

Reopening Michigan: Legal Issues to Consider



COVID-19

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Troy Cumings

- Over 20 years of government policy experience in Michigan, Washington D.C. and around the world
- Focuses on policies impacting businesses with a Michigan presence
- Lead advocate in law, policy and politics in health care, tax, economic incentives, labor, banking, etc.



Ed Bardelli

- Nearly 25 years as an employment and commercial litigator
- Represents manufacturers, utility companies, banks and more
- Defends against employment disputes that include race, sex, age, FMLA and disability discrimination claims and harassment, retaliation and whistleblower claims

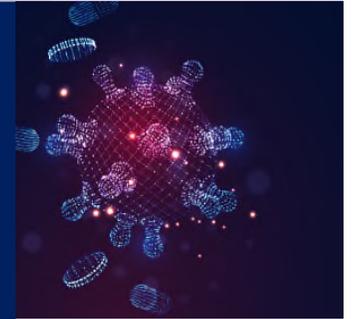


Michael Brady

- Nearly 23 years as a business and class action litigator
- Regularly represents automotive suppliers in contract negotiations and supply chain disputes
- Defends companies in class action cases involving antitrust, consumer and securities fraud

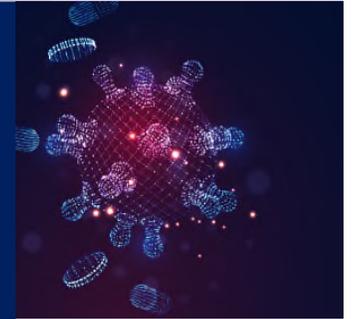
Lansing Update

- 60 executive orders addressing COVID-19 issues
- Governor revises and extends stay-home order on Friday
- Legislature forms joint oversight committee; Senate passes legislation that resolves potential conflict between emergency acts
- Governor proposes Michigan Safe Start Plan
- Governor requests additional 28-day extension of states of emergency and disaster from legislature



What did the Governor's recent executive orders do?

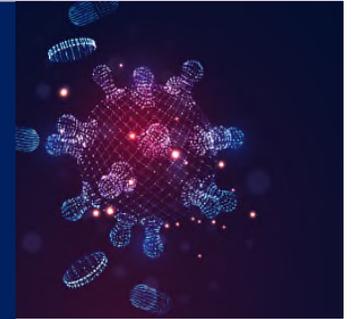
- Executive Order 2020-59
 - Extended stay-home order to May 15
 - Eased some restrictions
- Executive Order 2020-60
 - Food-selling establishments, grocery stores, and pharmacies



Revisions to Stay-Home Order

Workers who perform resumed activities:

- Process remote orders for curbside pickup
- bike maintenance/repair
- garden stores, nurseries, lawn care, pest control, landscaping operations – subject to enhanced restrictions
- maintenance workers and groundskeepers necessary to maintain safety and sanitation of places of outdoor recreation (but no provision of items to individuals) – subject to enhanced restrictions
- moving or storage operations – subject to enhanced restrictions



Revisions to Stay-Home Order, cont'd



Enhanced restrictions for workers who perform resumed activities:

- Barring gatherings of any size in which people cannot maintain 6-foot distance
- Limiting in-person interaction with clients to the “maximum extent possible”
- Providing PPE such as gloves, goggles, face shields, and face masks “as appropriate for the activity being performed”
- Adopting protocols to limit the sharing of tools and equipment “to the maximum extent possible” and to ensure frequent and thorough cleaning of tools, equipment, and frequently-touched surfaces

Revisions to Stay-Home Order, cont'd



Face-mask restrictions

- Any individual must wear face covering “when in any enclosed public space”
- All businesses and operations whose workers perform in-person work must provide non-medical grade face coverings to workers
- N95 and surgical masks reserved for healthcare professionals and first responders
- Elliott-Larsen nondiscrimination protections apply to persons wearing mask

Revisions to Stay-Home Order, cont'd

Eliminates requirements for big-box stores to close areas of the store:

