



Managing 2020 Labor Relations Concerns

Presented by Seyfarth Partners
Molly Gabel, Kyllan Kershaw,
Glenn Smith & Brian Stolzenbach

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Seyfarth Shaw LLP

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- 01** Changing Landscape
- 02** Qualtrics.xm and Sports & Leisure Research Group Survey
- 03** NLRB Recent Developments
- 04** Organizing and Protected Activity Developments
- 05** Issues Relating to Unionized Workforces – Bargaining & Increased Concerted Activity

Speakers



Molly Gabel
Labor & Employment
SEATTLE



Kyllan Kershaw
Labor & Employment
ATLANTA

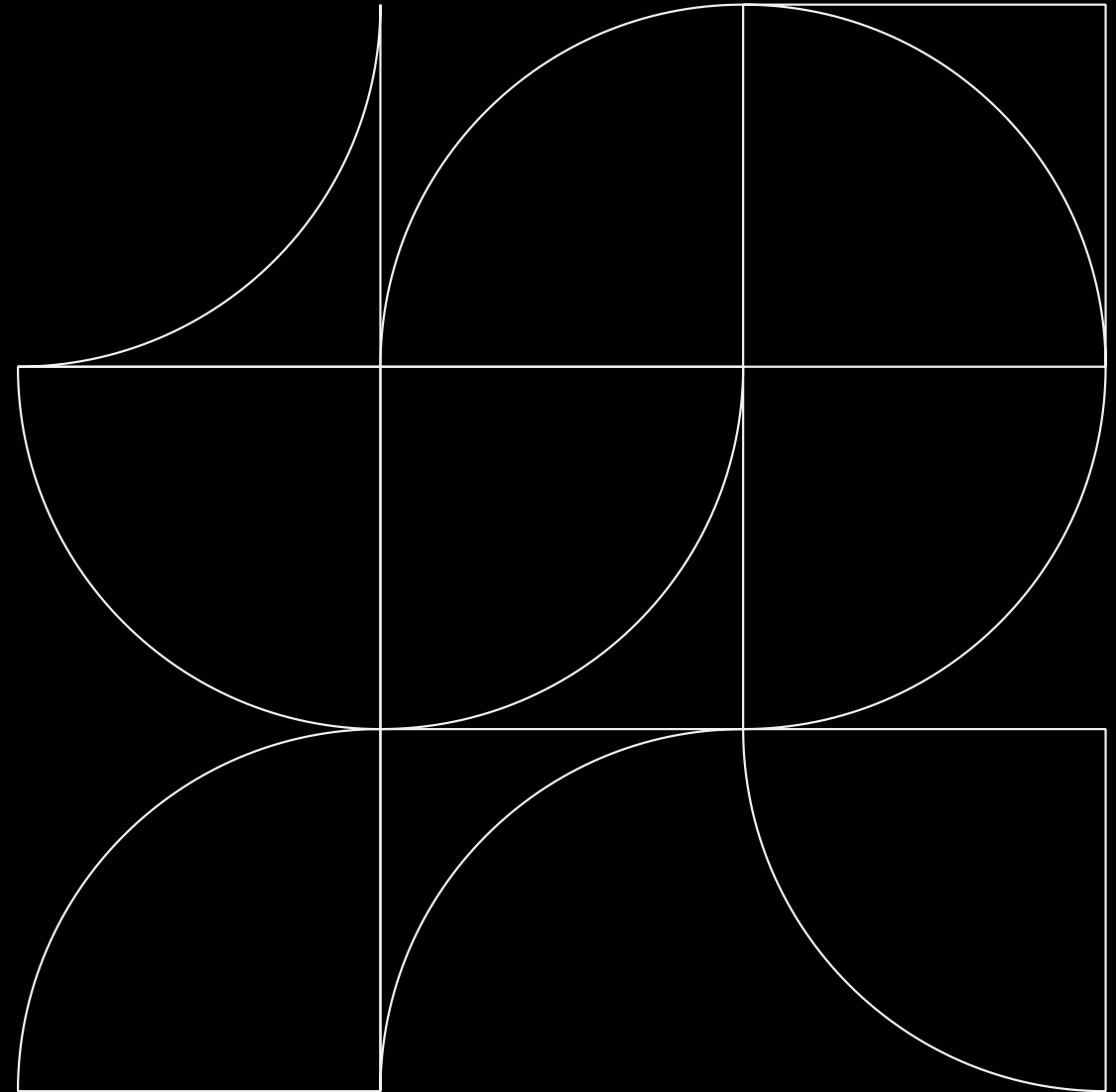


Glenn Smith
Labor & Employment
NEW YORK



Brian Stolzenbach
Labor & Employment
CHICAGO

Changing Landscape



What a difference a year makes...

2019

vs.

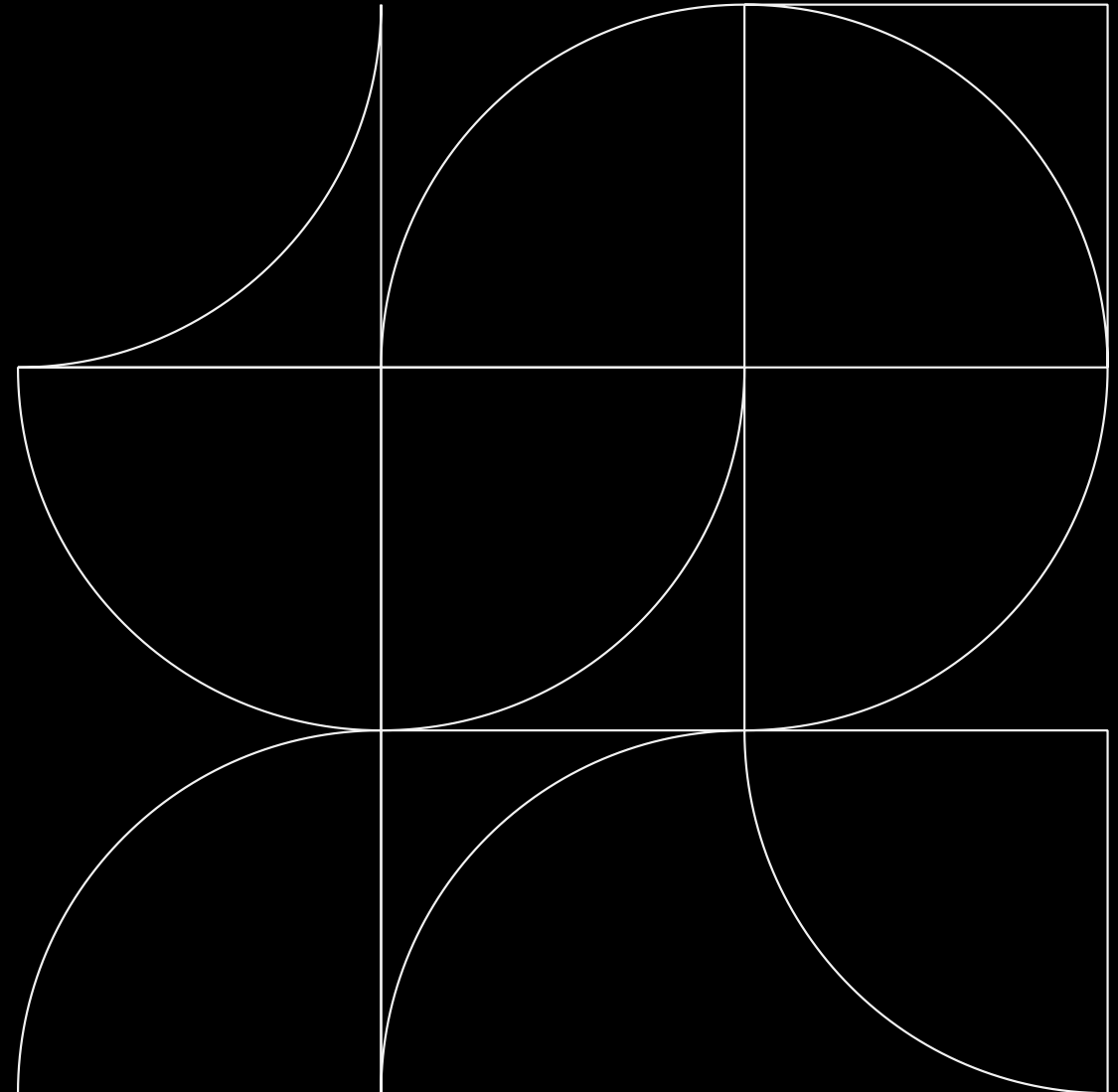
2020

- Historically low unemployment
- Economy rapidly expanding
- News Cycle
 - Russia
 - Impeachment
- NLRB – 4 members issuing multiple decisions largely moving labor law back to the pre-Obama Board

- Near record high unemployment
- Economic collapse
- News Cycle
 - COVID-19
 - Racial and social justice
- NLRB – down to 3 and soon to be 2 on August 27, 2020. Still evolving the law and procedure, but soon will grind to a halt.

