## China

### MEP Issues Implementing Opinions on Advocating the Treatment of Environmental Pollution by Third Parties

On August 9, 2017, the Ministry of Environmental Protection ("MEP") issued the Implementing Opinions on Advocating the Treatment of Environmental Pollution by Third Parties (the "Opinions").

The Opinions state that efforts should be made under the guideline of cleaning up environmental pollution in a market-oriented, professional and industrialized manner to make progress in establishing a new environmental pollution treatment mechanism under which the polluter pays principle and the third-party treatment of pollution integrate with the pollutant discharge permit regime, introducing private investment into the pollution prevention, and continuously improving the treatment efficiency and professional level. Meanwhile, we should stick to the principles of imposing the responsibilities of cleaning up environmental pollution on polluters as the subjects, combining the supervision, law-enforcement and information disclosure, and giving policy guidance and launching pilot programs. For this purpose, the Opinions ascertain a series of tasks, including "specifying third parties' responsibilities in treatment", "standardizing requirements on discharging technologies and management for enterprises" and "innovating the third-party treatment mechanism and their ways to eliminate environmental pollution". Additionally, the Opinions call for encouraging the innovation of green finance, and urging local governments to set up green development funds and actively introduce private investment to give financial support to treatment projects undertaken by third parties. Moreover, ways will be explored to introduce the third-party payment mechanism and subject payment to environmental performance, with an attempt to safeguard rights and interests of pollutant discharging entities and third parties engaged in the treatment.

### Comments Sought on the Technical Specification for Application and Issuance of Pollutant Discharge Permit: Textile and Dyeing Industry

On August 7, 2017, the General Office of the Ministry of Environmental Protection ("MEP") issued the Technical Specification for Application and Issuance of Pollutant Discharge Permit: Textile and Dyeing Industry (Draft for Comment) (the "Draft for Comment") to solicit comments from the entities concerned before September 7, 2017.

The Draft for Comment could be used as guidance both for pollutant emission entities in the textile and dyeing industry in filling in the Application Form for the Pollutant Discharge Permit and submitting relevant application information through the application system under the national pollutant discharge permit management information platform, and for approval authorities in reviewing and confirming licensing requirements on pollutant discharge permits for pollutant emission entities in the textile and dyeing industry. The Draft for Comment sets forth requirements on reporting basic information about pollutant emission entities in the textile and dyeing industry in respect of the application and issuance of pollutant discharge permits, methods to determine the permitted emission limits, methods to calculate the amount of pollutants discharged in effect, methods to judge compliance, self-monitoring, environmental management standing books and implementation reports for pollutant discharge permits, and other requirements on environmental management, in addition to requirements on feasible technologies used to prevent and clean up pollution generated in the textile and dyeing industry.

**MOFCOM Introduces Amendments to the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises**

On July 30, 2017, the Ministry of Commerce ("MOFCOM") distributed the Decision on Amending the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises (the "Decision") and the Announcement on Relevant Matters concerning the Administration of the Record-filing of the Incorporation and Change of Foreign-invested Enterprises. The Decision becomes effective as of the issuance date.

The Decision clearly states that where the strategic investment made by a foreign investor in a non-foreign-invested listed company falls under the scope prescribed in the Measures for record-filing, the relevant party should go through formalities to file a record by filling out the Establishment Reporting Form within 30 days before or after the registration of securities with the securities depository and clearing agency. Where the strategic investment introduced by a foreign-invested public corporation from a new foreign investor falls under the scope for record-filing, the relevant party should go through formalities to change the record previously filed by filling out the Change Reporting Form within 30 days before or after the registration of securities with the securities depository and clearing agency. Once the record-filing is completed, formalities should be handled to update the filed record within five days from the date in which the obligor for information disclosure fulfills its obligation to disclose information as required under the Securities Law and relevant provisions, provided that there is any change to the information filed in the record for the strategic investment.

**AQSIQ Calls for Accelerating the Reform of Trying out Simplified Approval Procedures for Industrial Product Production Permits**

On July 28, 2017, the General Administration of Quality Supervision, Inspection and Quarantine ("AQSIQ") issued the Circular on Accelerating the Reform of Trying out Simplified Approval Procedures for Industrial Product Production Permits (the "Circular").