- Carpet or flooring
- Furniture
- Garden centers and plant nurseries
- Paint

Eliminates ban on advertising vacation properties and non-essential goods



Revisions to Stay-Home Order, cont'd

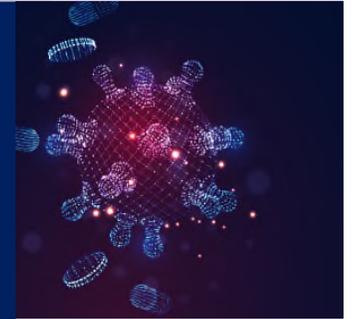
Low-risk activities allowed:

- Motorized boating
- Golfing, no carts
- Traveling between homes



What about the legislature?

- Carefully returning to cadence – regular session and limited committee meetings
- Senate's legislation
- Budget



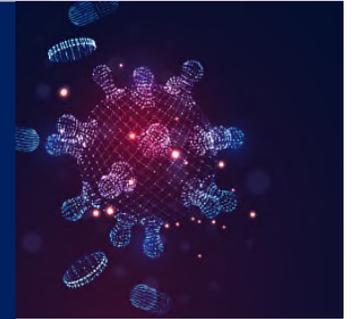
What about the reopening plan?

- Michigan Economic Recovery Council
 - Public health advisory committee
 - Business advisory committee
 - Set of recommendations for how the Governor can stage and sequence a return to normal operations for various industries when order is lifted for non-essential workers.
- Midwest Governors – Partnership to Reopen Regional Economy



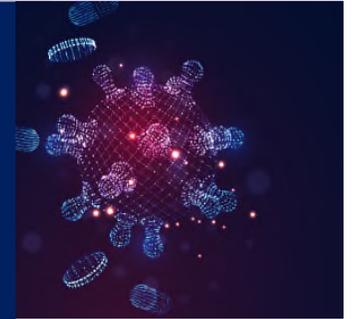
Michigan Safe Start Plan

- Restart triggers
- Regions
- Phased decision-making framework
- Risk categories for occupation types
- Risk mitigation

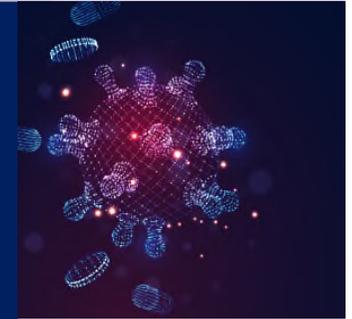


Restart triggers

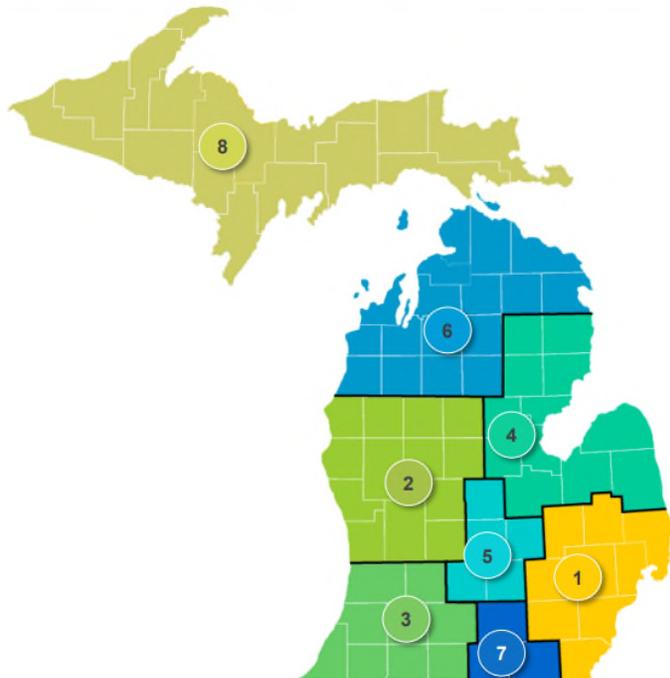
- Flatten the curve – epidemic spread
- Safely diagnose and treat patients – healthcare system capacity
- Track and isolate contacts – public health capacity