Survey Snippets

Qualtrics.^{xm} and Sports & Leisure Research Group





What employees want from **employers** at work . . .

- 70% want hand sanitizer and cleaning supplies available at all times
- 64% want to be able to wear a mask
- 61% want to maintain social distancing



What employees want from **employers** at work . . .

- 50% want more flexible sick-leave policies, which employees are encouraged to utilize, even with minor symptoms
- 43% want their temperatures checked before entering the building
- 37% want to be allowed to skip work without penalty if they feel unsafe

What employees want from their **co-workers** at work (or from employer rules) . . .

- 57% want all employees to be required to wear a mask all of the time
- 50% want social distancing implemented
- 45% want a no handshakes/hugs policy



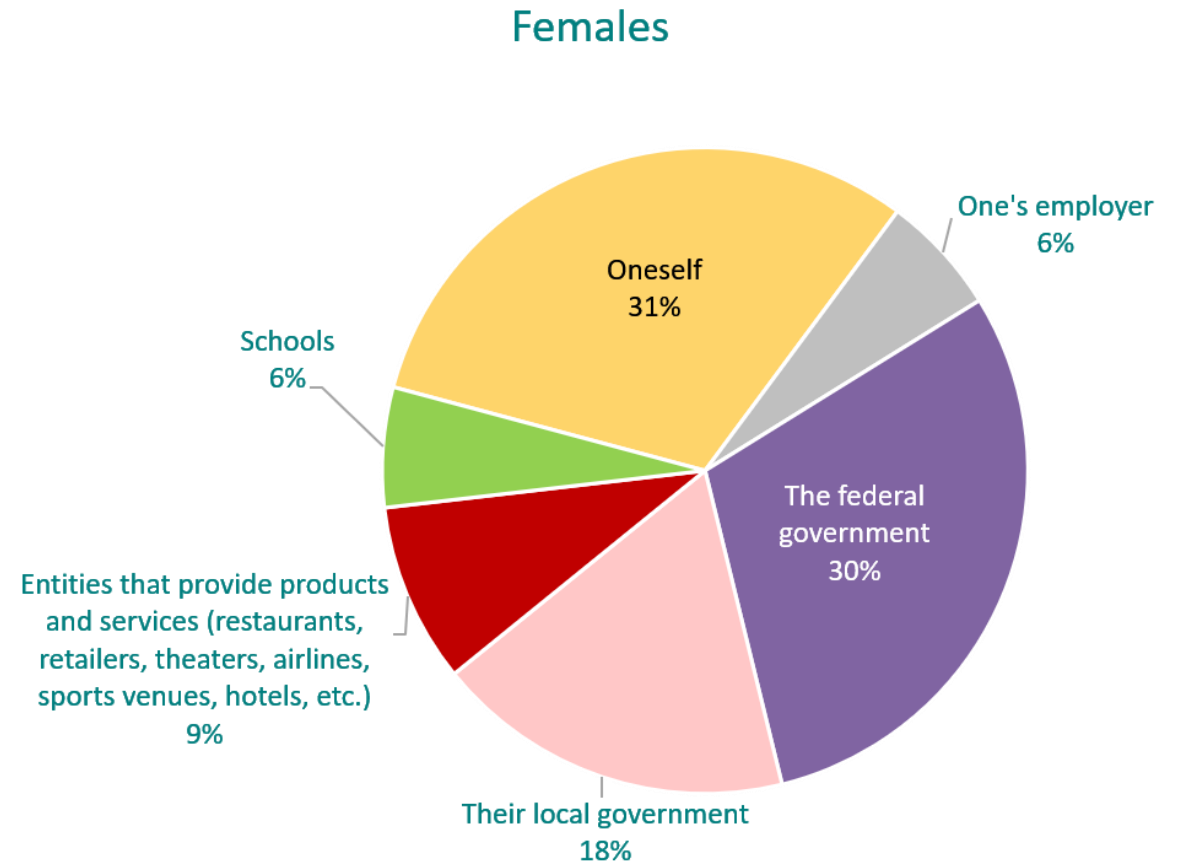
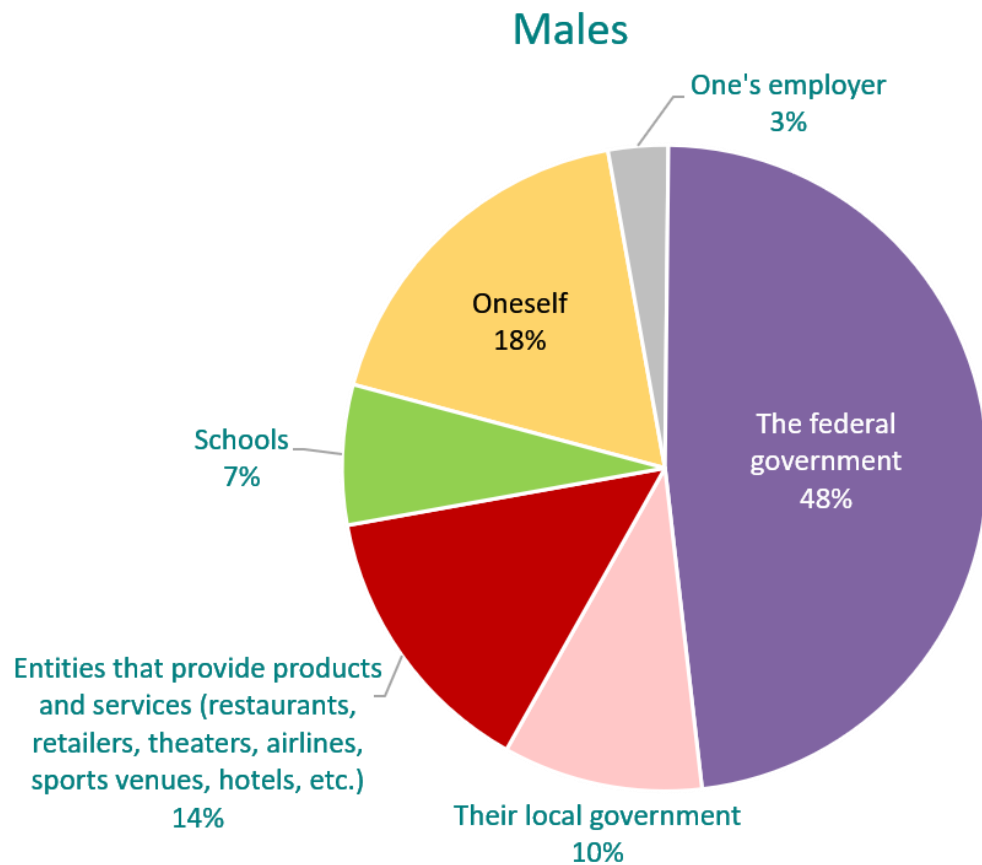
What employees want from their **co-workers** at work (or from employer rules) . . .

