



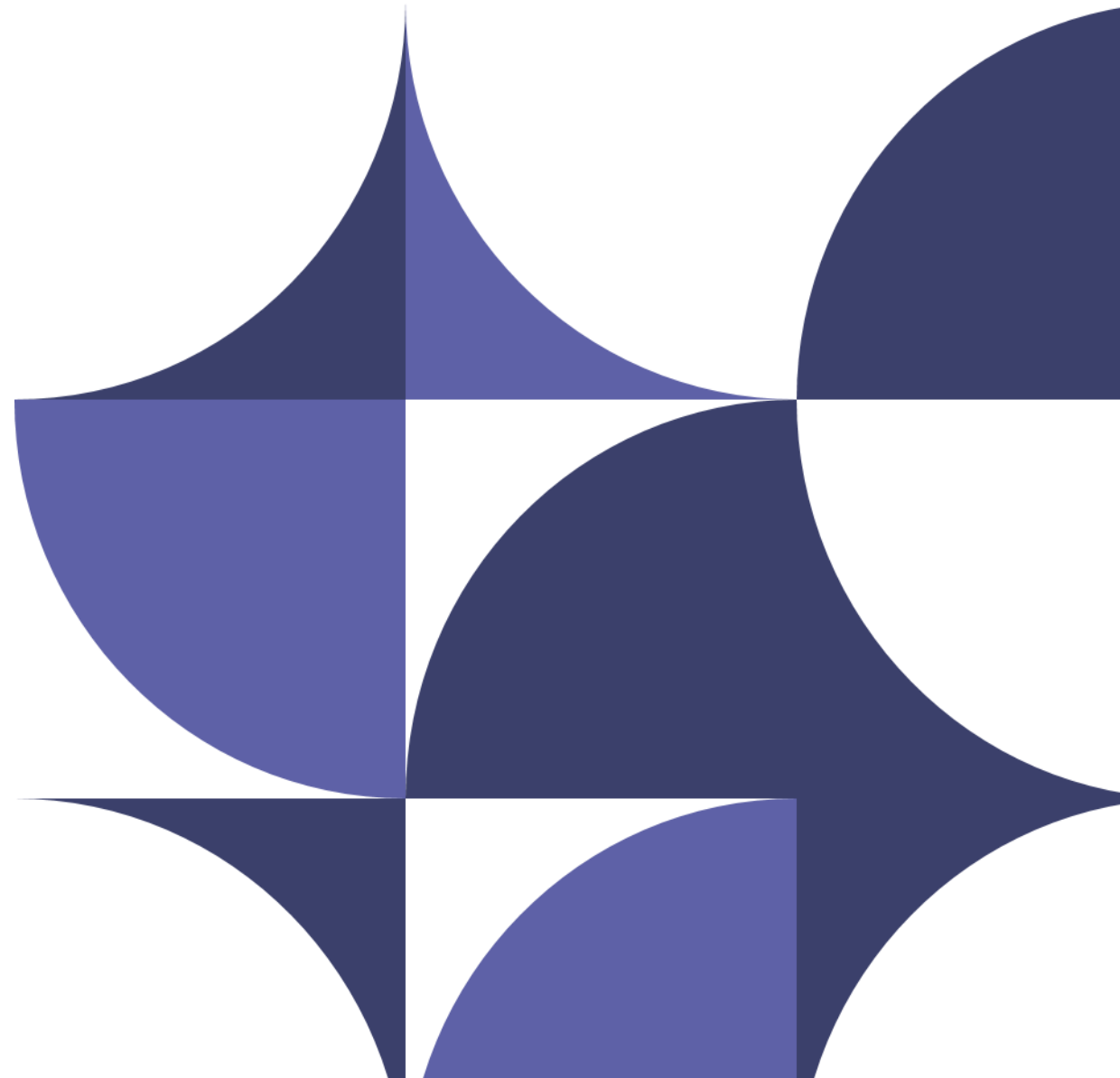
Return to Business in the Southeast:

How to Protect Your Most Valuable Assets

May 7, 2020

Seyfarth Shaw LLP

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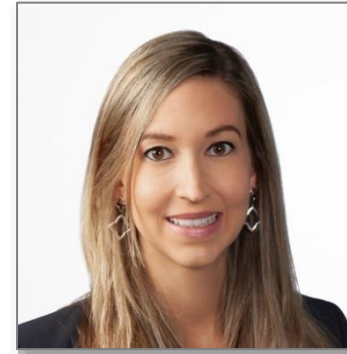
Speakers



Brett Bartlett
Labor & Employment
ATLANTA



Stan Hill
Labor & Employment
ATLANTA



Christina Meddin
Labor & Employment
ATLANTA



Fritz Smith
Labor & Employment
CHARLOTTE



Esther Slater McDonald
Commercial Litigation
ATLANTA



Rebecca Woods
Commercial Litigation
ATLANTA



Gale Evans
Real Estate
ATLANTA



State and Local Orders: Opening, Expiring, and Creating Confusion

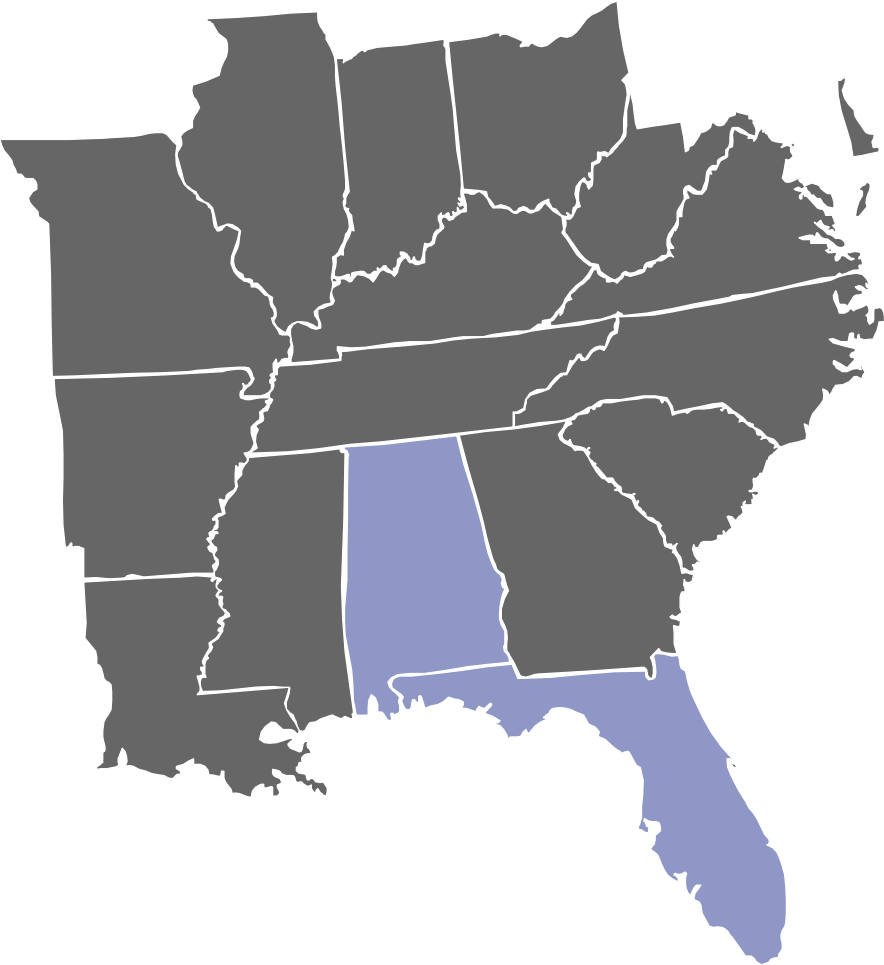
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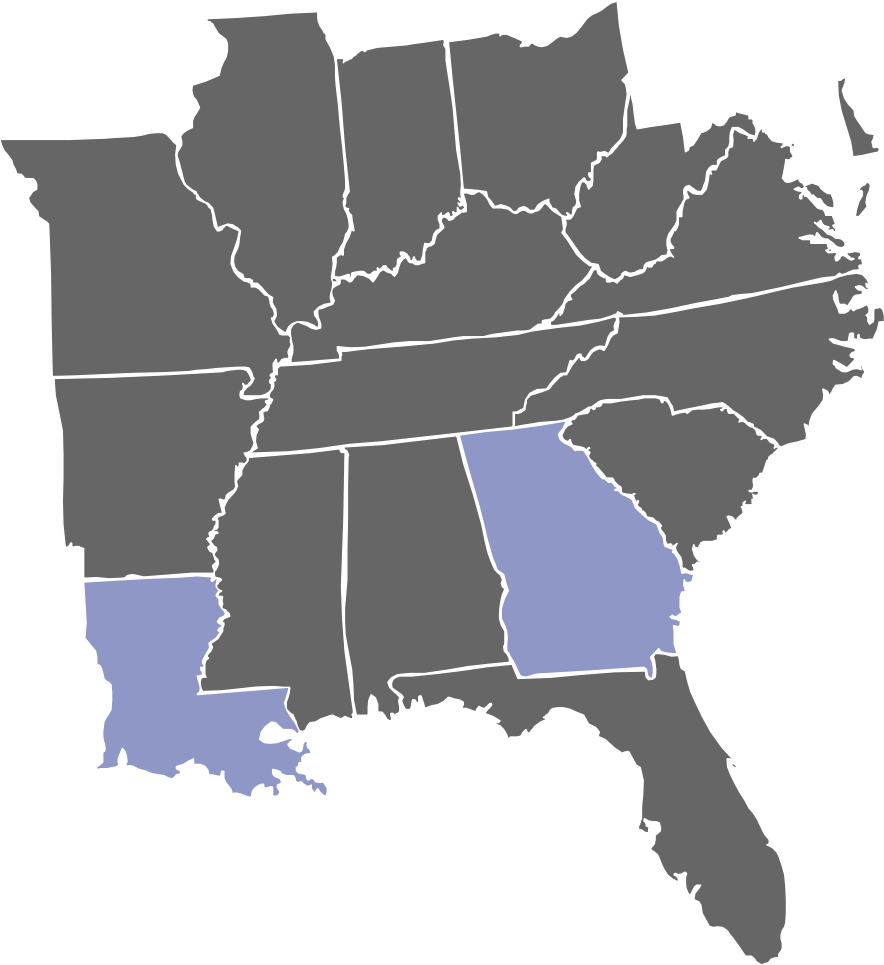
Closing Orders, Opening Orders, and Other Pieces of the Puzzle