Regions

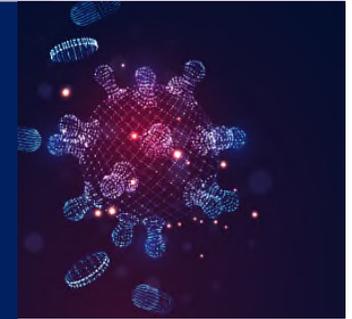


Michigan Economic Recovery Council Reporting Regions

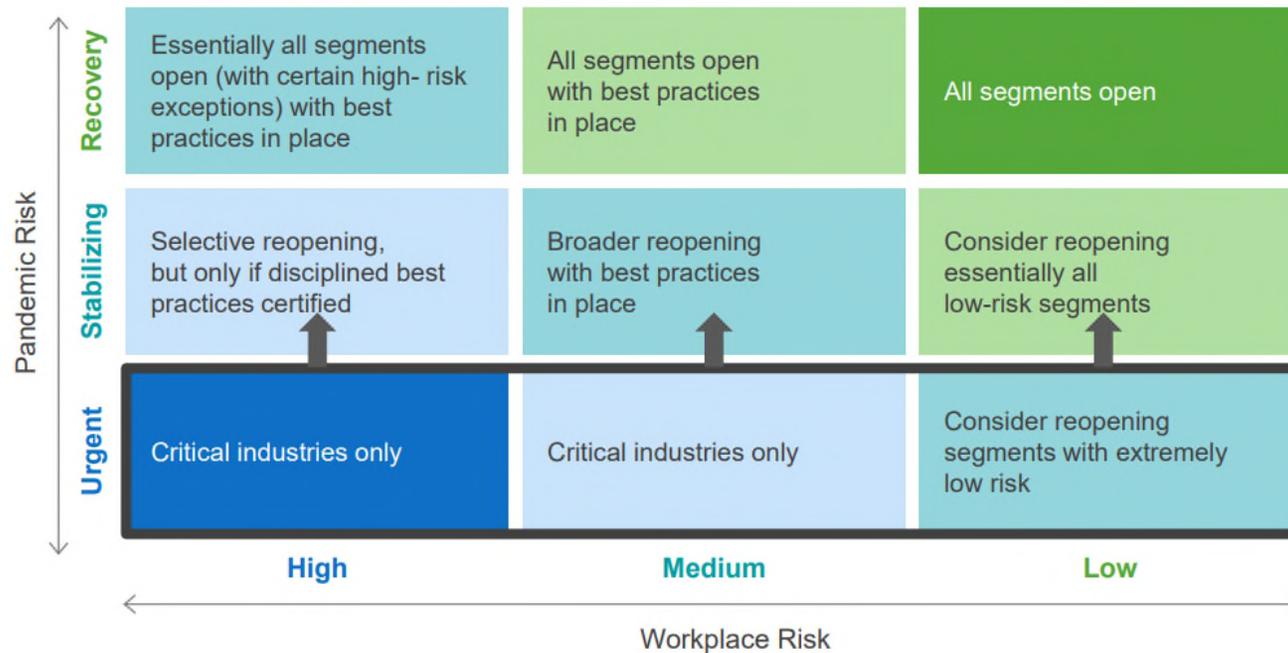


MERC Regions	Population	% of total
1 Detroit Region	5,243,543	52.5%
2 Grand Rapids Region	1,535,115	15.4%
3 Kalamazoo Region	964,202	9.7%
4 Saginaw Region	606,319	6.1%
5 Lansing Region	591,102	5.9%
6 Traverse City Region	445,159	4.5%
7 Jackson Region	302,566	3.0%
8 Upper Peninsula	298,851	3.0%
Total Michigan	9,986,857	100.0%

Decision-making framework



Framework for making return to work decisions



Occupations

Office	Schools
Industrial	Construction
Healthcare	Outdoor
Retail	Other
Restaurant/lodging	



