



Return to Business in the Midwest: What In-House Counsel and HR Are Grappling With During COVID-19

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Agenda

- 01** Welcome and Introductions
- 02** Leaves of Absence and Accommodations During COVID-19
- 03** Managing Safety Policies and Procedures
- 04** Chat with In-House Counsel
- 05** Q&A

Speakers



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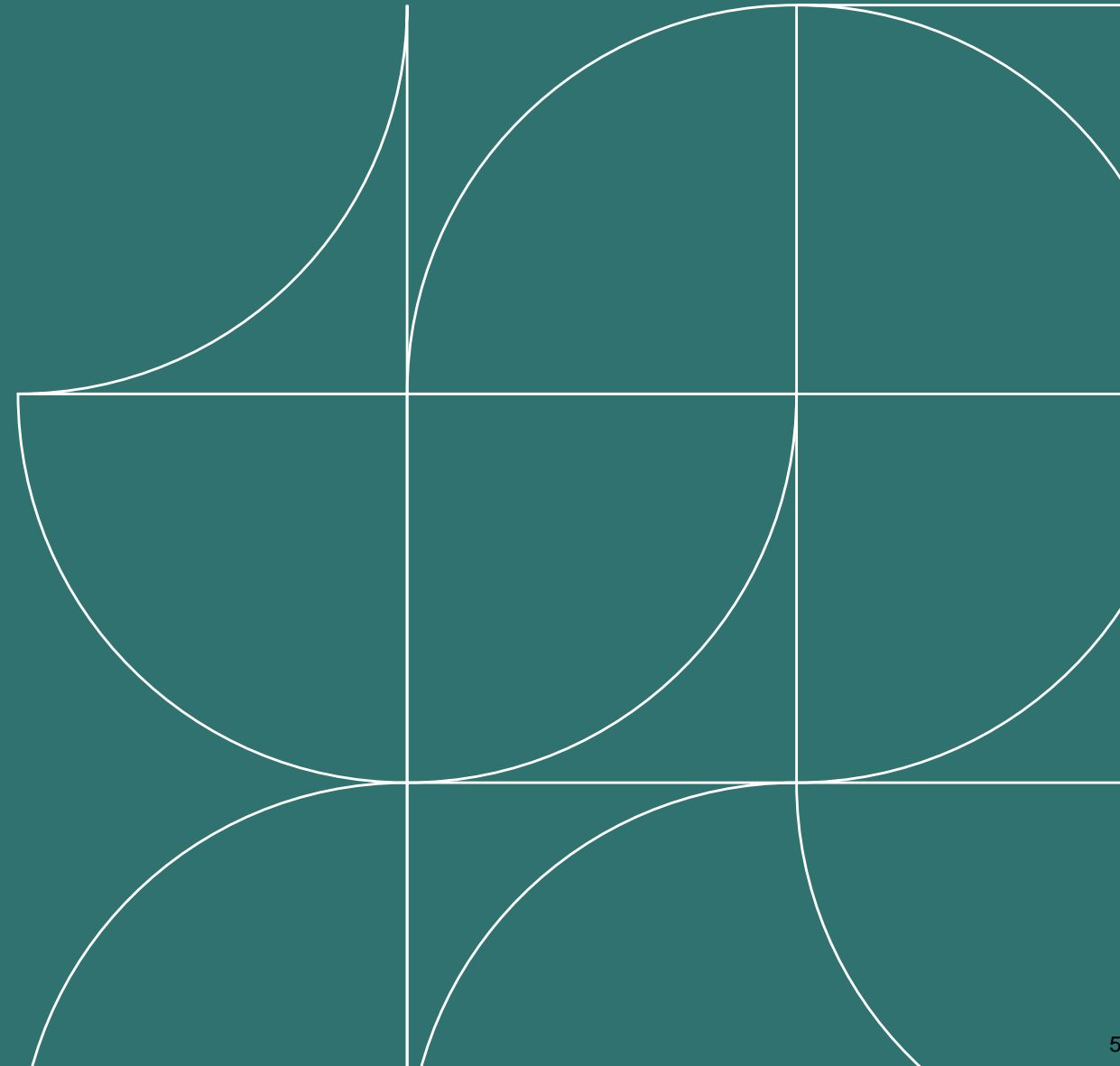