The Circular states that the simplified approval procedures will be piloted in advance. First, selected as the first group of pilot places, six provinces and municipalities directly under the Central Government, including Beijing, Shanghai, Jiangsu, Zhejiang, Shandong, and Guangdong, will carry out the pilot program as of August 1, 2017, a month earlier than the previously scheduled date which is September 1, 2017. Second, for the first group of the abovementioned six pilot provinces and municipalities directly under the Central Government, the authority of approving and granting production permits for eight types of products, such as feed milling machinery and construction winches, will be delegated to provincial departments of quality supervision as of August 1, 2017, also a month ahead of the scheduled date which is September 1, 2017. The Circular, meanwhile, clearly states that in terms of the production inspection before the elimination of relevant permits, a report submitted voluntarily by an enterprise to testify the qualification of its products under inspection should be the inspection report generated within one year for the identical product unit; and the inspection report provided by the enterprise should cover all test items as required in the implementing rules for production permits.

For more information on any of the items included for China, please feel free to call Nicholas Chan.

## Hong Kong

### The proposal to abolish MPF set- off mechanism

In certain circumstances on termination, an employee may be entitled to a statutory Severance Payment (SP) on redundancy, or Long Service Payment (LSP) on dismissal with more than 5 years' service, in accordance with the Employment Ordinance (EO). In case of a monthly rated employee, the calculation of both SP and LSP is two-thirds of the employee's last full month's wages or two-thirds of HK$22,500 whichever is higher, multiplied by his reckonable years of service. The maximum amount of SP or LSP is currently HK$390,000.

Under the current legal regime, employers have the right to offset the SP/LSP against the accrued MPF benefits that derive from the employer's contributions to the employee's fund. They are at discretion to implement either of the following:

- After actually paying to an employee SP or LSP in accordance with the Employment Ordinance, an employer can apply to the MPF trustee with supporting evidence for re-payment of the relevant amount from the employee's accrued benefits derived from the employer's contributions; or
- The employer can set off the accrued value of benefits from the employer's contributions (as ascertained from the MPF trustee) against the calculation of SP and LSP and pay to the employee only the net balance of the SP or LSP (if any).

Earlier this year, the government proposed to:

- Reduce the maximum for SP and LSP from HK$390,000 to around HK$200,000. The abolition of the right to reduce SP and LSP will have no retrospective effect. In other words, employers' MPF contributions before the implementation date of the proposal will be "grandfathered" and available to reduce SP and LSP;
- The formula for calculating SP and LSP will be amended so that the payments are reduced from the implementation date. Currently the employee is entitled to two-thirds of one month's wages for each year of service up to a capped amount; this will go down to one half a month's wages; and
- There will be a rebate scheme from the Government over a 10 year period as a transitional arrangement in order to help employers and share part of the expenses.

Pursuant to the proposed changes, employees' welfare will no longer be unreasonably curtailed following the gradual abolition of the setoff scheme whereas the reluctance of employers can be mitigated. However, the latest development on this proposal will still be subject to possible further consultations and review.

### Imprisonment of Director after defaulting on MPF contributions

Mandatory Provident Fund Scheme ordinance (Cap. 485) provides that any employer who, without reasonable excuse, fails to make a timely payment of mandatory contributions commits an offence and could be fined up to HKD 450,000 and face up to four year's imprisonment. On 10 July 2017, a company director who failed to comply with a court order to pay outstanding MPF contributions was sentenced to 21 days' imprisonment. The Court displayed a strong attitude against the default of MPF contributions by the employer, by way of a prison sentence.

### Arbitration on your Intellectual Property Rights

The Arbitration (Amendment) Ordinance 2017 was passed on 14 June 2017 and gazetted on

23 June 2017. It introduces a new Part 11A (s.103A to 103J) to the Arbitration Ordinance (Cap. 609), which will come into force on 1 January 2018, to the effect that all disputes of intellectual property rights can be arbitrated and that it is not against Hong Kong public policy to enforce arbitral awards involving intellectual property rights.

Correspondingly the Amendment Ordinance also clarifies some of the provisions of the Arbitration Ordinance to make it more efficient and responsive to the concerns of parties. The amendments are a welcome update to the law.

