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COVID-19

Navigating Short-Term Legal Challenges

March 13, 2020

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Agenda

- Introduction
- Cybersecurity and Privacy
- Employment
- Commercial Contracts
- Force Majeure and Contractual Defenses
- Questions



Speakers



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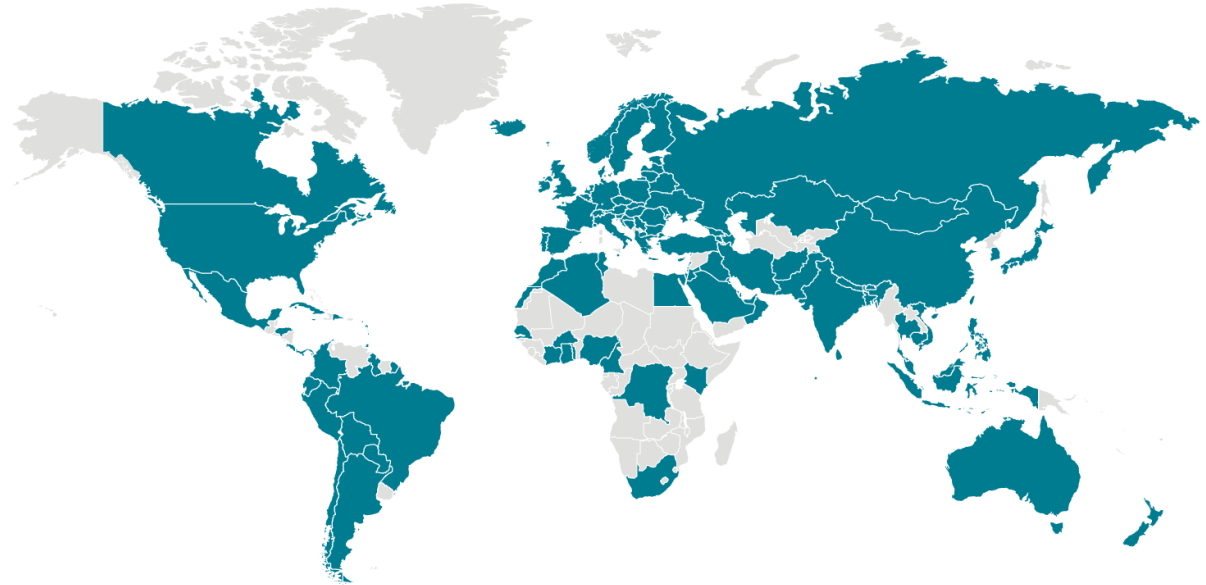
Recent Statistics