Leaves of Absence and Accommodations During COVID-19

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COVID-19 Leave Considerations

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- Reasons for Use
 - Employee Serious Health Condition
 - Family Member with a Serious Health Condition
- Notice/Certification
 - Same rules apply

FMLA Leave



Serious Health Condition (Self or Family Member)



- Symptomatic
 - Only if rises to the level of “serious health condition” as defined by FMLA
- Tested Positive
 - Only if symptoms rise to the level of serious health condition
- Exposed, Asymptotic (no)
- Only High-Risk (no) but let’s talk...
- Mandatory Quarantine (no)

New York v. U.S. Dept. of Labor, S.D.N.Y.



- August 3, 2020 – Order vacating certain aspects of the DOL’s FFCRA regs;
- Regulations vacated include:
 - the work-availability requirement
 - the definition of “health care provider” and eligibility for leave – ruled overly broad
 - the requirement that an employee secure employer consent for intermittent leave
 - the temporal aspect of the documentation requirement
- Scope of Opinion
 - Technically only applies in the SDNY, but employers should keep abreast of DOL’s next steps and determine whether it will follow the rules as set forth in this opinion.



COVID-19 State Leave Laws Update

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State Laws Providing COVID-19 Related Leave

- Paid sick and safe time laws (at least 30 locations with developments)
- Paid time off laws (i.e., NV guidance)
- Paid family and medical leave laws (i.e., NY and NJ expansion)
- State disability insurance laws (i.e., NY and NJ expansion)
- Unpaid family and medical leave laws (i.e., Washington, D.C. and NJ expansion)