**Employment (Amendment) Bill 2017**

On 17 May 2017, the Employment (Amendment) Bill 2017 was introduced into the Legislative Council for first and second reading. This pending bill is largely similar to the Employment (Amendment) Bill 2016 which lapsed in the last Legislative Council term. The second meeting of the Bill Committee on the Employment (Amendment) Bill 2017 will be held on 17 October 2017.

Amongst other things, the proposed legislation confers on the Labour Tribunal the discretionary power to grant an order for reinstatement or reengagement irrespective of the employers' readiness. Any employer who fails to comply with the order will face a compensation of 3 times the employee's average monthly wages subject to a maximum of $72,500.

It should be noted that there is usually a breakdown of mutual confidence and trust in an employment relationship when a case is bought to the Labour Tribunal, and despite the clear intention of lawmakers to offer holistic protection of a career to employees who have been unlawfully or unreasonably dismissed, further observation about the practicality of reinstatement orders and efficiency of the new mechanism is awaited.

For more information on any of the items included for Hong Kong, please feel free to call Nicholas Chan.

## United States

**EEOC Employer-Sponsored Wellness Programs – Federal Decision**

On August 22, 2017, in AARP v. EEOC, D.D.C., No. 16-2113, a federal judge found incentives offered to employees in connection with employer-sponsored wellness programs run afoul of regulations protecting the collection of sensitive medical information from employees. The case stems from a challenge the American Association of Retired Persons ("AARP"), a nonprofit organization representing Americans over the age of 50, filed against U.S. Equal Employment Opportunity Commission ("EEOC").

Employer-sponsored wellness program are popular in many work places as a means of promoting employee health and reducing healthcare costs. Two regulations, however, generally forbid employers from requesting personal health information from employees with narrow exceptions for voluntary programs for workers volunteering their information: the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). The ADA prohibits employers from requiring medical examinations or inquiring whether an individual has a disability unless the inquiry is both job-related and consistent with business necessity. GINA prohibits employers from requesting, requiring, or purchasing genetic information from employees or their family members, with an exception that permits employers to collect information as part of a wellness program as long as the employee's provision of the information is voluntary.

AARP argued incentives to join employer-sponsored wellness programs were contrary to the laws protecting personal health

information and were inconsistent with requirements that participation is voluntary. They claimed that under the regulations, workers wanting to keep their medical and genetic data private would essentially face penalties that increased their health insurance costs. The EEOC maintained the incentives fell within the exceptions provided for in the ADA and GINA, and thus are allowed.

The judge for the District of Columbia sided with the AARP and held the authorization of incentives for participation in employer-sponsored wellness programs was arbitrary and capricious. "The central issue here results from the tension that exists between the laudable goals behind such wellness programs, and the equally important interests promoted by the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA)." The judge noted the EEOC failed to justify the incentives and penalties does not render participation in the plan as "involuntary." The judge then ordered the EEOC to address the deficiencies and revise the rule, though until that revision is finalized, the current rules will remain in place to avoid disruption.

Employers can continue to follow the current rules for the use of incentive in employer-sponsored wellness programs for now, however, employers should anticipate revised rules in the near future. A time frame for when the revised rules will be finalized are not clear, nor whether a court will accept the EEOC's revisions. In the interim, employers will need to keep an eye out and be prepared to address the forthcoming revisions.

**DOL Overtime Rule – Federal Update**

In a previous update, we discussed the November 2016 decision by the Eastern District of Texas to grant a preliminary injunction delaying the implementation of the U.S. Department of Labor's ("DOL") Fair Labor Standards Act ("FLSA") Overtime Rule. As a quick refresher, the Overtime Rule doubled the salary threshold for exempt employees from $455 per week ($23,660 annually) to $921 per week ($47,892 annually). Exempt employees receive time-and-a-half pay for any time worked above 40 hours in a given week. The Overtime Rule was set to take effect in December when the judge granted the preliminary injunction, which prevented the DOL from implementing the Overtime Rule nationwide pending further order of the court.