- 39% want serious safety measures around any communal food
- 38% want employees who travel for work or pleasure to have to self-quarantine for 14 days
- 37% want people to be brought back in phases instead of all at once



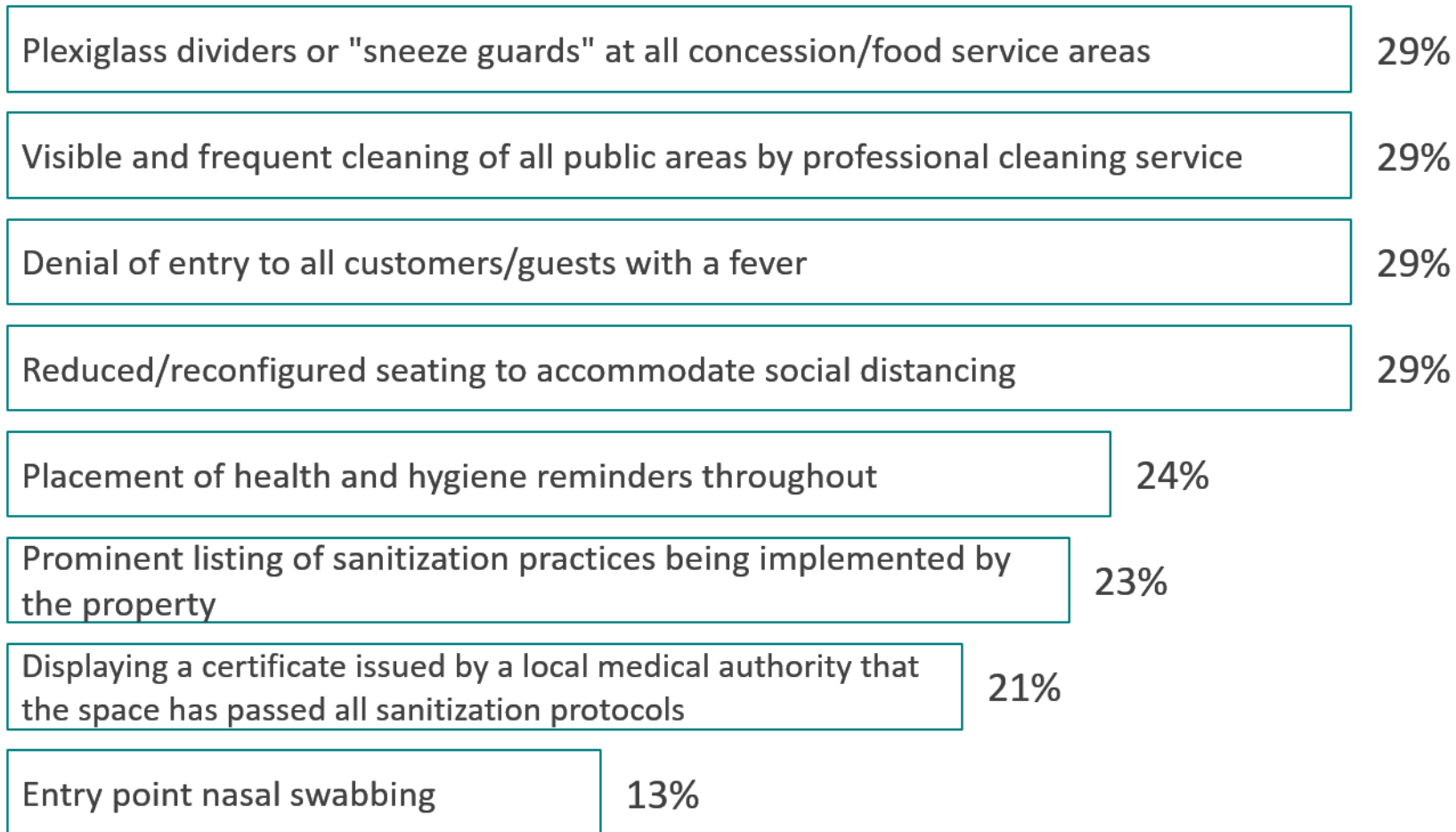
Who is most responsible for your safety?

Which entity is MOST responsible for ensuring that as Americans start to return to normal activities, they don't catch COVID-19?



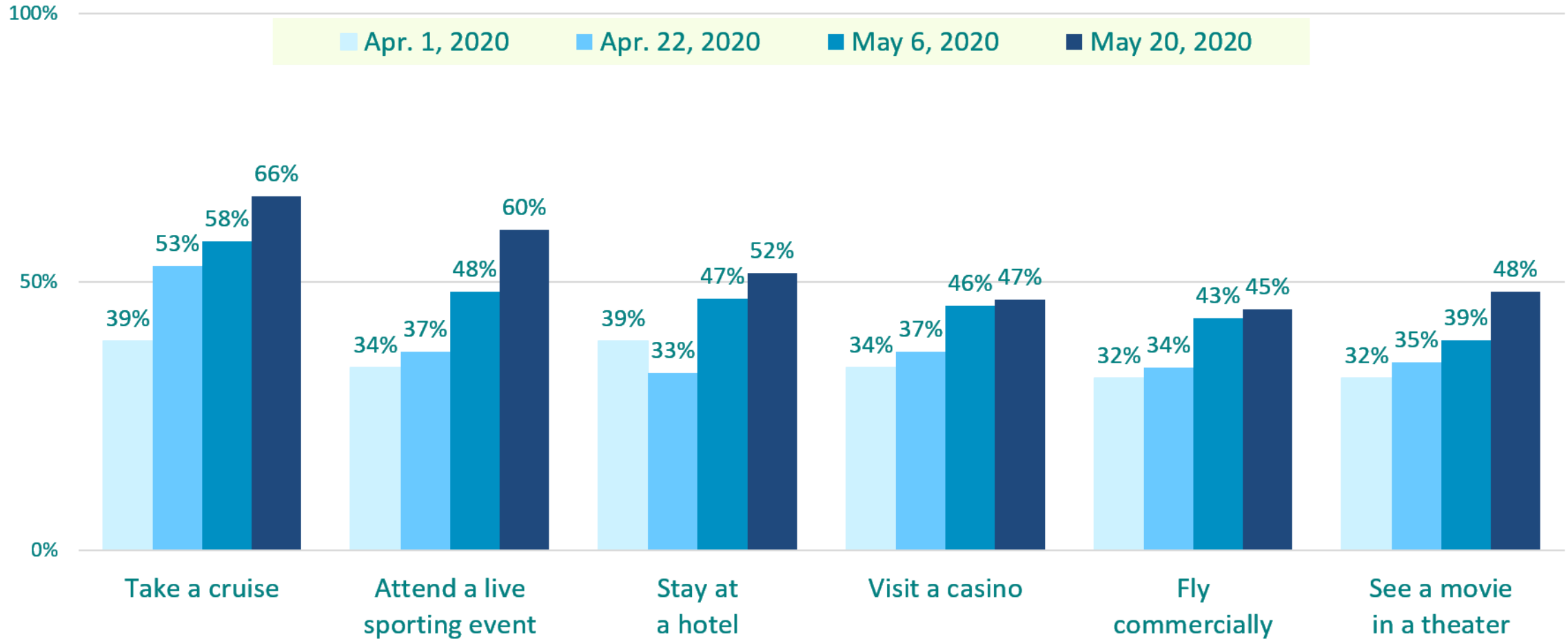
Precautions Employers Should Take

Which of the following are the most important steps your employer or business must take to prevent people in your workplace from catching COVID-19?