Worldwide

- Cases: 125,048
- Deaths: 4,613

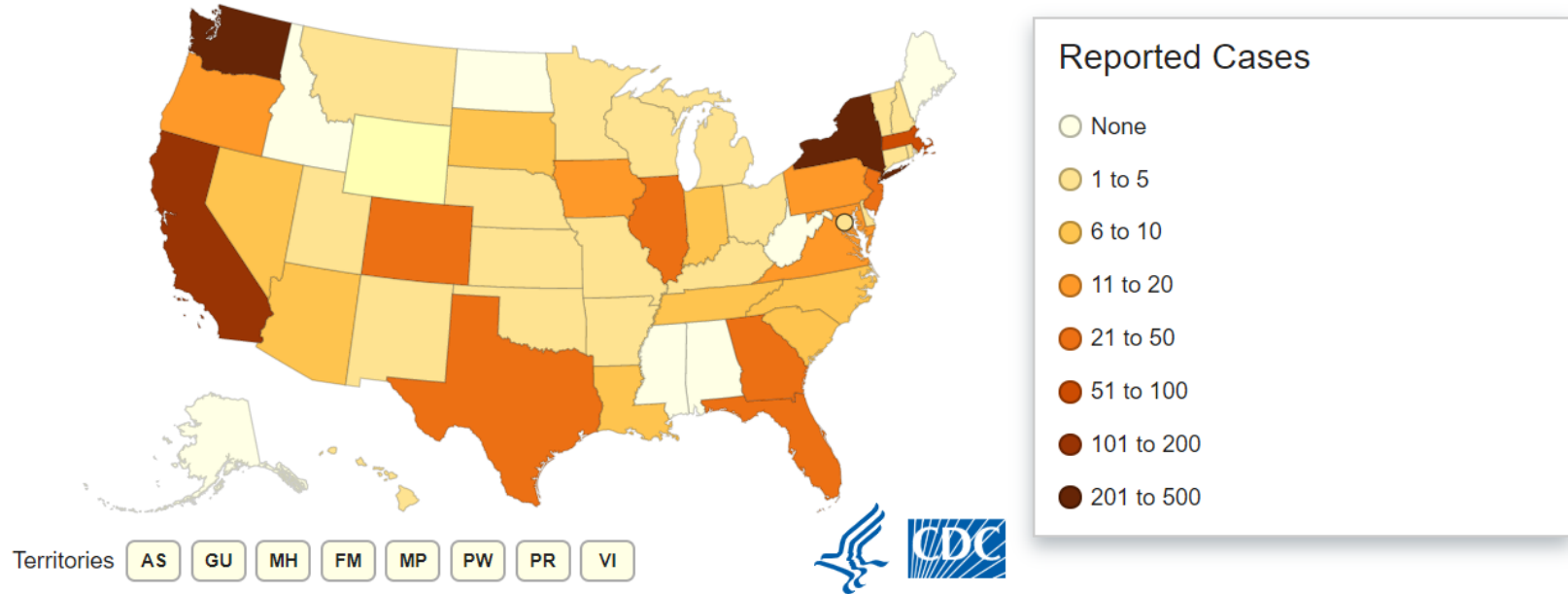
United States

- Cases: 1,215
- Deaths: 36



Source – Worldwide: COVID-19 Situation Report – 52, World Health Organization. Data as reported by national authorities by 10 AM CET 12 March 2020. Source – United States: COVID-19 Situation Summary, Centers for Disease Control and Prevention. Data reviewed as of March 12, 2020.

States Reporting Cases of COVID-19 to CDC*



* Data include both confirmed and presumptive positive cases of COVID-19 reported to CDC or tested at CDC since January 21, 2020, with the exception of testing results for persons repatriated to the United States from Wuhan, China and Japan. State and local public health departments are now testing and publicly reporting their cases. In the event of a discrepancy between CDC cases and cases reported by state and local public health officials, data reported by states should be considered the most up to date.