On August 31, 2017, the federal judge granted summary judgment in favor of challengers of the Overtime Rule, stating the DOL improperly looked at salaries instead of job descriptions when determining whether workers should be eligible for overtime pay. The Department of Justice ("DOJ") appealed to the 5th Circuit Court of Appeals, requesting the appellate court affirm the DOL's authority to take salary into account for overtime purposes. However, on September 5, 2017, the DOJ announced that it will not defend the Overtime Rule and requested the appellate court to drop its appeal.

Labor Secretary Alexander Acosta has indicated the DOL may issue a new rule with a moderate salary threshold bump. Until the revised rule is drafted, companies will not have to take any action and any previous plans to reclassify U.S. employees based on salary increases in line with the Obama administration rule can be shelved. It's not clear if or when a new overtime rule will be implemented and companies plc should continue to monitor the DOL.

**Specific Jurisdiction – Update to Bristol-Myers Squibb U.S. Supreme Court Decision**

In a previous post, we discussed the U.S. Supreme Court decision in *Bristol-Meyers Squibb Co. v. Superior Court of California*, where the Court held that the exercise of personal jurisdiction must comport with the requirements of the Due Process Clause of the 14th Amendment. In *Bristol-Meyers Squibb,* plaintiff's claims would be exactly the same even if the defendant had no forum contacts, there is no basis for specific jurisdiction because the case does not sufficiently arise out of or relate to the defendant's forum activities. Since the June 2017 decision, several courts have applied the Supreme Court's holding and dismissed out of state plaintiff's claims on the basis of lack of personal jurisdiction.

In *Siegfried et al v. Boehringer Ingelheim Pharmaceuticals, Inc. et al*, case number 4:16-cv-01942 (June 27, 2017), Missouri plaintiffs joined out-of-state plaintiffs in suit against Boehringer Ingelheim Pharmaceuticals Inc. and Boehringer Ingelheim International GmbH (collectively "Boehringer") in a Missouri District Court. The plaintiffs claimed they were injured by Boehringer's drug, Pradaxa. Similar to the *Bristol-Meyers Squibb* case, none of the out-of-state plaintiffs were prescribed the drug in Missouri, nor did they suffer any injuries or receive treatment in Missouri. The Missouri court examined the issue of personal jurisdiction first, noting it was now a more straightforward inquiry after the *Bristol-Meyers Squibb* decision. The court then dismissed the out-of-state plaintiffs' claims, holding their injuries had no connection with Missouri.

In *Jordan et al v. Bayer Corp. et al,* case number 4:17-cv-00865 (July 14, 2017), seven plaintiffs in Missouri joined 94 out-of-state plaintiffs in suit against Bayer Corporation, Bayer Essure Inc., Bayer HealthCare LLC, and Bayer Healthcare Pharmaceuticals Inc. (collectively "Bayer") in a Missouri District Court. As with *Siegfried* and *Bristol-Meyers Squibb,* the plaintiffs alleged injury from a medical device manufactured by Bayer, even though none of the out-of-state plaintiffs acquired the device from a Missouri source, nor were they injured or received treatment in Missouri. The court again examined the issue of personal jurisdiction first as "the more straightforward inquiry" following *Bristol-Meyers Squibb*. The court held that, with the exception of one Illinois resident, none of the out-of-state plaintiffs could establish sufficient contacts with Missouri and dismissed those plaintiffs for lack of personal jurisdiction.

It appears there's a pattern developing where courts are now looking first to the issue of personal jurisdiction over subject matter jurisdiction because the *Bristol-Meyers Squibb* decision had made it a straightforward inquiry. Now that plaintiffs can no longer forum shop to notoriously plaintiff-friendly venues by simply adding at least one in-state plaintiff to establish jurisdiction, manufacturers that may be the subject of multi-plaintiff product liability suits can now look to personal jurisdiction to immediately seek dismissal and avoid lengthy and costly litigation. It should be noted, however, that there is one case in the 9th Circuit which has narrowly construed the Supreme Court's decision and found that defendant manufacturer's clinical trials necessary for NDA approval were conducted in the forum state of California and therefore created sufficient contacts for personal jurisdiction. Companies should consider limiting contacts with states perceived to be plaintiff friendly to

avoid becoming subject to that state's jurisdictional reach.

For more information on any of the items included for the US, please feel free to call Huu Nguyen or Sarah Rathke.

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