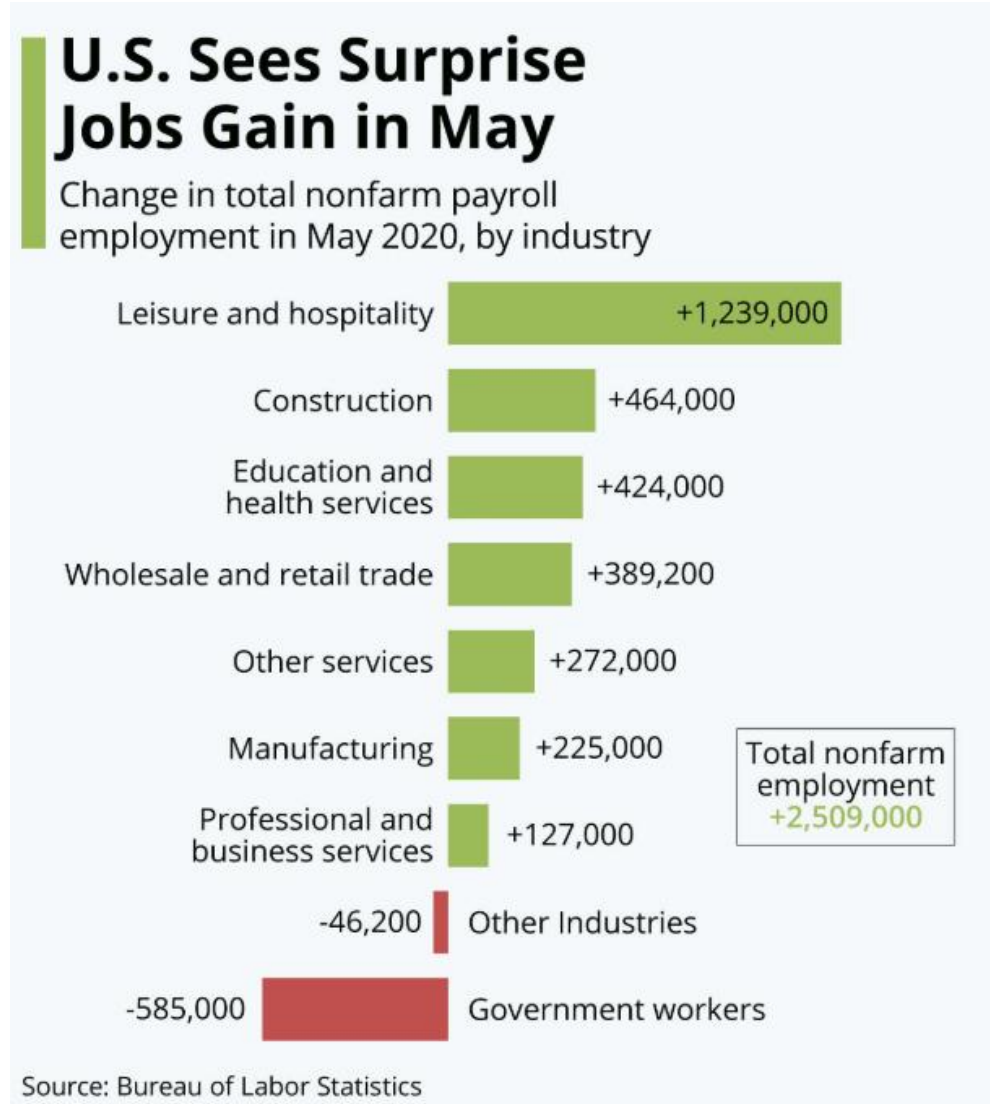
A sizable % would return tomorrow

Are you currently willing to engage in the following activities, without hesitation?

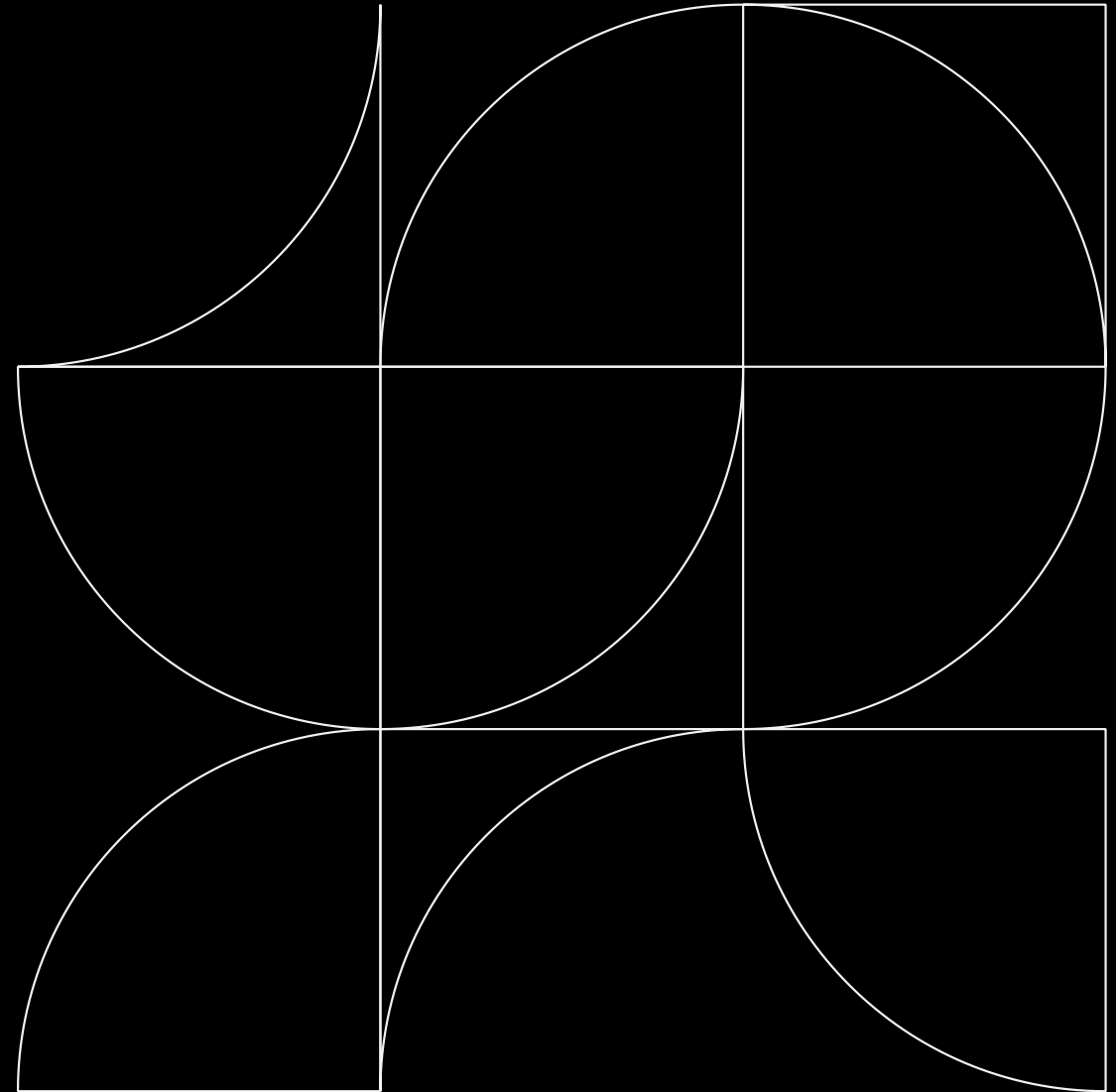


Like it or not...

- Return to work is happening – all states are lifting stay at home orders
- Unemployment made a startling downward adjustment last week
- Some returning employees will take a pay cut from enhanced unemployment compensation
- Many of the jobs that will return are in industries that are more highly unionized or subject to greater organizing risks