Risk factors



Worker interaction	Workplace characteristics	Worker type
Interaction with general public	Indoor/outdoor	Demography
Contact with fellow coworkers in normal course of work	Number of workers	Preexisting conditions
Shared tooling/machinery	Worker density	Contact outside of work
	Required travel	Transit options
	Basic industrial hygiene	Immunity

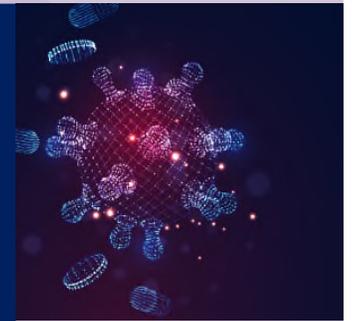
Risk mitigation for workplace types

- Access control
- Social distancing
- Sanitation/hygiene
- PPE
- Contact tracing/isolation



Expectations?

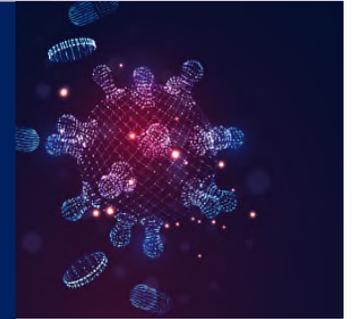
- Governor will finalize Michigan Safe Start Plan within two weeks
- Phase-out process could take months
- Risk mitigation in some form could remain for longer
- New normal!



Bringing Employees Back

Phases Likely

- Federal/President Trump
 - Three Phases
 - Gateways
 - Deference to States
- Governor Whitmer/Individual Counties
 - Governor Whitmer recent press conference
 - Need to see specifics but should anticipate phases

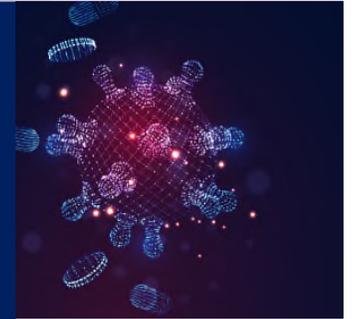


Time to Bring Employees Back

Plan must be flexible



Bringing Employees Back



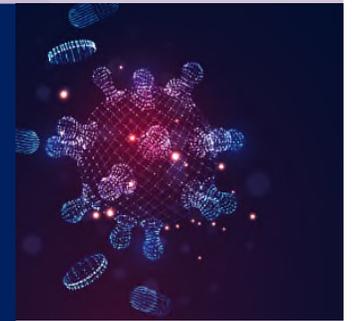
Things we can anticipate now and best practices

- Develop a COVID-19 Preparedness and Response (P&R) plan, consistent with OSHA recommendations
- OSHA COVID-19 Guidance right now states it is not a standard or regulation and creates no new legal obligations
- But Gov. Whitmer's Executive Orders 2020-42 and now 2020-59 require a P&R for any business continuing in-person work, and that it be available at company headquarters or the worksite
- To the extent we "reopen" we can expect the next EO will require this for any business; and in any event, this is a best practice as we bring employees back into the "new normal"

Bringing Employees Back

Basics of P&R Plan

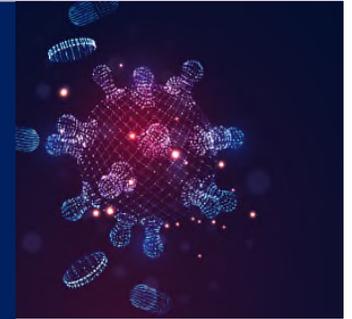
- Identify baseline safety protocols
 - Basic infection prevention measures
 - Deep clean
 - Clean/disinfect frequently touched surfaces daily
 - Communicate to employees to Stay home if sick, respiratory etiquette, hand washing, etc.
 - Social Distancing
 - Encourage telework when possible
 - Increase physical space between workers at worksite
 - Decrease social contact at workplace (e.g. limit in-person meetings, meetings for lunch in break rooms, other gathering spaces)
 - Stagger work schedules
 - Limit large work-related gatherings