Alabama	<p>Phase 1: "Safer at home" phase lasting until May 15, during which residents are recommended to stay home but not required to. Retail stores are allowed to begin reopening at 50 percent capacity, beaches can open with gatherings no more than 10 people, release restrictions on medical procedures. Restaurants and bars are still limited to take out.</p> <p>Phase 2: "Safer apart" phase to be determined.</p>	Original stay at home order expired: April 30
Florida	<p>Phase 1: Beaches reopened for "essential activities" in parts of the state on April 17</p> <p>Phase 2: Florida will start to re-open on May 4 (minus Miami-Dade and Palm Beach County). Dining and retail can open at 25% capacity. Restaurants can offer outdoor seating if tables are 6 feet apart.</p>	Original stay at home order expired: April 30



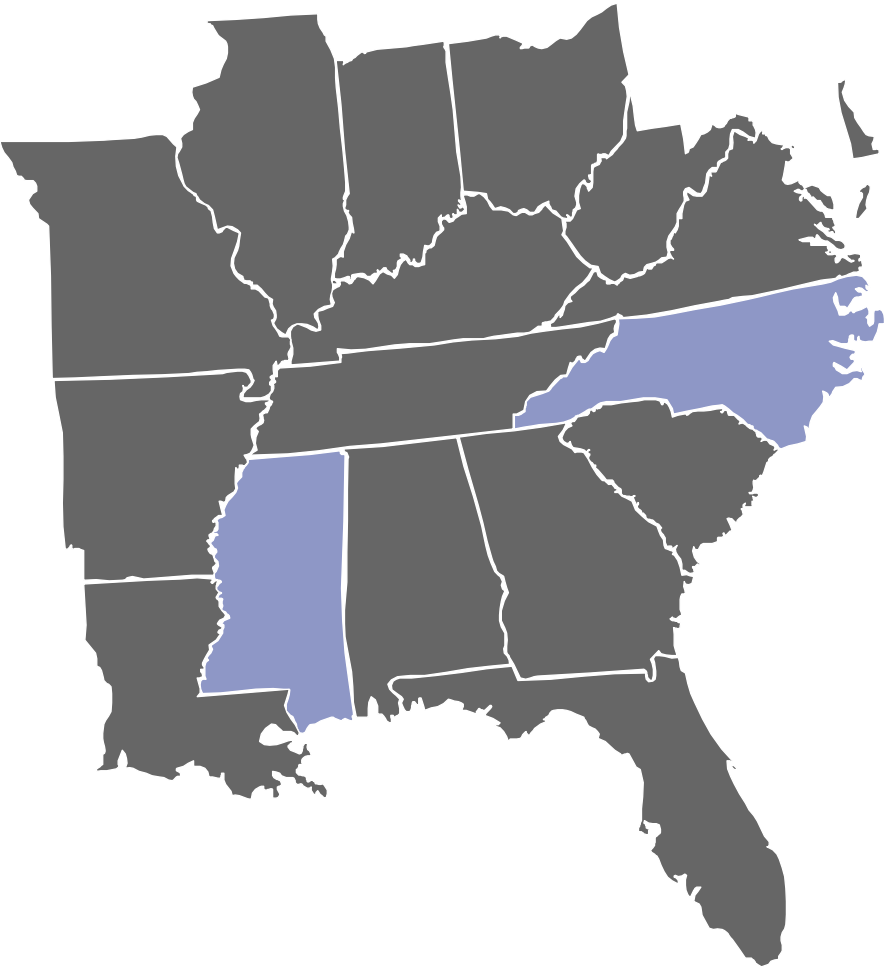
Closing Orders, Opening Orders, and Other Pieces of the Puzzle

Georgia	<p>Phase 1: Elective medical procedures began on April 22</p> <p>Phase 2: Gyms, hair and nail salons, bowling alleys and tattoo parlors reopened on April 24</p> <p>Phase 3: Restaurants allowed to resume limited dine-in service, and movie theaters and other entertainment venues also allowed to reopen</p>	<p>Extended emergency order expires: May 13</p> <p>Vulnerable population stay at home extended: June 12</p>
Louisiana	<p>As of May 1, stores open for curbside delivery; restaurants allowed to open their outside areas, for meals only, without table side service; employees of businesses having public contact must wear a mask. Businesses previously directed to be closed should remain closed; e.g., salons, barbers, bars and casinos. Businesses deemed essential under the third phase of federal CISA guidance remained open. Non-essential retail businesses open with limitations to fewer than 10 people total inside.</p>	<p>Original stay at home order expired: April 30</p>