COVID-19 State and Local Leave Overview

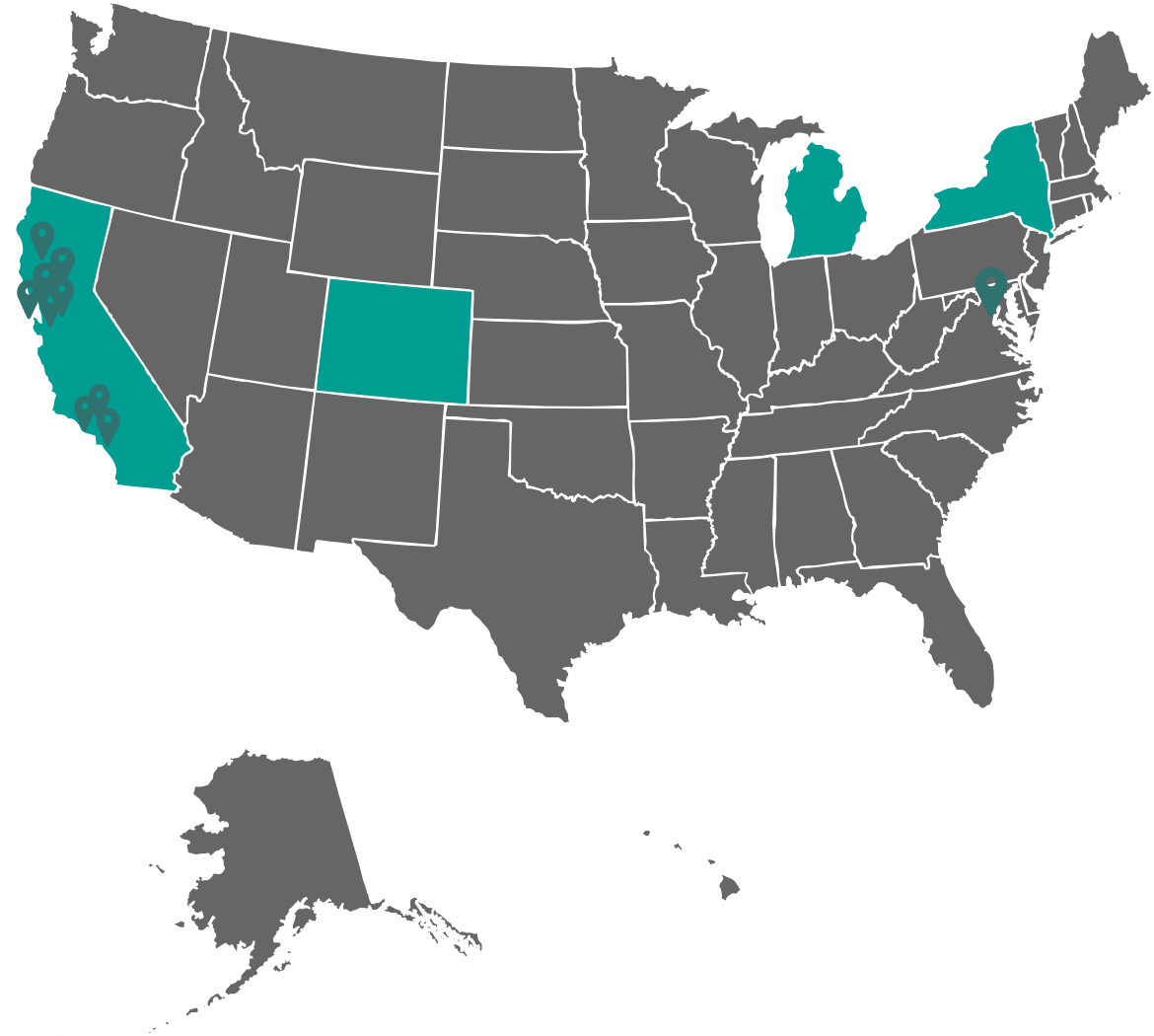
Paid Sick Leave / PTO Laws and COVID-19 Developments: 3 Main Groups

- **Group 1:** Entirely new laws / executive orders
- **Group 2:** Amendments to existing laws or regulations
- **Group 3:** General non-binding guidance regarding applicability of an existing PSL law in light of COVID-19