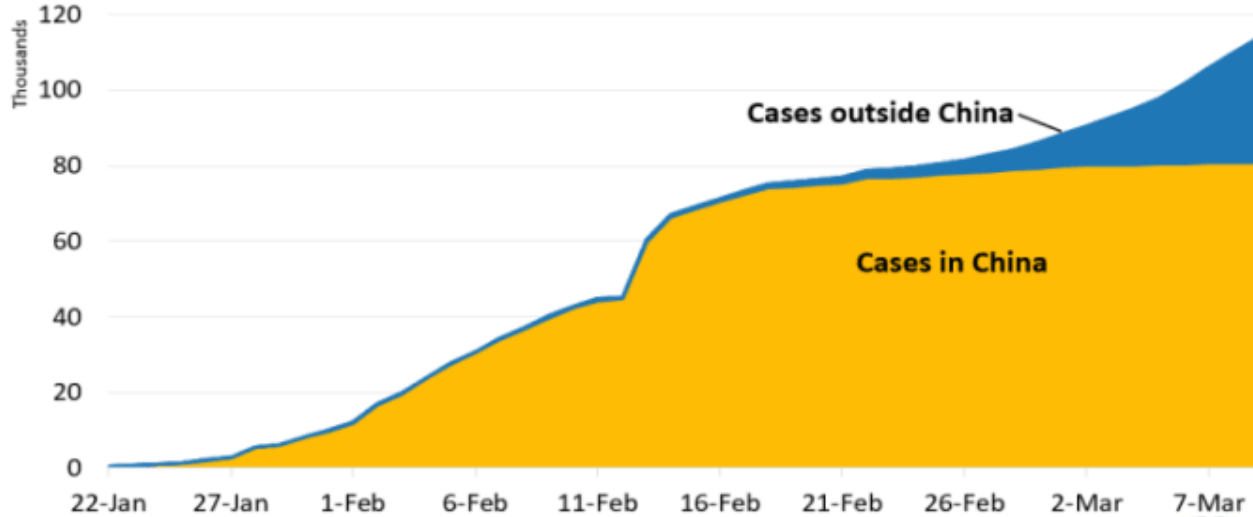
How Businesses are Responding

- Schools in affected areas closed
- Universities going to distance learning
- SEC and other government agencies imposing travel restrictions and work from home protocols
- Numerous conferences and meetings cancelled
- Latest travel restrictions

Lessons from China

Global spread of coronavirus

Confirmed cases of COVID-19 have been increasing outside China



SOURCE: Johns Hopkins University. *Chinese officials changed the way they track the outbreak on Feb 13



Lessons from Italy

- Early undetected transmissions
- Patient One went to hospital, but was not admitted or isolated
- Total confirmed cases: 12,462
- Countrywide Lockdown – 16 million affected

Source: COVID-19 Situation Report – 52, World Health Organization. Data as reported by national authorities by 10 AM CET 12 March 2020.

Privacy & Cybersecurity

Tara N. Cho
Partner – Raleigh, NC

Cybersecurity Reminders

- Ongoing Communications and Refresher Training
 - Tell employees how company communications and updates will be provided
 - Direct employees to review relevant policies, procedures and related technical controls
 - Don't let tunnel vision on the matter at hand create additional risk exposure
- Remote Workers and Virtual Environments
 - Remind employees of security requirements and permissible uses for VPN or other remote network access
 - Reinforce device management policies and controls
 - Ensure infrastructure support / business continuity teams are on the ready and load test (as applicable)

Cybersecurity Reminders

- Remain Vigilant and Remind Employees to Do the Same
 - Be prepared for phishing attacks, clickbait and other cyber scams
 - Use trusted resources such as government websites
 - Verify an organization's authenticity (e.g., charitable organizations)

Privacy Considerations

- Collecting or Accessing Employee or Client/Customer Personal Information
 - Continue to follow internal processes and legal standards when collecting personal data (including health information or travel information)
 - Consider whether new policies should be developed, specific to data collection and processing related to triaging COVID-19 related issues
- Disclosing Personal Information
 - Ensure disclosures to government officials or other third parties are permissible by law and privacy notices as well as client/customer contracts

Employment Considerations

John E. Pueschel

Partner – Winston-Salem, NC

Policy Implications

- **ADA**
 - COVID-19 is not a disability
 - Avoid disability related inquires
 - Avoid medical exams and temperature testing should be avoided
 - Reasonable accommodations
 - Sending an employee home is likely not a valid basis for a “regarded as disabled” claim
- **NLRB**
 - Employees may refuse to work with an employee who was or potentially exposed due to safety concerns
- **FMLA**
 - Common symptoms of COVID-19 are not considered serious health condition
 - Doctor’s Note?
- **FLSA**
 - Non-Exempt vs. Exempt
 - Time Tracking for Remote Work
- **OSHA**
 - General Duty
 - Employers can refuse to allow employees to wear masks under most circumstances

Prevention, Exclusion and Remote Work

General Prevention

- Communicate to reduce anxiety and fear
- Limit visitors, conferences and events
- Actively remind sick employees to stay home
- Remind employees about hand hygiene
- Implement travel restrictions

Employee Exclusion

- When can we send an employee home or require them to stay home?
 - Symptomatic
 - Family Members
- Can I require incubation periods after personal travel?
 - Yes, apply CDC guidelines
- What if an employee refuses to come into work out of fear?
 - Generally, not permissible
- Self-quarantined employees can return to work once they are symptom free based on CDC requirements.