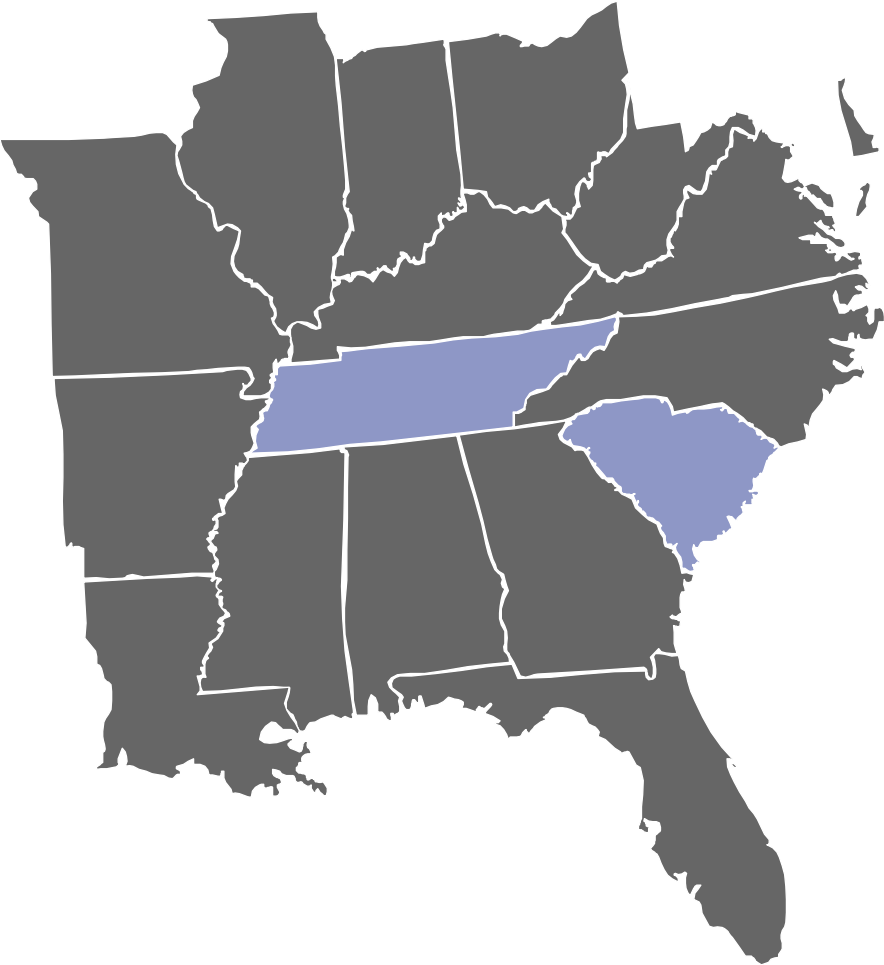
Closing Orders, Opening Orders, and Other Pieces of the Puzzle

Mississippi	<p>Phase 1: "Safer at home" phase lasting until at least May 11, during which residents are recommended to stay home but not required to. Retail stores are allowed to begin reopening at 50 percent capacity, but restaurants are to remain limited to pick-up and curbside service. Schools are closed through the rest of the school year.</p>	Original stay at home order expired: April 27
North Carolina	<p>Phase 1 (May 8): Stay-at-home order remains in place; people can leave home for commercial activity at any business that is allowed to be open. Most can be open, with restrictions. Businesses will need to implement social distancing, cleaning and other protocols. Gatherings are still limited to no more than 10 people.</p> <p>Phase 2 (at least 2-3 weeks after Phase 1): Lift the stay-at-home order, while vulnerable populations should remain at home. Permit limited opening of restaurants, bars, gyms, personal care services, and other businesses that can follow strict safety protocols and reduced capacity. Increased number of people allowed at gatherings.</p> <p>Phase 3 (at least 4-6 weeks after Phase 2): Allow increased capacity at restaurants, bars, other businesses, churches, & entertainment venues. Increase number of people allowed at gatherings.</p>	Phased opening approach



Closing Orders, Opening Orders, and Other Pieces of the Puzzle

South Carolina	On April 20, retail stores that sell furniture, clothing, shoes, jewelry, luggage, leather goods, sporting goods, books, crafts, music, and flowers, along with department stores (with the exception of hardware and home-improvement) and flea markets were permitted to open, but were limited to 20% capacity with social distancing. Restaurants were permitted to provide outdoor dining as of May 4.	Stay at home order expired: May 4
Tennessee	Restaurants were allowed to open on April 27 and retail outlets on April 29, at 50% capacity. Close contact services like salons and barbershops were allowed to reopen on May 6 in 89 of the state's 95 counties.	Original stay at home order expired: April 30



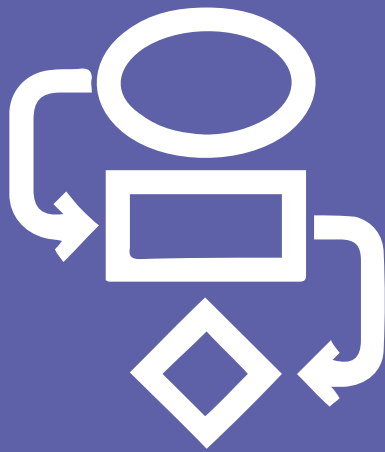


Employee concerns: Health, safety, and operational realities

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Determine Which Federal, State and Local Laws and Orders Apply