Paid Sick Leave / PTO Laws and COVID-19 Developments: Group 1

Group 1: Entirely new laws / executive orders

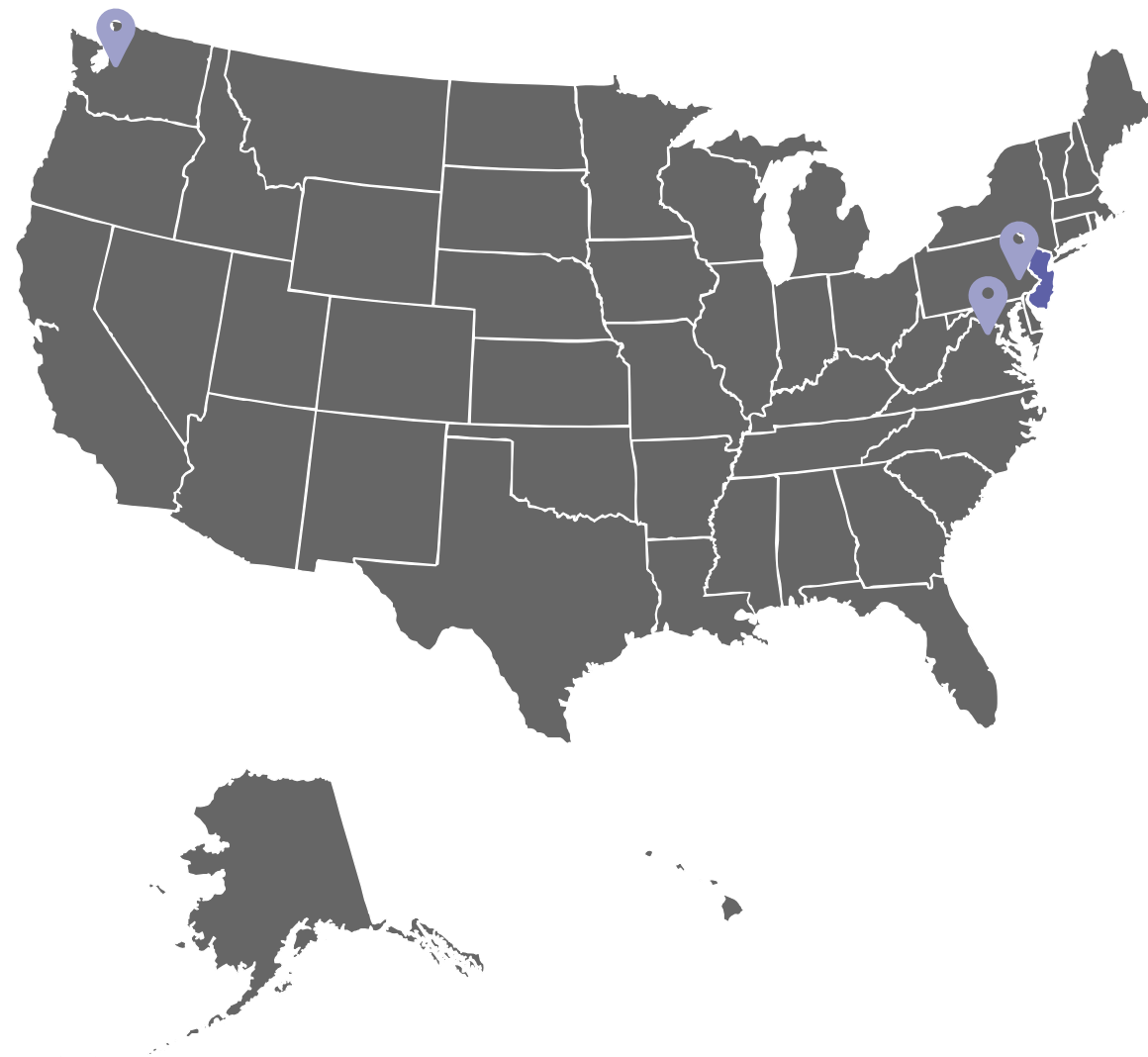
1. California – State
2. California – Long Beach
3. California – Los Angeles, City
4. California – Los Angeles County
5. California – Oakland
6. California – Sacramento
7. California – San Francisco
8. California – San Jose
9. California – San Mateo County
10. California – Santa Rosa
11. Colorado – State
12. Michigan – State
13. New York – State
14. Washington, D.C.