Remote Work

- Employers can require employees to work from home
 - ADA Reasonable Accommodations
- IT capability
- Data Security



Benefits: Pay, PTO and Sick Leave

General Pay Rules

- Exempt and Non-exempt employees should be allowed to take leave in accordance with state law and FMLA policies
- Exempt employees are entitled to pay for any week in which work is performed
- Employees are not entitled to pay for weeks of furlough or a facility closure
- Non-Exempt employees are entitled to pay only for time worked
- Employers may have to pay employees for reporting to work, even if they are sent home
- Be mindful of predictive scheduling laws

PTO and Sick Leave

- Encourage self-reporting, self-monitoring and remote work
- Follow existing policies but remain flexible
- Employee out of leave what are our options?
 - Allow unpaid or paid leave, or remote work
- New Hire not entitled to leave for 90 days, what can we do?
 - Relax current policies and allow leave
- Employee refuses to come in and can not work from home?
 - Allow unpaid or paid leave
- FMLA is generally unpaid leave



Exposed Employees and the Return to Work

Exposed: What now?

- Send employees home
- Reporting Requirements
- Employee Notification and Communication Plan
- Cleaning the Workplace
- Short Term Disability and Workers Compensation
- Confidentiality

Return to Work

- Monitor and follow procedures from federal and state agencies
- Confirm employee is symptom free
 - Doctor's Note?
 - CDC guidelines
- If a vaccine becomes available can we require it?
 - Generally, no

Considerations

- Furloughs and lay-offs
 - WARN Act
 - Notification
 - Unemployment Insurance

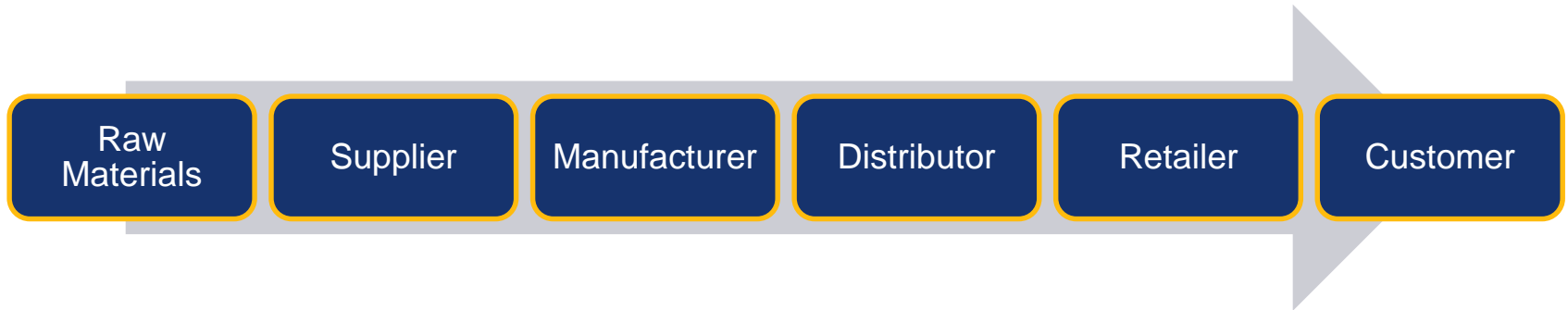


Commercial Contracts

Dorinda L. Peacock
Partner – Raleigh, NC

COVID-19 will disrupt companies on both the supply and demand side

- Reduced demand or inability to meet demand due to supply constraints may reduce revenue and profits
- Ability to react to decreased supply or demand will be constrained by the rights and restrictions in commercial contracts
- Companies must make an accurate assessment of the biggest potential disruptions to supply and demand, then take steps to mitigate those disruptions as permitted by its contracts