NLRB Recent Developments

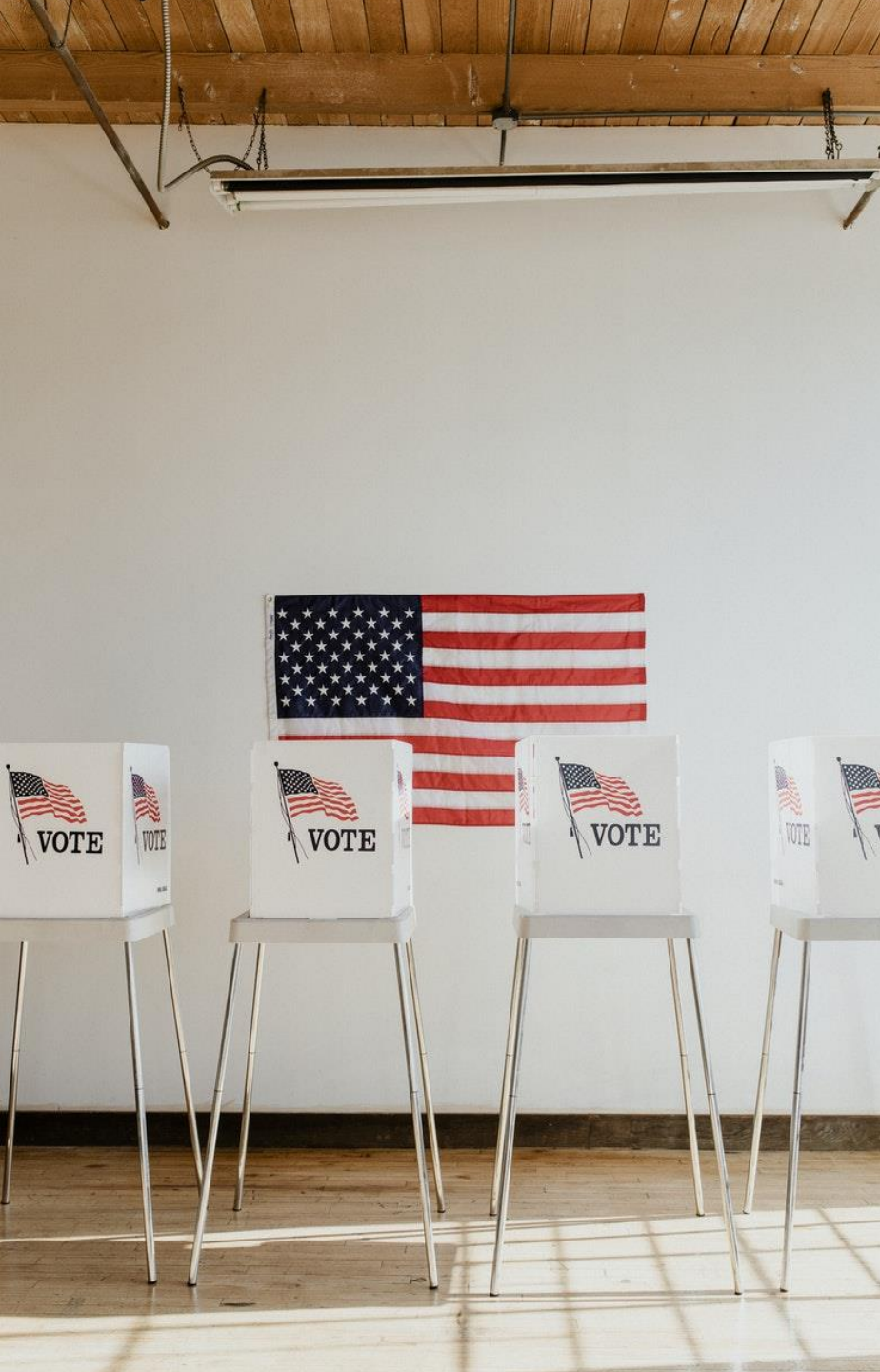


New Election Rules – in effect as of June 1 Parts that were overturned

- **Providing employers an increased ability to challenge and litigate certain issues prior to an election.** These issues included disputes concerning unit scope and voter eligibility, including issues of supervisory status.
- **Increasing the length of time between the filing of the petition and the date of the election.** Under the proposed rule that meant that while still trying to schedule the election at the earliest practicable date, it would not normally be before the 20th business day after a DDE or the stip gets approved. As we all recall, under the previous rules the Region's guideline was earliest practicable date without limitation and we saw some plenty of instances of elections being scheduled before the 20th business day after a DDE or approval of a stip.
- **Adding to the time period for an employer to serve a voter list;** Under proposed rule this was a change from 2 to 5 business days after DDE or approval of a Stip.
- **Limiting who can serve as an election observer;** Under the proposed rule it provided that The use of a nonemployee observer will now be considered a breach of the election agreement unless agreement by the parties to use a nonemployee observer or the use of a nonemployee observer is reasonable under the circumstances.
- **Delaying certification of election results if a request for review is pending or may still be timely filed.** Under the proposed rule the Regional Director would no longer certify the result of an election if a request for review is pending or before the time has passed during which a request for review could be filed.

New Election Rules – in effect as of June 1 Parts that are effective

- The remainder of the rules were not overturned by the Court; however, the Court remanded the entire set of rules to the NLRB for reconsideration following the court's ruling. On June 1, 2020, the NLRB announced that all unaffected rules would be implemented immediately, and those now effective changes include the following:
- **Scheduling the hearing at least 14 days from issuance of the notice of hearing.** Was 8 days ve much greater discretion to do so. Parties have the right to introduce evidence at hearing relevant to the existence of a question of representation and other issues in the case that are properly raised.
- **Posting the notice of petition for election within 5 days instead of 2 days**
- **Changes in timeline Requiring petitioner to serve a responsive statement of position.** This is a new requirement. Petitioner (usually the union) must file a Statement of Position at least 3 business days (by noon) before the hearing
- **Reinstatement of Post-Hearing Briefs.** Filed within 5 business days after the close of the hearing. Extension of up to 10 additional business days where good cause is shown.
- **Reinstating Regional Director discretion on the timing of a notice of election after the direction of an election.** The rule emphasizes the Regional Director's discretion to issue election details in the direction of election.
- **Ballot impoundment procedures when a request for review is pending.** Where a request for review is filed within 10 business days of the Regional Director's decision, and if the Board has not ruled on the request or granted it before the conclusion of the election, the ballots whose validity might be affected by the Board's ruling on the request will be segregated and all votes will be impounded pending the Board's ruling.
- **Oppositions to Requests for Review.** Oppositions are explicitly permitted in response to all types of requests for review, and the practice of permitting replies to oppositions and briefs on review only upon special leave of the Board has been codified.
- **Prohibition on bifurcated requests for review.** The rule provides that the direction of election "may" include election details, but emphasizes that the Regional Director retains the discretion to continue to investigate the time, place and manner of election even after issuance of the decision and without having to justify the bifurcated action on the existence of "unusual circumstances.
- **Terminology changes and defining days as "business" days.** All time periods applicable to the election rule are calculated based on business days as opposed to calendar days. Federal holidays are not designated business days in time period calculations.
- **Certain changes in formatting for pleadings and other documents.**



Elections Paused Then Resumed (Maybe)

- Is your region holding elections?
- How soon?
- Can you figure out who is in the bargaining unit?
- Mail ballots or in-person?