Paid Sick Leave / PTO Laws and COVID-19 Developments: Group 2

Group 2: Amendments to
existing laws or regulations

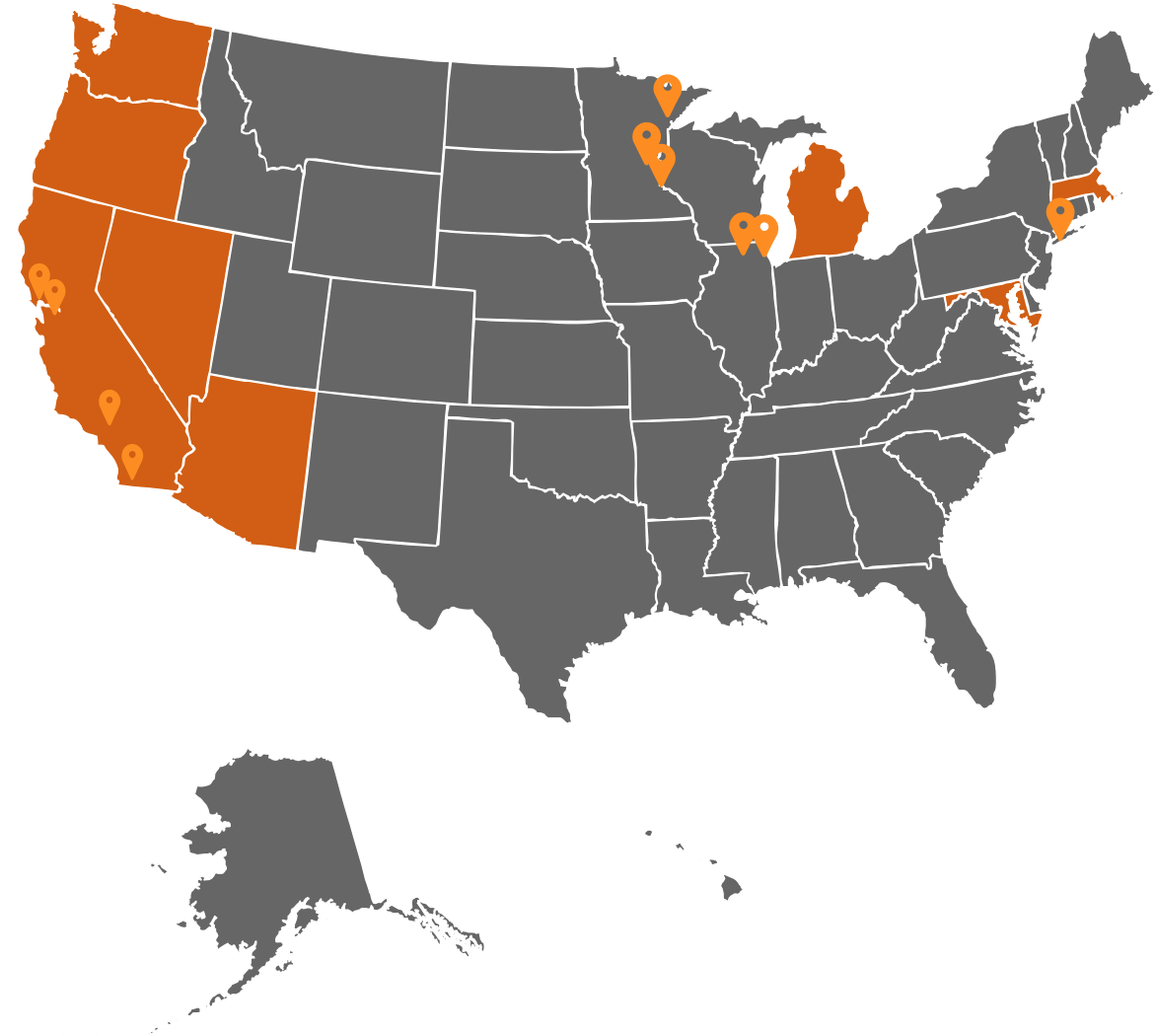
1. New Jersey – State
2. Pennsylvania – Philadelphia
3. Washington – Seattle
4. Washington, D.C.



Paid Sick Leave / PTO Laws and COVID-19 Developments: Group 3

Group 3: General non-binding guidance regarding applicability of an existing PSL law in light of COVID-19

1. Arizona – State
2. California – State
3. California – Emeryville
4. California – Los Angeles City
5. California – San Diego
6. California – San Francisco
7. Illinois – Chicago
8. Illinois – Cook County
9. Maryland – State
10. Massachusetts – State
11. Michigan – State
12. Minnesota – Duluth
13. Minnesota – Minneapolis
14. Minnesota – Saint Paul
15. Nevada – State
16. New York, New York City
17. Oregon – State
18. Washington – State



Midwest Roundup

Chicago

- Guidance regarding the applicability of the existing Ordinance for COVID-19
- Guidance for Businesses and Employers that provides recommendations on implementing and administering sick leave policies.
- Anti-retaliation Ordinance protecting employees who remain at home for complying with public health orders or for other COVID-19 related reasons from adverse action

Cook County

- Guidance regarding the applicability of the existing Ordinance for COVID-19.
- Includes some instruction that is helpful when dealing with furloughs.