Bringing Employees Back

Basics of P&R Plan

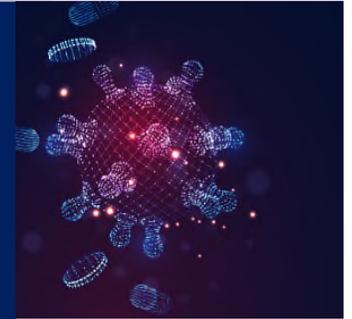
- Identify baseline safety protocols
 - Procedures for prompt identification and isolation of sick people
 - Consider regular health checks (e.g. questions at start of shift, taking temperature)
 - If identify employee with symptoms
 - Immediately separate from other employees, customers and visitors and sent home
 - If confirmed COVID-19, inform fellow employees of possible exposure (without identifying employee)
 - Individuals who have had close contact for a prolonged period of time (CDC says 10-30 minutes)
 - Stay home 14 days after last exposure
 - Self-monitor for symptoms
 - Follow CDC guidance if symptoms develop
 - Close off, clean and disinfect areas used by the sick person



Bringing Employees Back

Basics of P&R Plan

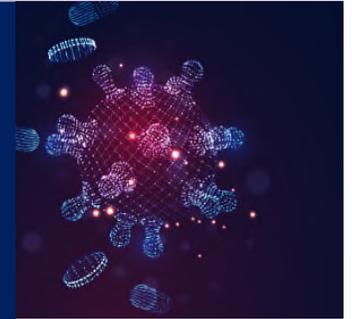
- Identify worker risk levels (low, medium, high, very high):
 - Which workers having regular contact with others?
 - Which workers deal with customers, visitors, deliveries?
 - Which workers work side-by-side on machinery or in office cubicles?
 - OSHA recognizes most workers low risk – not required to be in contact with those infected with COVI-19 nor frequent, close (6 feet) contact with the general public



Bringing Employees Back

Basics of P&R Plan

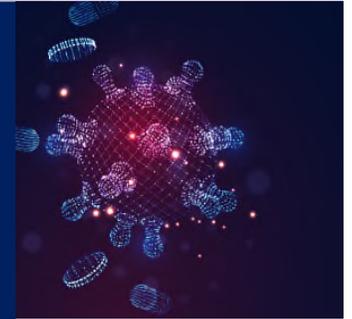
- Determine controls based on risk levels
 - Always have the baseline safety protocols
 - Low risk employees
 - No additional PPE required, e.g., masks and gloves – use PPE, if any, would ordinarily use for job task
 - Keep in mind new Executive Order (2020-59)
 - Medium risk employees
 - Provide additional PPE and consider engineering controls (e.g., sneeze guards, barriers)
 - High and very high risk employees
 - Additional engineering controls, administrative controls and PPE



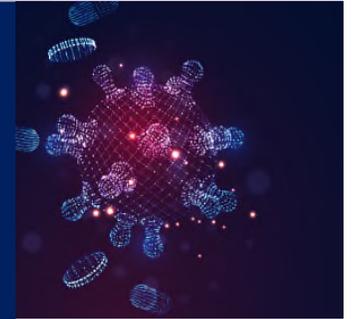
Bringing Employees Back

Basics of P&R Plan

- Implement the P&R Plan
 - Identify who will be responsible (HR, contractor, hygienist, etc.)
 - Do what CDC, OSHA and State and Local Authorities require AND recommend
 - Enforce safety protocols – be consistent
 - No retaliation/encourage communication/reporting
 - Be prepared to update – things are ever-changing



