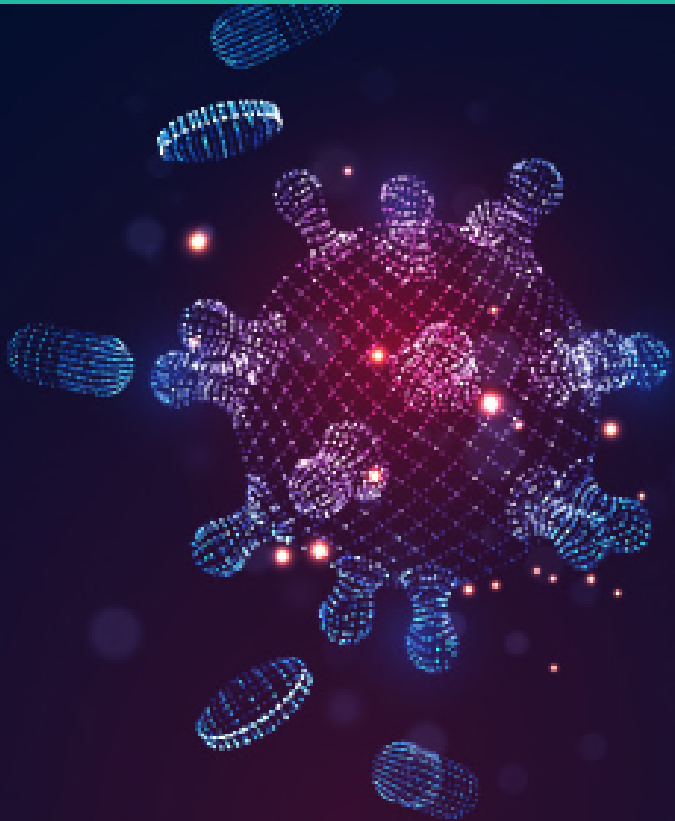


# Reopening Michigan: Legal Issues to Consider



## COVID-19

Troy Cumings | Ed Bardelli | Michael Brady

April 24, 2020

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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

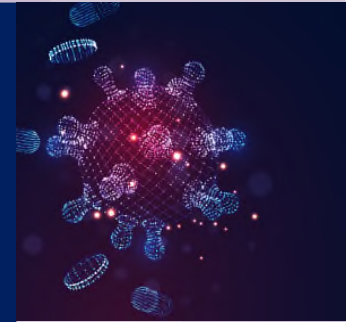


## Michael Brady

- 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



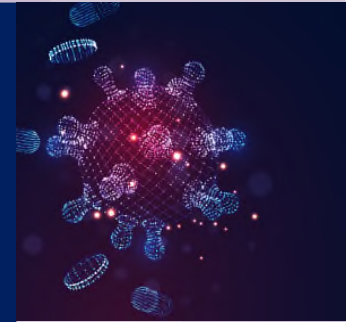
# What about the legislature?

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



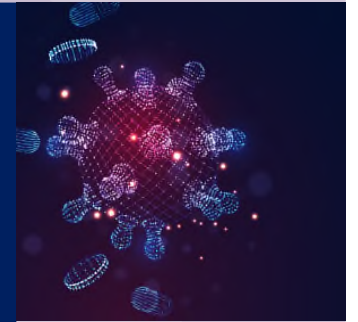
# What about the reopening plan?