Michigan

- Executive Order prohibits Michigan employers from discharging, disciplining or retaliating against employees who are absent for work for certain reasons relating to COVID-19.
- Employers must treat covered employees as if they are taking medical leave under the Michigan PSL law.
- If an employee has no paid leave under the Michigan PSL law, must give unpaid leave.

Duluth, St. Paul & MPLS

- Guidance regarding the applicability of the existing Ordinance in response to the COVID-19 pandemic.
- The primary update of the guidance is that it expands certain reasons which employees can use available paid sick time benefits in light of COVID-19.



Leave Under the ADA for COVID-19

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Leave as Reasonable Accommodation



- EEOC Pandemic Guidance
 - ADA and Rehabilitation Act still apply
 - Pandemic declaration changes rights under ADA
 - Can rely on CDC guidance and recommendations to address COVID-19 in the workplace
- Still must engage in interactive process
- Always ask for medical documentation and it should not be vague
 - Consider providing description of the safety protocols and more information regarding the employee's position.
 - Screening, safety training, social distancing measures, mask requirements, capacity limits, etc.
- Explore alternative effective accommodations to employee's request for leave, to work remotely or other accommodation

Leave as an Accommodation Under the ADA

- Consider if employee has a “disability” as defined by the ADA
 - Employee with COVID-19 (possibly)
 - Depends on symptoms and diagnosis; duration
 - High-risk employee (possibly)
 - Age v. Condition
 - Refer to CDC/WHO guidance
 - i.e., Diabetes, Cancer, COPD
 - Employee with fear of returning to the office because of COVID-19 (possibly)
 - No, if generalized fear
 - Maybe, if diagnosed medical condition such as anxiety
 - High risk family member (no)



Other ADA Accommodation Considerations

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- **Pre-pandemic Accommodation**

- If an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship.
- Example: Accountant with low vision has a screen-reader on her office computer should be provided the same to telework and the employer should pay for it.

Other ADA Accommodations Cont.

Other ADA Accommodations Cont.



- Post-pandemic Accommodation
 - Will the fact that an employee worked remotely during the pandemic necessarily mean that it's not an undue hardship to have the employee work remotely post-pandemic?
 - Any documentation that allowing remote work because of the pandemic?
 - Document if not doing all EJP while working remotely during the pandemic and require all EJP to be performed upon return
 - EEOC on March 27 stated: working from home during the pandemic could serve as a “trial run” that may obligate the employer to grant the accommodation request after the pandemic ends but recognized that but for the pandemic remote work would not have been allowed

- Face Coverings

- Standard interactive process; require medical documentation
- Alternative effective accommodations should be explored, like a face shield, having the employee work in an area where they don't have to wear a mask (but still must do so when going to the bathroom, coming into the location etc.), etc.



Other ADA Accommodations Cont.





What's on the Horizon?

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COVID-19 Vaccination Requirements



- Vaccination must be “job related and consistent with business necessity.”
- Prior Case Law
 - Mainly healthcare / hospital employer
- ADA and Title VII
- EEOC Guidance
 - even during a pandemic, an employee “may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability ... barring undue hardship.”
 - employees may be entitled to a reasonable accommodation for sincerely held religious beliefs.
- State and Local Guidance
 - Some states have more strict approach as to whether a vaccination requirement is job-related and consistent with business necessity
 - i.e., New York City and California
 - New York City “cooperative dialogue”