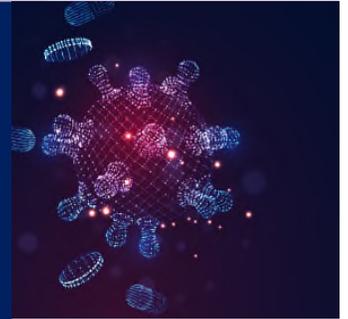
Bringing Employees Back



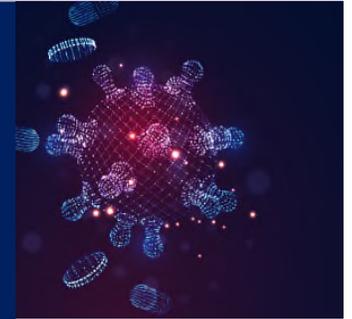
- Under the most recent Executive Order masks are required to be **supplied** by the employer whose workers perform in-person work
- Must employers require that masks be worn by all employees even if the business is not open to the public?
 - Executive Order 2020-59 not clear – requires individuals to wear masks when in any enclosed public space
 - Executive order 2020-60 issued on April 24 created additional restriction regarding food-selling establishments and pharmacies, including **requirement** that “checkout employees” where masks in addition to “the strategies” in EO 2020-59
 - Best practice – analyze your workplace and in most instances would require it as part of P&R Plan – consistent with OSHA and CDC guidelines
- If employer requires it, and employee refuses, what happens?
 - Can discipline/discharge
 - ADA considerations

Bringing Back Employees

- Put yourself in employee's shoes
- Safety Checklist
 - Social Distancing
 - Sanitization
 - Common Areas
 - PPE
 - Landlord/Facility



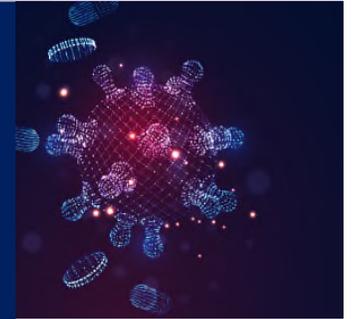
Bringing Employees Back



Other Issues

- Do all employees come back at once?
 - Depends on your circumstances and ability to comply with CDC and OSHA guidelines (e.g. social distancing, etc.)
 - Likely will not bring everyone back at once
 - Be mindful of anti-discrimination statutes (e.g. age, gender)

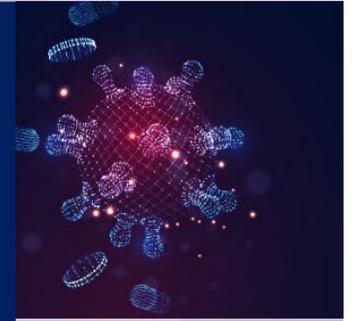
Bringing Employees Back



- What can you do?
 - Require employees with COVID-19 to stay home
 - If employee had confirmed case of COVID-19 you can require medical clearance to return
 - Take temperature/ask questions about symptoms for all those entering workplace
 - An employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus
 - Ensure that the tests are accurate and reliable. Guidance from FDA and CDC or other public health authorities
 - Consider the incidence of false-positives or false-negatives associated with a particular test.
 - Accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Bringing Employees Back

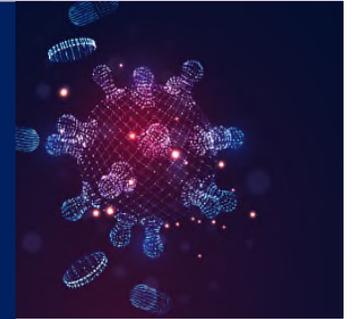
- What can you do?
 - Employees in vulnerable categories – as defined by CDC <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>
 - Those relevant for us are:
 - 65 and over
 - Underlying health conditions
 - Can we force them to stay home?



Bringing Employees Back

Other Issues

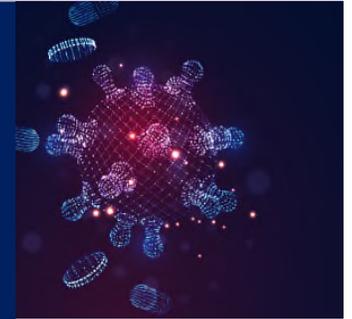
- Employee refuses to return to work
 - FFCRA (Paid Sick Leave, EFMLA); FMLA; ADA
 - Principles of these statutes still apply
 - Especially anti-retaliation provisions
 - Executive order 2020-36
 - Employees cannot be retaliated against for staying home if test positive for COVID-19 or display symptoms or close contact with someone in those categories
 - It does not prevent an employer from disciplining or discharging an employee: (a) who is allowed to return to work under the conditions of the Order but refuses to do so; (b) with the employee's consent; or (c) for any other reason that is not unlawful
 - Can't refuse because afraid to come to work
 - NLRA Section 7 – Protected Concerted Activity