- 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



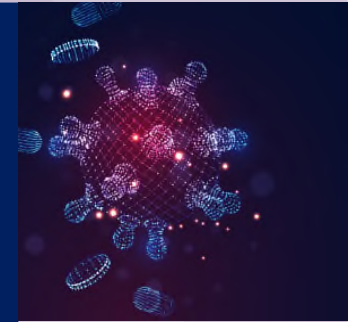
# Restart triggers

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

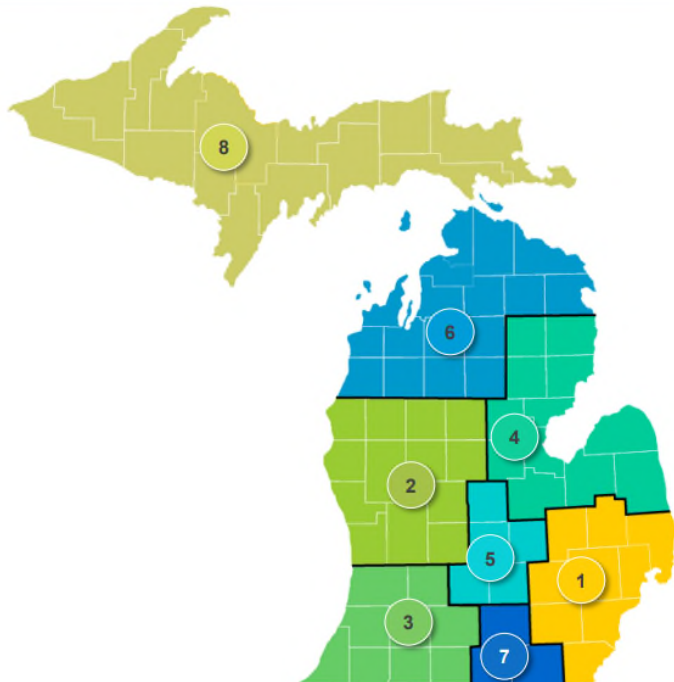




# Regions

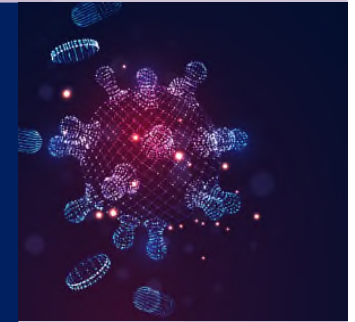


## Michigan Economic Recovery Council Reporting Regions

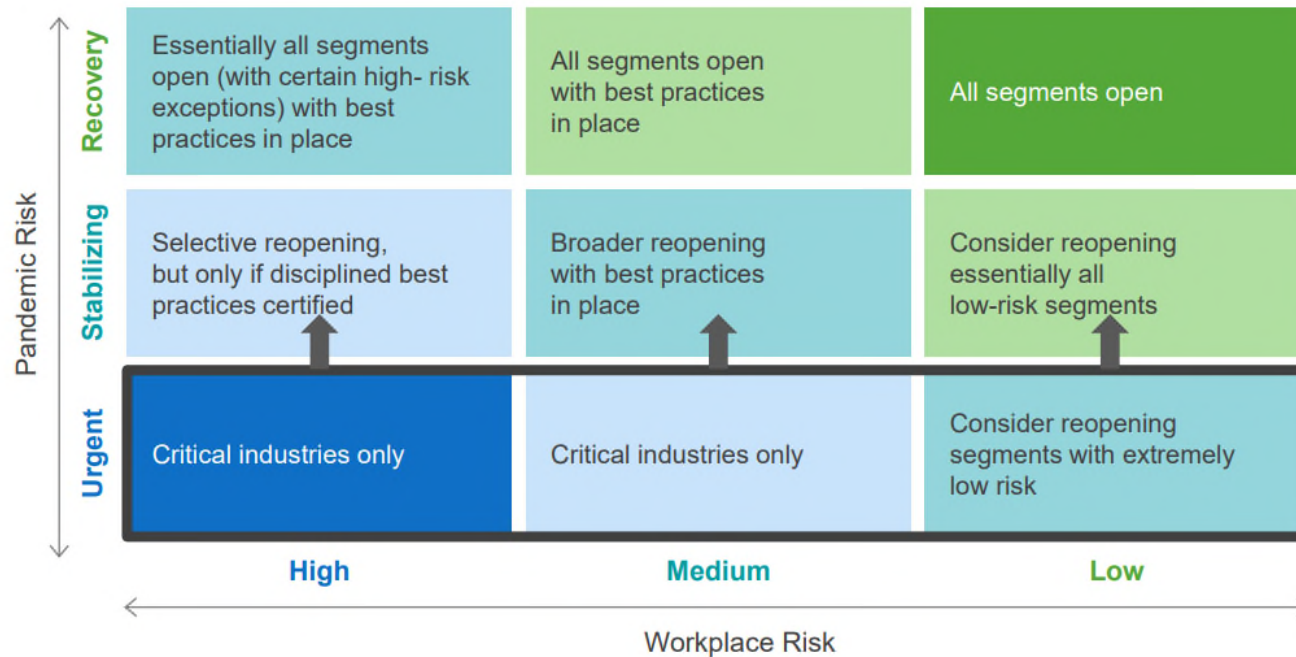


MERC Regions	Population	% of total
1 Detroit Region	5,243,543	52.5%
2 Grand Rapids Region	1,535,115	15.4%
3 Kalamazoo Region	964,202	9.7%
4 Saginaw Region	606,319	6.1%
5 Lansing Region	591,102	5.9%
6 Traverse City Region	445,159	4.5%
7 Jackson Region	302,566	3.0%
8 Upper Peninsula	298,851	3.0%
<b>Total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

# Decision-making framework



## Framework for making return to work decisions

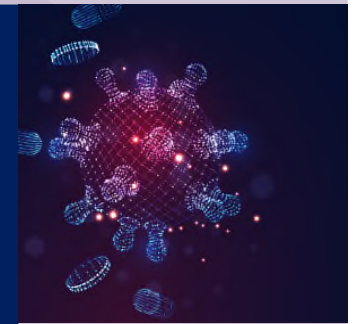


# Occupations

Office	Schools
Industrial	Construction
Healthcare	Outdoor
Retail	Other
Restaurant/lodging	



# Risk factors



<b>Worker interaction</b>	<b>Workplace characteristics</b>	<b>Worker type</b>
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

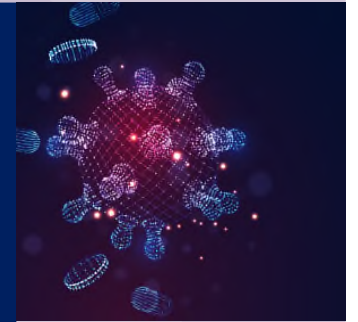
# Risk mitigation for workplace types

- 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





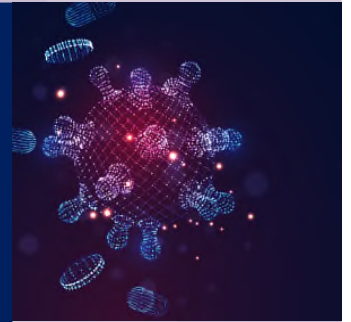
# Bringing Employees Back

- 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)