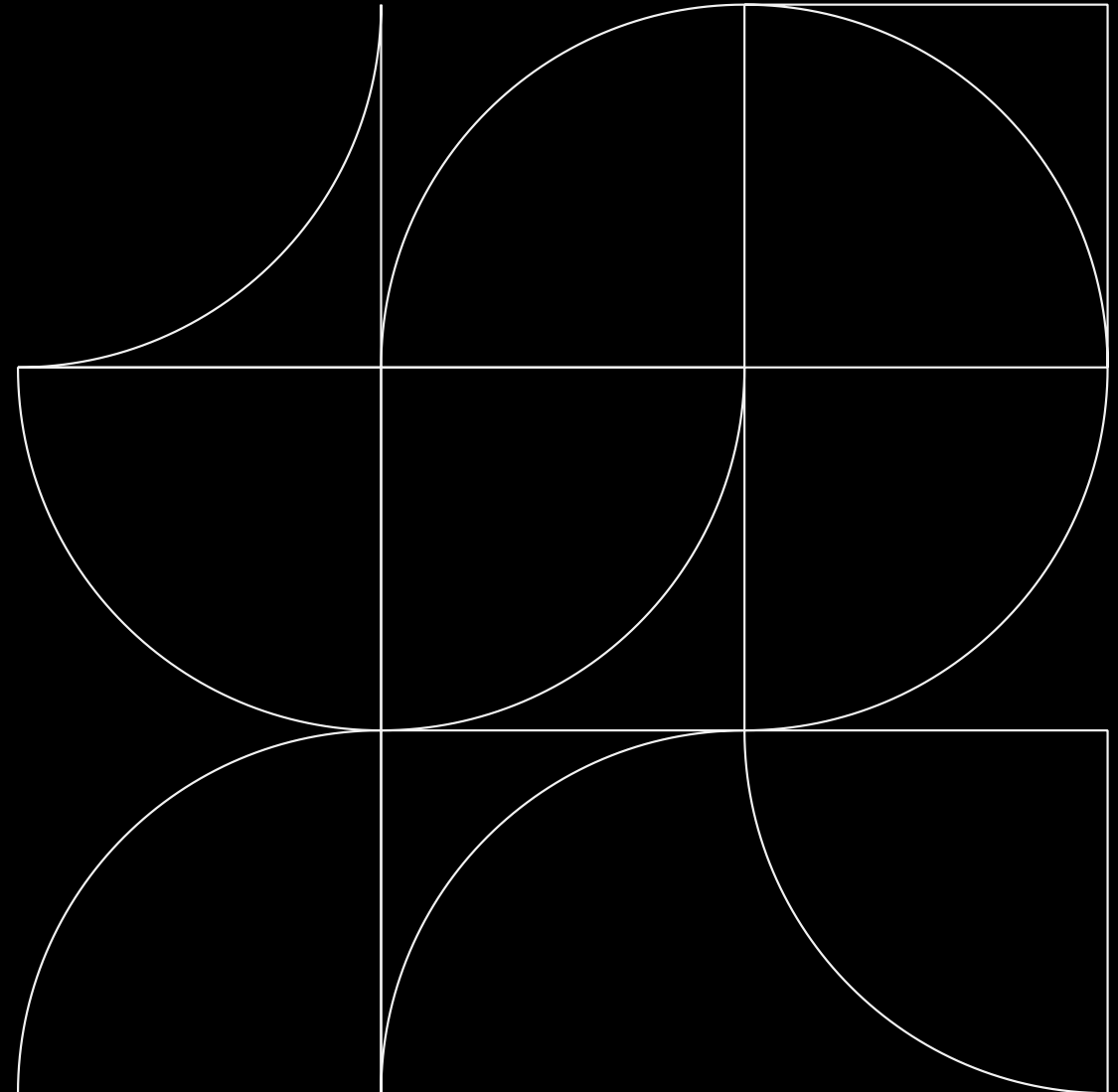
Solicitation Redefined

- **NLRB Expands Definition of ‘Solicitation’ in Precedent Altering Decision**
- *Wynn Las Vegas, LLC*, 369 N.L.R.B. No. 91 (May 29, 2020)
- *Redefines “solicitation” to include any employee activity encouraging other employees to vote for or otherwise support a union.*
- *In doing so, the NLRB overturned precedent that limited “solicitation” to efforts to induce employees to sign union authorization cards.*
- *Applying its newly refined standard, the NLRB upheld the discipline of an employee for having a three-minute discussion on work time to encourage a co-worker to vote in favor of union representation in an upcoming election.*
- *This decision is a potential “game changer” for employers, who may now lawfully enforce non-solicitation policies that cover any activity aiming to drum up union support during work time.*

Prior Developments That Seem More Applicable Now

- Maintain Control Of Your Computer Policies
 - *Caesars Entertainment d/b/a/ Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 overturns *Purple Communications, Inc.*, 361 NLRB 1050 (2014).
- Regulating Attire And Face Mask Messaging
 - *Walmart Stores, Inc.*, 368 NLRB No. 146 (December 16, 2019) – enhanced right to issue neutral dress/attire policies
- Workplace Civility
 - In *The Boeing Company*, 365 NLRB No. 154 (Dec. 14 2017), the NLRB overruled *Lutheran Heritage Village-Livonia*, a 2004 decision that gutted workplace civility policies.

Organizing and Protected Activity Developments





Section 7 of the NLRA provides employees with:

[T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other ***concerted activities*** for the purpose of collective bargaining ***or other mutual aid or protection . . .***

29 U.S.C. § 157 (emphasis added).

Mutual Aid Takes Many Forms

CWA

COMMUNICATIONS
WORKERS OF
AMERICA



**COVID-19: FAQ for Engaging in Protected
Concerted Activity To Stay Safe From
COVID-19 at Work**

- Significant uptick in protected, concerted activity in non-union workplaces, even in the absence of union organizing
- Walkouts, sit-ins
- Safety and hazard pay demands
- Increase in OSHA complaints
- The image to the left comes right from the CWA website and urges union and non-union workers to engage.



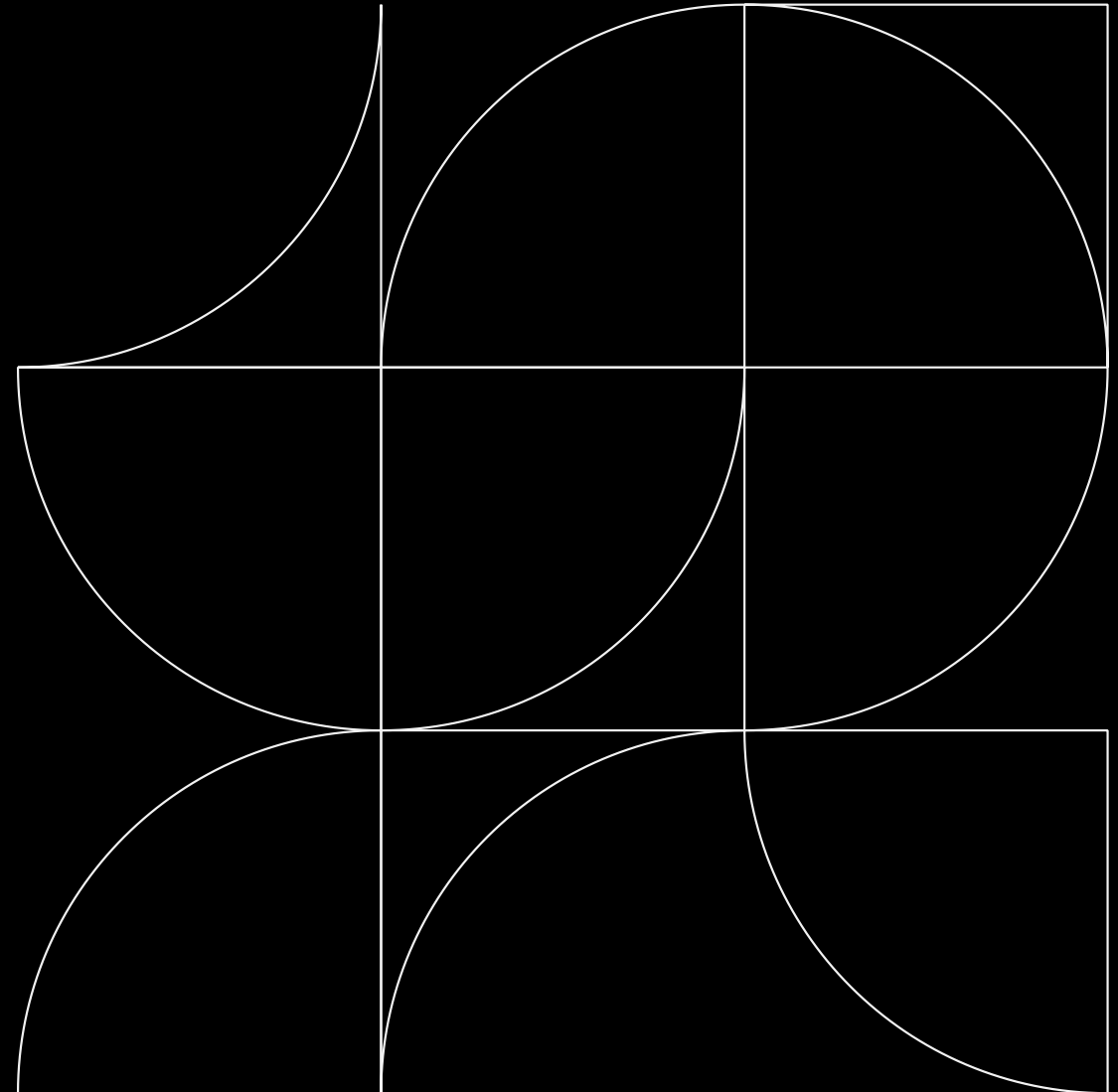
Organizing issues

- Safety (whistleblowing)
- Hazard or Incentive pay
- Paid leave
- Unpaid leave
- Treatment of “Essential Workers”
- “Heroes” take center stage
- Equality and justice

What Should/Can You Do?

- Understand your state and local laws and executive orders
- Understand what your employees want and meet them where they are
- Talk with frontline supervisors
- Be proactive before employees find an inflection point
- Institute lawful policies – facial covering policies and procedures
- Develop a plan—ensure that you have the ability to communicate with employees in multiple ways and not just in-person
- Communicate employee-facing items to employees
- Train management and, importantly, frontline supervisors on TIPS and PER
- Communicate your story and what you're doing
- Keep your workforce in mind--some industries and age groups are more pro-union than others (i.e., digital media, millennials)
- Use technology—more important than ever in this COVID-19 world

Issues Relating to Unionized Workforces – Bargaining & Increased Concerted Activity





Balancing Competing Interests

- Unions and employees are seeking more
 - Unions have experienced financial pain from all the layoffs
 - Many unions and their members are enflamed by recent world developments
- Employers are struggling mightily
 - Many are contemplating massive overhauls to their businesses and need concessions
 - Very few are flush with cash and most are looking at increased expenses relating to workplace requirements



Industries on the Brink

Hospitality

- Travel
 - Air
 - Rail
- Health Care
- Retail
- Dining
- Brick and mortar anything

Mid-Term Decisional Bargaining

- Do you have to bargain before you implement?