Bringing Employees Back

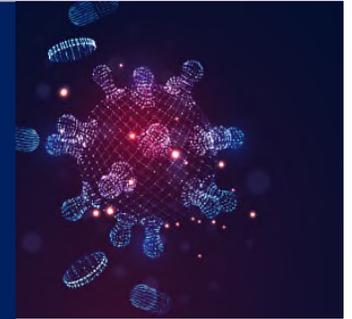
Other Issues

- Liability if employee gets sick
 - Worker's Comp will likely cover injury or death of employee infected at work
 - Employee must prove work-related
 - Intentional tort exception – very high standard
 - Worker's Comp will NOT cover injury or death of infected household members
 - Negligence claim
 - Implementation and compliance with P&R Plan best defense



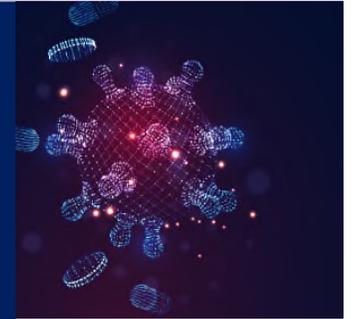
Re-Opening Business Operations

- How can I declare force majeure due to COVID-19 and the government shut downs?
- What should be expected of me after I've declared force majeure or been shut down by a shelter in place order?
- What are the risks associated with a force majeure declaration?
- How do I manage my customers and suppliers as I get my business back up and running?



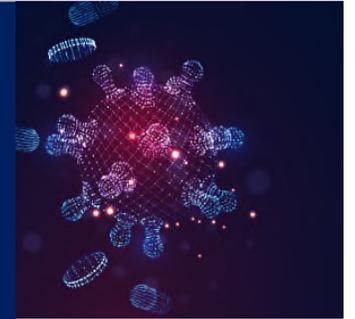
What is a Force Majeure Event?

- Allows for excused or delayed contractual performance
- An event that could not be foreseen or anticipated and makes performance impossible or commercially impracticable
- No fault by either party
- A “Superior Force”
- An act of God, natural disasters, fire, war
- May include pandemic or government action



How is a Force Majeure Event Defined?

- Contract terms
- Uniform Commercial Code – sale of goods
- Common law – services



Providing Notice of Force Majeure

- Contractual written notice
- Now is the time to review (again) notices sent/received, and responses
- Communication early and often – be proactive



As businesses begin to open what does this mean for you?

- Review each contract carefully
 - What are your contractual obligations to your customers?
 - What are your suppliers' contractual obligations to you?
- Force Majeure provision
- Shipment and delivery terms
- Duty to mitigate harm



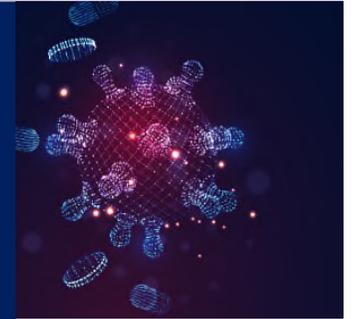
How much must you incur financially to mitigate impact?

- Generally seller must make reasonable efforts to avoid/minimize the impact
- Increased costs generally won't excuse performance
- Some contracts state seller must bear the costs associated with failure to make timely deliveries
- But force majeure declaration excuses late performance
- Significant cost increase due to unforeseen event that alters essential nature of performance may excuse performance.