- State and local shelter-in-place orders
- OSHA and other health and safety laws and orders (may vary by location, industry)
 - Mandatory “PPE” → Risk assessment to identify hazards?
- Paid sick, paid leave, unpaid leave, and other relevant laws
 - “Available work” may trigger FFCRA leave entitlements.
 - Unpaid leave as an ADA accommodation
 - Unpaid leave under traditional FMLA
 - Employment policies – consistent application of policies
- Determine whether there is a need to bargain with any union(s) regarding additional workplace health/safety protocols and other changes to policies and practices, and whether local rules or orders will impact bargaining



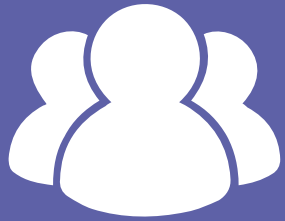
Accommodating Employees Who Cannot Return to Work

- Varied reasons for not returning to work: increased risk of exposure due to age or underlying condition, childcare needs, fear
 - Some reasons are protected, other are not
 - May depend on employer size (e.g., FFCRA requires childcare leave for most employers under 500 employers; larger employers not covered)
- Interactive process, individualized assessment
 - **Avoid stereotyping / generalizing which risk “regarded as” disability discrimination claims**
 - Accommodation requests should be employee-driven.
 - Accommodation decisions are employer-driven.
- Potential “accommodations” include:
 - Remote work
 - Reassignment to open position
 - Alternative work schedule (incl. PT work)
 - Paid leave, Unpaid leave, Short-Term Disability



Requests to Work Remotely After Worksite Opens

- Has overall philosophy toward remote work changed since COVID-19?
 - Requests for reasonable accommodations for a disability (including potential need to revisit pre-COVID-19 accommodation request denials)
 - Requests due to fear of COVID-19 (note: potential ADA (e.g., anxiety) and whistleblower issues)
 - Requests due to membership in a vulnerable population
 - Requests due to allegation(s) of violations of health and safety orders and/or laws or need to quarantine due to potential exposure
 - Requests due to child/senior care challenges
 - Requests due to transportation challenges
 - Requests due to household family members being in a vulnerable population (pre-vaccine) (e.g. household family members with underlying medical conditions/immuno-compromised or who are senior citizens)
 - Requests due to other personal reasons



Determining if Individual Employees are Safe to Return

- Daily questionnaires, temperature checks, self-certifications
 - Permitted for now – subject to change
- Screening process to determine if individual employees are safe to return, i.e., employees who:
 - have tested positive for COVID-19
 - have been diagnosed as presumptively positive for COVID-19
 - have experienced COVID-19 symptoms
 - have potential exposure, but no symptoms
- **Consider related protocols for (1) independent contractors regularly on-site, and (2) vendors, guests, and customers.**



A Few Words on Testing

- Active Infection v. Antibody Testing
 - Immune?
 - Contagious?
- Testing to reduce legal risk v. testing an employee benefit
- Any testing is a snapshot of a moment in time.
- Reliability of antibody tests vary widely.
- Employer-paid testing (whether voluntary or mandatory) should be reviewed for ERISA and Affordable Care Act compliance.



Litigation: Liability and Insurance Considerations

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Potential Claims by Customers & Invitees

- Significant risks of negligence and breach of contract claims (also fraud, phishing, cyber, and privacy)
 - Class actions
- Federal limitations of liability for companies?
- Brand and reputational risk

Insurance that May Respond to COVID-19 Claims



Property/Business Interruption



Event Cancellation



General Liability



Other (EPLI, E&O, D&O)