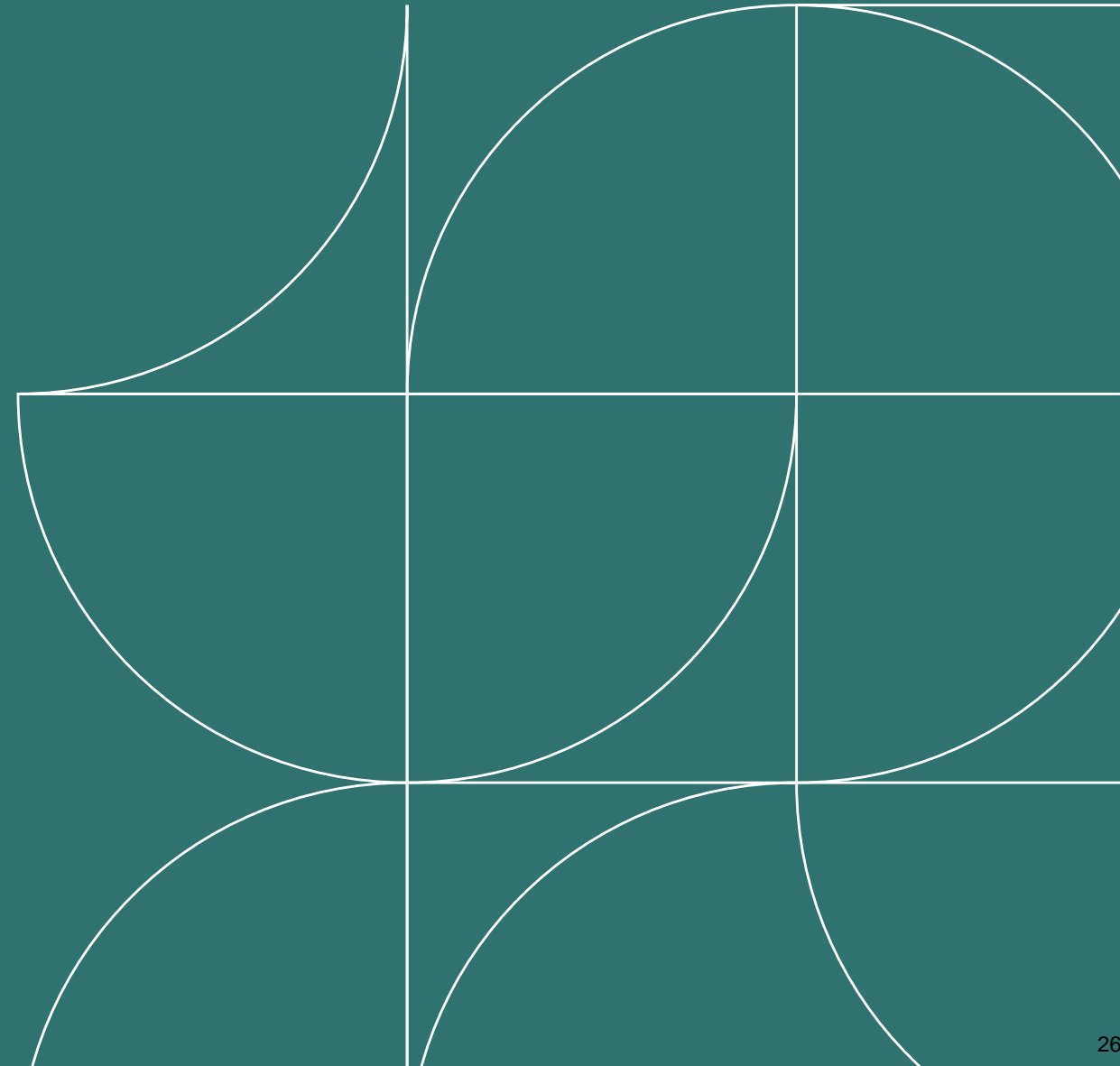


Managing Safety Policies and Procedures

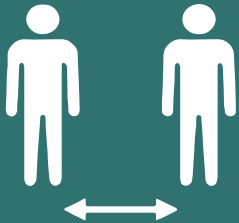
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OSHA Considerations



- Conduct a COVID-19 risk assessment.
- What type of facility are you?
 - Very high or high risk:
 - Hospitals and Healthcare.
 - Medium Risk:
 - Workers have frequent contact with travelers or direct contact with public in community spread areas.
 - Low Risk:
 - Workers do not have contact with public.