Maybe – It depends on . . . contract language or situation

- Remember NLRB GC Memorandum 20-04 – issued March 27, 2020 - bargaining during emergency situations

Effects Bargaining

- Do you have to bargain about the effects of the decision?

Yes, if requested, essentially no matter what

- When?

Ideally before you implement --
Must give union a meaningful opportunity to bargain



Expired or Expiring Contracts

- Getting the Union to meet with you (remotely or in person)
- Unions may want delays
- Extending existing agreements
- Letting your agreement expire
- Can you make changes after expiration?

Bargaining Issues – RTW Plans or Further Layoffs

- Order of layoffs or furloughs
- Order of recall
- Willingness or ability to return
- Voluntary buy outs
- Bargaining Issues – Peeling Back COVID Enhancements





Bargaining Issues – Concession Bargaining

- There are national discussion about healthcare employers who are seeking to freeze wages and stabilize costs
- Retailers will be forced to address the elephant in the room - stores are struggling. Unions are resisting.

Bargaining Issues – Leaves Of Absence

- Paid leave
- Unpaid leave
- Voluntary leaves of absence
- Impact of leave on seniority, pay or benefits
- Benefits during leave



Bargaining Issues – Sick Leave

- Use of sick leave to care for others instead of self
- Restoration of sick leave upon return to work
- What to do about the use of vacation and PTO



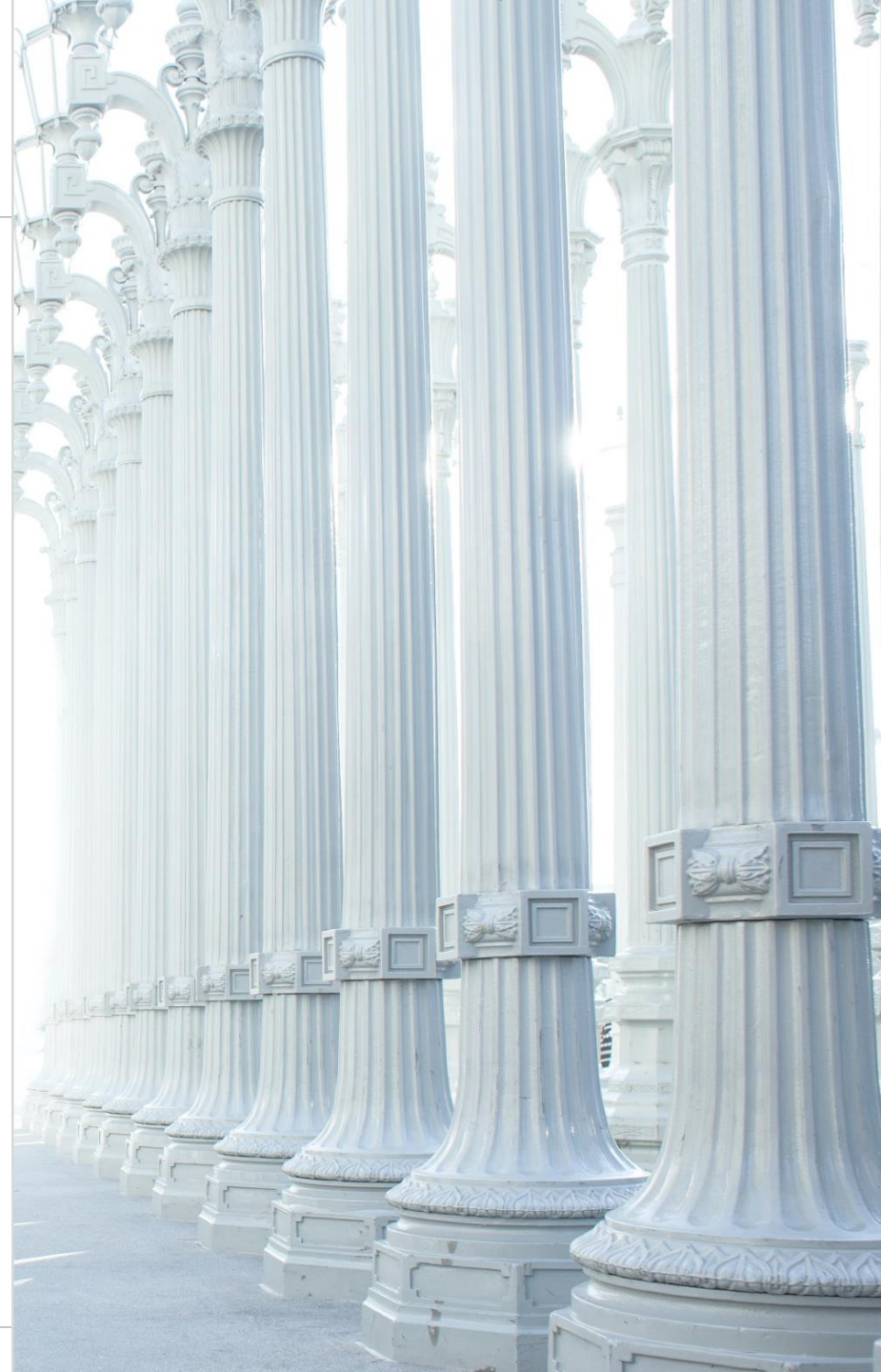


Bargaining Issues – Other Terms & Conditions

- Bargaining about cleaning practices
- Bargaining about attendance policies and inability to discipline for attendance violations
- Childcare
- Where federal or state relief to employer/industry goes (e.g., certain percentage to employees, etc.)

State And Local Laws

- What do you do if they prohibit you from following your CBA?
- What do you do if they provide more generous benefits?





Increased Mobilization of Your Union Workforce

- Expect more First Amendment behavior
- Plan for job actions and demonstrations
- Focus on safety
- Expect appeals to legislators and politicians
- Engage in partnership with employees and unions where you can



METOrchestraMusicians.org June 9, 2020 Our Statement On Equity, Diversity, Inclusion, And Belonging

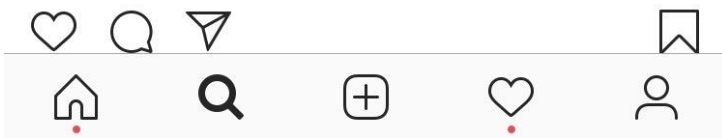
The MET Orchestra Musicians are horrified by the instances of police brutality and racial injustice that have caused incredible pain for the Black community and unrest in our country. The events of recent weeks have led us to reflect on ways The Metropolitan Opera, as an organization, can make real and lasting changes and how the MET Orchestra Musicians can play a meaningful role in that process.

We appreciate that The Metropolitan Opera has recognized the need to acknowledge the mistakes of the past and that they have expressed a willingness to open conversations going forward about equity, diversity, inclusion, and belonging (EDIB). We stand in agreement with our music director, Yannick Nézet-Séguin, in his recent statements acknowledging the need for systemic change with regards to EDIB at The Metropolitan Opera. In order for our company to be its best, it must create an inclusive environment where every person – performers, stagehands, staff members, and audience – feels they truly belong.

We recognize there are problems, and we want to be part of the solution. It is our hope The Metropolitan Opera will include The MET Orchestra's voice in the critical work that is necessary for us to move forward as an institution. Following initial discussions, we have several recommendations, and we encourage The Metropolitan Opera to implement them as soon as possible.

- The Opera must commit to hiring composers and conductors of color in the operatic and symphonic seasons each year.
- The Opera must commit to hiring soloists of color during each Carnegie Hall season.
- The Opera must commit to hiring people of color in upper administration.
- The Opera must adjust its mission to include serving and engaging communities of color.
- The Opera must be inclusive in its engagement with its local community.
- The Opera must commit to an external review of the organization that focuses on issues of EDIB, including concerns regarding equity in employee compensation.
- The Opera must collaborate with the Metropolitan Opera Orchestra Committee on diversity and inclusion issues.
- The Opera must play a leadership role in encouraging systemic change with regards to EDIB at Lincoln Center.