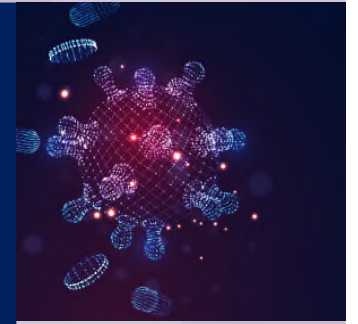
# Bringing Employees Back



- 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?



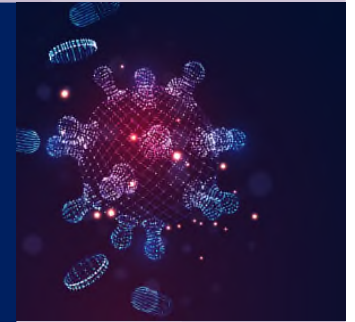
# Bringing Employees Back

## 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?



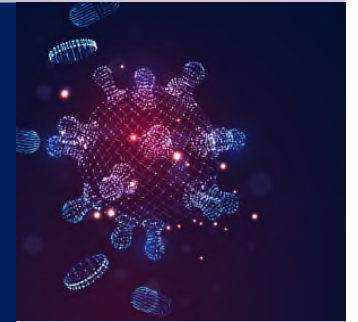
# What is a Force Majeure Event?

- 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



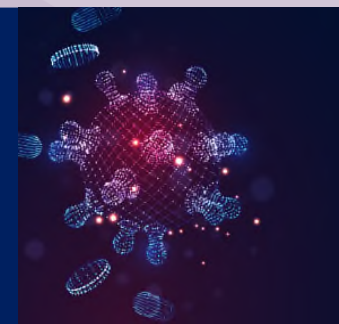
# Providing Notice of Force Majeure

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



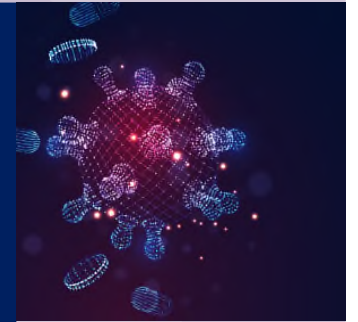
# As businesses begin to open .... what does this mean for you?

- 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.

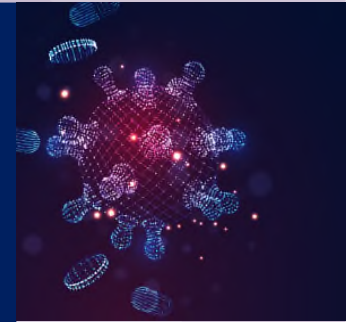


# Risks of Declaring Force Majeure

- 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](http://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](mailto: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

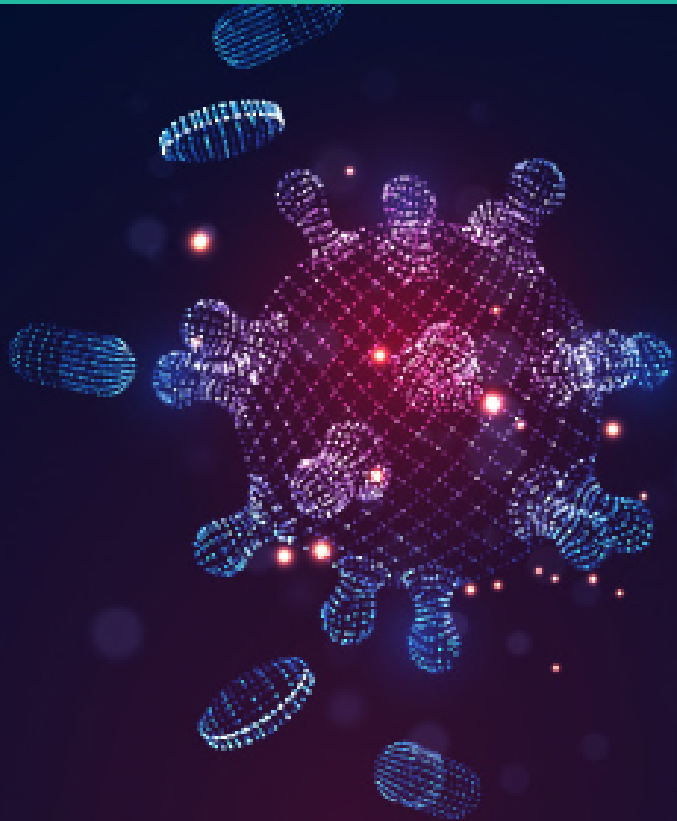
April 29: What's Next? How Landlords, Tenants and Lenders are Navigating the COVID-19 Pandemic

## "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

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