Infectious Disease Preparedness and Response Plan

- Develop an Infectious Disease Preparedness and Response Plan
- Plan should consider the level of risk associated with the worksite and job tasks.
- Consider:
 - Where, how and to what sources employees may be exposed to COVID-19.
 - General public, co-workers, customers or vendors
 - Workers' individual risk factors (e.g., older age, chronic medical conditions, pregnancy).



Implement Basic Infection Prevention Measures



- Good hygiene and infection control are key:
 - Frequent hand washing and use of sanitizer (at least 60% alcohol);
 - Workers to stay home if sick;
 - Covering coughs and sneezes;
 - Provide employees and customers/visitors with tissues and trash receptacles;
 - Consider flexible work policies such as telecommuting and staggered shifts;
 - Discourage employees from sharing workspaces (e.g., phones, desks, offices, tools and equipment).
 - Ensure supply of sanitizer and other hygiene products is adequate.

Establish Robust Housekeeping and Cleaning Schedules

- Frequent cleaning of common spaces:
 - Restrooms
 - Breakrooms
 - Lobby
- Frequent cleaning of commonly touched areas:
 - Countertops;
 - Reception desks;
 - Copiers, printers and community computers.



- Establish Policies for Employee Work Flow Throughout the Facility Including:
 - Social distancing;
 - Staggered shifts;
 - Employee flow when entering and exiting the facility;
 - Time clock;
 - Locker rooms, breakrooms and common areas.

Establish Policies



Develop Processes



- Develop Process for Identifying and Addressing Sick Employees
 - Isolation;
 - Restrict number of people coming into contact;
 - Contact tracing;
 - Cleaning and disinfecting.

Consider Potential Engineering and Administrative Controls

- Increased ventilation;
- High efficiency air filters;
- Installation of barriers (such as sneeze guards);
- Limit third-parties on site (e.g., drive-through or curbside service for customers and vendors);
- Replace face to face meetings with virtual meetings.
- Restrict employee travel;
- Limit personal contact among employees/third-parties in common areas;
- Consider personal protective equipment where appropriate (gloves, face shields, goggles, respirators).

- Conduct Employee Training Prior to Restarting Operations.
- Critical that Employees Understand the New Procedures.
- Update/Refresh Training Regularly.

Employee Training



Third-Parties On-Site

- Identify all Third-Parties On-Site and Account for Potential Exposures, for Example:
 - Customers;
 - Vendors;
 - Visitors;
 - Temps/Contract Workers;
 - Delivery Drivers



Contingency Planning



- Develop Contingency Plan for Future Potential Outbreaks.
 - Increased absenteeism;
 - Options for conducting essential operations with reduced workforce (e.g., cross-training);
 - Interruption of supply chain or delayed deliveries.

- If facility has Been Idle During Shelter-in-Place Orders:
 - Ensure all equipment is current on PM's and safe to restart.
 - Equipment should be visually inspected to ensure guards, interlocks, gates, etc. . . are functional.
 - Employees are up to date on training or re-certifications (e.g., LOTO, PIV, HAZCOM).
 - Conduct refresher training as necessary to ensure employees understand safety protocols.

Equipment Safety



Employee Safety Concerns as a Basis Not to Return to Work



- 11(c) of the OSH Act protects employees who have a good faith belief in the danger of death or serious injury. Any employee may refuse to perform a task if all of the following conditions are met:
 - Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and
 - The employee refused to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists; and
 - A reasonable person would agree that there is a real danger of death or serious injury; and
 - There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.
- Employers should follow CDC / OSHA guidance and implement measures to protect employees.
- Employers should explain and demonstrate to the workforce that its actions comport with CDC / OSHA guidance.

Q&A with In-House Counsel



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Thank You!