Mitigate Risk & Maximize Insurance

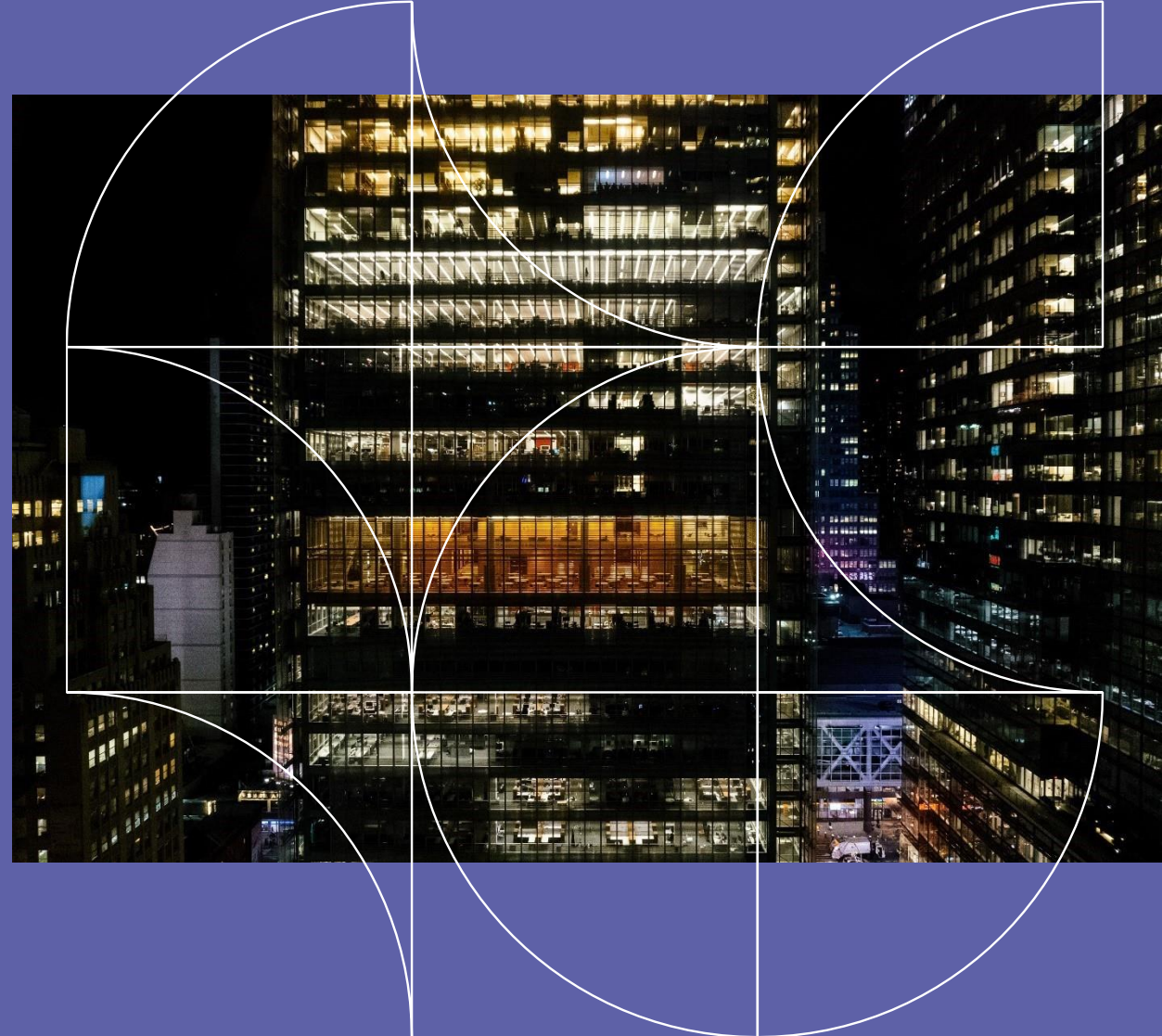
- Guidelines: Patchwork, evolving, standard of care
- Document, Action Plans, Evolve
- Revisit contracts (indemnification and release of liability) and insurance program
- Insurance claims



Real Estate Matters: Guidance to Commercial Tenants and Landlords

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Landlords: Strategizing the Reopening of Your Building/Shopping Center/ Planning

Planning



Plan now before restrictions are lifted. Select your reopening team, which should include your trusted legal counsel.

Consider what safety and protective measures will be necessary/required.

Consult with legal counsel



Review all planned new procedures and protocols, operational changes, and other potential legal exposures.