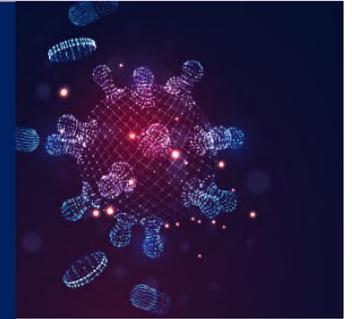
Risks of Declaring Force Majeure

- Even if force majeure is appropriate, party must still take reasonable measures to reduce harms, and resume performance
- Buyer may seek other sources during force majeure event
- Buyer may terminate contract
- Buyer may seek damages if force majeure event lasted longer than it should have



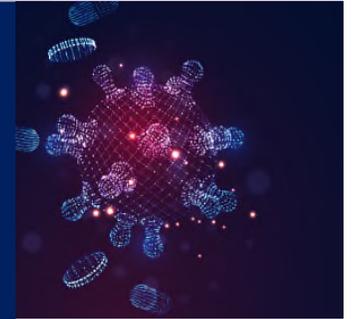
How do you allocate your capacity among your customers?

- “Fair and reasonable” allocation of supply among existing customer base
 - Not arbitrary.
 - No self-dealing
 - Can rely on sales history
- Provide seasonable notice of your decision



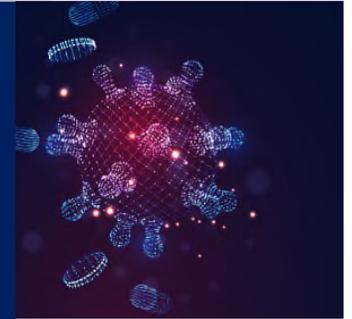
What are your customers' needs?

- What level of support does your customer actually need?
 - Assess firm orders
 - Realistic?
- Regular Customer Communication:
 - Explain concerns, reliance
 - Emphasize Collaboration
- Communication between sales and purchasing teams



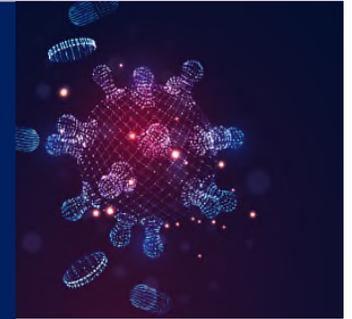
What is your capacity, and the capacity of your supply base?

- Fully assess capacity of your supply base
 - Determine law/executive orders controlling suppliers
 - Are they ready – raw materials, labor?
 - COVID countermeasures?
 - Financial Audit needed?
 - Alternative supplier options?
- Demand adequate assurances of performance



Build a record ...

- Communicate early and often
- Speak with “one” voice
- Inform customers *in writing* of your allocation/production decisions
- Inform suppliers *in writing* of order requirements/procedures
- Litigation is on the horizon ...



Warner's COVID-19 Resource Center

www.wnj.com

Question of the Day – Answers to high-priority concerns

eAlerts – Identifying key developing issues and action to take

Webinars – Online registration and links to previously recorded sessions and materials

Sign up for COVID-19 eAlert and webinar notices by emailing covid@wnj.com and you will be added to the email subscriber list.



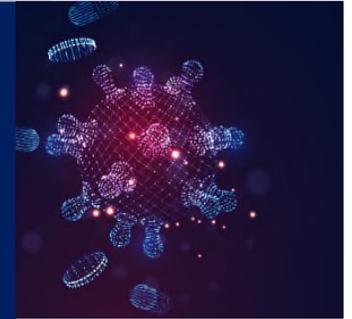
Recent/Upcoming Webinars

April 24: Strategies and Pitfalls for Retaining, Terminating and Returning Employees to Work in the World of COVID-19

April 29: What's Next? How Landlords, Tenants and Lenders are Navigating the COVID-19 Pandemic

"Return to Work" Series:

- April 24: From the Capitol: COVID-19 Update
- April 27: Returning Employees to Work After COVID-19
- April 29: Preparing the Facility for Operations After COVID-19
- May 1: Managing External Relationships and Supply Chains After COVID-19



Questions?



COVID-19

Troy Cumings | Ed Bardelli | Michael Brady

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