though there is no impediment to actual performance.

QUESTIONS/COMMENTS?

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