COVID-19 will disrupt companies on both the supply and demand side

Supply Disruptions

- Supply chain disruption
 - Raw materials or goods manufactured in China, South Korea, Italy, or other hard-hit areas
 - Transportation and shipping delays
 - Disruptions may lag behind outbreaks and not immediately be rectified if an area begins to recover
- Labor disruption
 - Office closures
 - Public transportation closures
 - Employees are quarantined and unable to work from home
 - Sick employees

Demand Disruptions

- Reduction in demand directly due to virus containment efforts
 - Reduced travel and hospitality
 - Lock-downs and quarantines
 - Cancelled events
- Reduction in demand due to changed consumer spending behavior
 - Medical costs
 - Emergency savings
 - Limit discretionary spending



In the near term, companies should act to anticipate and mitigate disruptions to supply and demand

- Constantly monitor the situation
 - Understand geography of customers, suppliers and employees and stay abreast of news in those areas
 - Understand pressures on customers and suppliers to anticipate potential issues
- Review contracts with key suppliers and customers to understand company's obligations and rights
 - Payment and reporting obligations
 - Minimum delivery requirements
 - Covenants
 - Notice obligations
 - Force majeure
 - Breach, defaults and cross-defaults
- Review contracts with key suppliers and customers to understand restrictions and requirements to make alternative arrangements
 - Notice
 - Mitigation
 - Request for assurances
 - Exclusivity
 - Termination rights

In the near term, companies should act to anticipate and mitigate disruptions to supply and demand

- Analyze insurance policies to determine whether damages may be covered, e.g., under business interruption or trade disruption insurance
- Maintain current contact information of key suppliers and customers and proactively communicate
 - Request assurances of performance from suppliers
 - Discuss potential grace periods or leniency
 - Renegotiate agreements
- Prioritize / allocate resources based on strategic and financial needs, within contractual constraints

Going forward, companies should take steps to increase contractual flexibility to react to disruptions

- Review form customer and supplier agreements and revise as necessary to increase flexibility in the event of disruption
- Ensure contracts coming up for renewal are renegotiated to include more flexible terms if possible
- Develop and maintain backup plans
 - Diversify the supply chain and create redundancies
 - Avoid exclusive supplier relationships where possible, or allow exceptions for extenuating circumstances
- Analyze insurance policies to determine whether the right types and levels of coverage for crisis situations are in place
- Keep track of “lessons learned”

Force Majeure & Contractual Defenses

Jennifer S. Collins
Partner – Atlanta, GA

Defenses that Relieve Performance

- Impossibility/Impracticality
- Frustration of Purpose
- Force Majeure

Impracticability/Impossibility

- Performance excessively burdensome— impracticable—by a supervening event.
- The supervening event is:
 - Unforeseeable (but not inconceivable)
 - Not the excused party's fault
 - Inconsistent with the basic assumption of the parties at the time of contract
 - Something that a reasonable party would not have guarded against in the contract. . . . Tomorrow's contract?

Frustration of Purpose

- Supervening event fundamentally changes the nature of a contract and makes one party's performance worthless to the other.
- Nothing to do with inability to perform.

Force Majeure Clause

- Non-performing party seeking to avoid obligations based on contract provision
- Plain language, narrow construction
- Burden of demonstrating:
 - Existence of a Force Majeure Event
 - Efforts to fulfill non-performing parties' contractual obligation
 - Causation requirement

All of these...

- Burden: like an affirmative defense
- Not your fault, no lack of diligence
- Not mere preference or economic hardship
- Contract does not provide that you assumed the risk
- Mitigation required

Case Law – On Point?

- Unique nature of unfolding events
 - Duration unknown
 - Impact unknown
 - Containment measures and effectiveness unknown
- Emotional impact
- Domestic vs. international dealings

Continuum

More like a defense.



Considerations

- Look at the actual contract
- Think about notice
- Reputational risks?
- If it's really a business preference decision, make the best one you can and see if you can strike a deal for the future
 - Mitigation

Conclusion & Questions

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