The MET Orchestra Musicians commit, at this moment in history and in the months and years to come, to doing our part to support this vital cause.



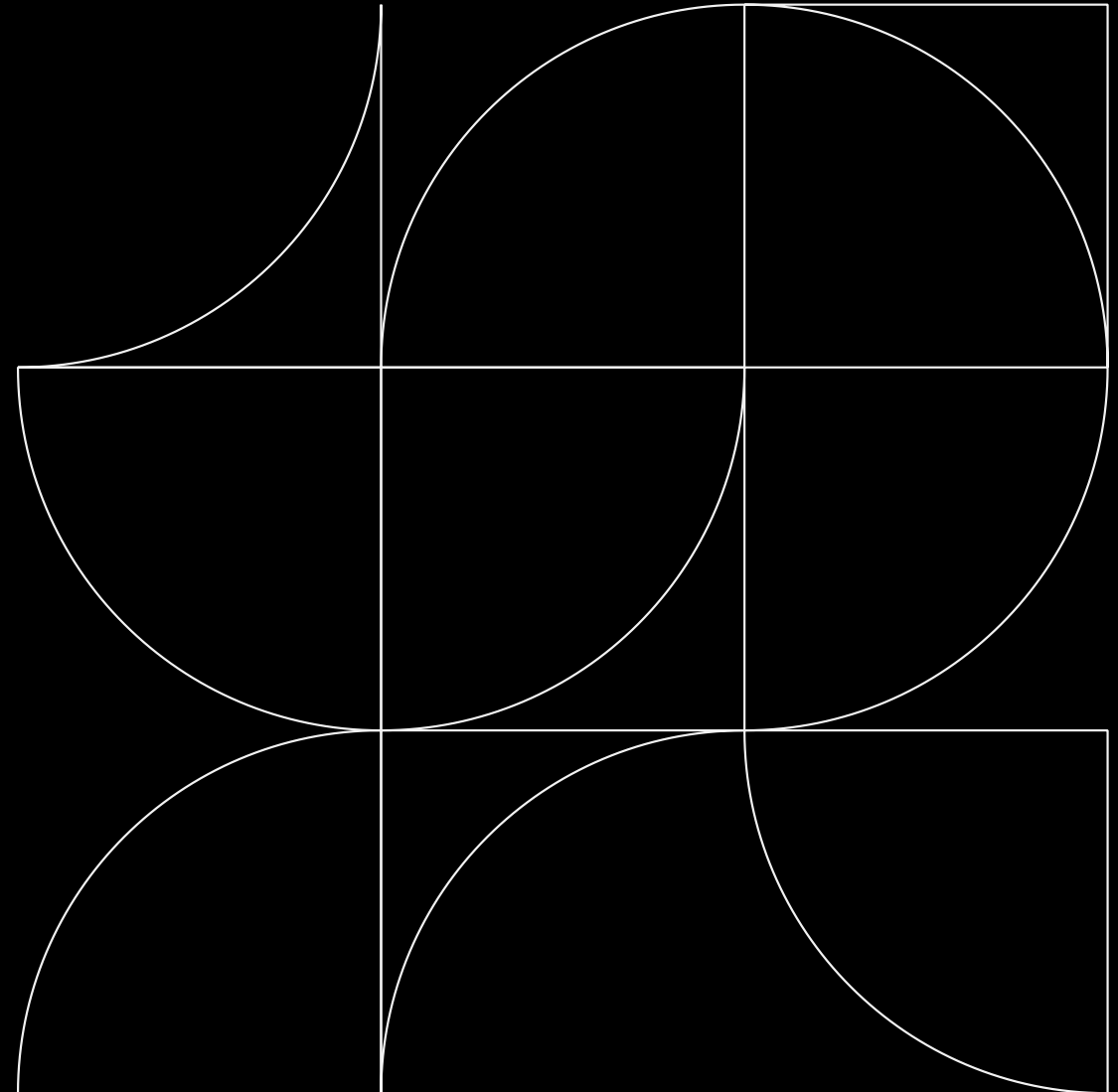
Mutual Aid Takes Many Forms

- Significant uptick in protected, concerted activity
- Walkouts, sit-ins
- Safety and hazard pay demands
- Increase in OSHA complaints
- Demands being publicly made

Union Information Requests

- Requests about COVID cases
- Requests about government stimulus and how it is being used
- Requests about financial condition
- Employer's requirement to respond
 - objections
 - responses
 - confidentiality
 - timeliness

Questions & Answers



Labor Management Relations Practice Group

- Labor management relations is in our DNA. Since Seyfarth was founded in 1945, employers have trusted us with their high-stakes collective bargaining, litigation, and advisory needs.
- Our services encompass the entire range of labor relations matters, including: representation/decertification elections; collective bargaining; interest arbitration; unfair labor practice litigation, injunction proceedings, and other labor litigation; grievance-handling and labor arbitration; strikes and lockouts; consumer boycotts; corporate campaigns; and advice and strategic planning on other labor relations matters.
- **Collective Bargaining.** Whether a first contract or renewing an existing labor agreement, contract negotiations present both challenges and opportunities. Employers regularly turn to us for help with strategic issues, obtaining operational changes, understanding and maximizing employer leverage, developing a negotiation
- **Union Organizing.** Much is at stake when a union is trying to organize an employer's workforce. In these times of high stakes and even higher stress, employers turn to us for strategic advice and representation.
- **Arbitration and Other Litigation.** We are leaders when it comes to representing management in all types of labor litigation, whether before an arbitrator, a court, or a government agency. Our arbitration experience spans the full spectrum of issues that can arise in the union setting, whether they involve contract interpretation, discipline, or interest disputes.
- <https://www.seyfarth.com/services/practices/litigation/labor-management-relations.html>

Seyfarth's COVID-19 Resources



Post-Pandemic Recovery and Renewal

Planning and Executing a Strategic and Successful Return to Work

We have assembled a cross-disciplinary Recovery and Renewal team who can advise you on the current state of business impact as a result of COVID-19, and what the future holds for business. Our team of 100+ lawyers is already deeply credentialed, having advised thousands of clients on the developments of the rapidly changing pandemic across the globe. We have a deep understanding of how the pandemic is affecting businesses and industries deemed essential and non-essential, and the related legal, business, and workforce issues specific to all. Likewise, we are already helping clients build phased return-to-work plans by modeling various scenarios for how business might resume—from continued social distancing to a full engagement of their workforces in full operations.

We are ready to leverage our knowledge to help you reengage in business—and grow.

We recognize that your business is unique and the legal landscape faces unprecedented complexity. Accordingly, we employ a three-step process to prepare a comprehensive, bespoke return-to-work toolkit for our clients.

1. Review

- Investigation and audit of pre-pandemic business status quo
- Step-by-step checklist addressing business elements and pandemic
- Establish goals and overall business strategy for near, mid, and long term

2. Analysis

- Business review in the new legal and business landscape using Seyfarth's in-depth **Return to Work Treatise**
- Strategic conversations regarding return-to-work timing, business considerations, and growth opportunities
- Identification of legal landmines with strategies for minimizing risk
- **Return to Work Selection Process Guide**

3. Implementation

- Execution of custom plan for return to work: phased/all/none; employee selection; employee screening protocol; workplace safety plan; communications cascade
- Access to Seyfarth's first-in-class **Policy, Communications & Tracker Repository**
 - Positive test / confirmed Case
 - Temperature screening
 - Antibody testing
 - Social distancing
 - Face covering
 - Business travel
 - Expense reimbursement
 - Visitor self-Declaration
 - Work from home
 - FFCRA request
 - Infectious disease

- **Seyfarth's COVID-19 Resource Center**

- www.seyfarth.com/covid19

- **Sign Up For Seyfarth's Latest COVID-19 Updates**

- <https://connect.seyfarth.com/33/48/landing-pages/rsvp-blank---covid-19.asp?sid=blankform>

- **Seyfarth Post-Pandemic Recovery and Renewal**

- <https://www.seyfarth.com/services/practices/advisory/post-pandemic-recovery-and-renewal.html>

- **Seyfarth COVID-19 Webinars on Demand**

- www.youtube.com/playlist?list=PLg0AI7yn7R3cVmPQJEuTYilEffzrSgJdv

Thank You