Review leases, license agreements and other agreements (vendor, contractors) to understand your rights and obligations under each document.

Consult with risk management and insurance broker



Review insurance policies and coverages.

Communicate



Well in advance of reopening, communicate reopening protocols clearly with tenants, vendors, and contractors.

Be prepared for tenant questions on your reopening plan and protocols.

Landlords: Strategizing the Reopening of Your Building/Shopping Center/ Planning (continued)

Be Informed



Designate one or two team members to stay current on federal, state, and local mandates and recommendations, and guidelines from the CDC, EPA, ASHRAE, and other regulatory and public health agencies.

Be Agile



Be prepared for ongoing changes in the situation and ready to revise protocols as necessary to handle changes.

Costs



Can (should) you pass through the cost of additional safety measures to tenants?

Landlords: Strategizing the Reopening of Your Building/Shopping Center - Preparation / Health and Safety

- **Safety and Personal Protective Equipment:** Require building personnel, vendors, and contractors to wear masks. Amend existing service agreements to include the requirement. Can you require tenants to wear masks (amend rules and regulations)?
- **Social Distancing - Tenants, vendors and contractors:** Limit building occupancy. Recommend tenants limit the number of visitors. Work with vendors and contractors to limit the number of personnel in the building.
- **Social Distancing - Landlord employees and brokers:** Limit number of people at meetings and use virtual meetings whenever possible, including when showing the building.
- **Social Distancing - Elevators:** Consider cab sizes, number of building floors, and daily number of tenants and visitors when determining number of persons allowed in an elevator. Queuing marks in elevator lobbies; designate elevators for “up” and “down” use to avoid longer ride times.

Landlords: Strategizing the Reopening of Your Building/Shopping Center - Preparation / Health and Safety (Continued)

- **Common Areas and Amenities:** Increase space between lobby furniture and/or reduce seating. Close amenity spaces when possible and in accordance with leases or license agreements. Provide hand sanitizer stations. Supply hand wipes in fitness facilities.
- **Security and Building Access:** Separate paths for “in” and “out”. Limit access points - one entrance and one exit. Monitoring of building protocols by security. Visitor and delivery protocols.
- **Signage:**
 - Provide in parking areas, building, access points, building and elevator lobbies, common areas, and freight elevators.
- **Training:**
 - Train employees on protocols and use of PPEs. Keep detailed records of where training was provided.
 - Require vendors and contractors to provide their health and safety plans and employee training on plans.

Tenants: Deciding Which Location/Office to Open

- **Economic Analysis:** Pre-crisis performance vs. re-opening projections. Cost of lease termination should a given location no longer prove viable post-COVID. Do the costs of post-COVID retrofits render a site no longer financially viable?
- **Co-Tenancy Considerations:** If you are a retail tenant, have COVID-19 closures triggered co-tenancy provisions in your portfolio? If so, analyse what steps you must take, and the required timing, to claim the relief provided under your lease(s).
- **Evaluate the Landlord/Tenant Relationship:** Is this a multi-site landlord with cross-default considerations? Have you not paid (or short-paid) April and/or May rent for this location and/or other locations leased from this landlord? If so, has a strategy been devised to restore the relationship with this landlord?
- **Sublease / Assignment / Give Back / Repurposing Opportunities:** Is this a site where it might make more sense to seek an alternative user or convert to a support use (e.g., ghost kitchen, BOPIS, curbside delivery, or dark store)? Do you have rights in your lease to “give back” square footage and shrink your footprint? What are your rights under your lease to assign the lease or sublease the space (all or a portion); if landlord consent is required, what hoops must you jump thorough and what timing is embedded in the consent provisions? Is there any deemed consent provision?

Tenants - Physical Space Coordination and Retrofit

- **Access Space:** Talk with landlords and building management to obtain early access to:
 - ready your space or store for return-to-work (deep cleaning, retrofitting as necessary for new regulations)
 - installation of new signage, etc.
 - inspect facilities including HVAC and water systems
 - clean equipment
 - install any required or desired protective measures.
- **Social Distancing:**
 - If in a single-tenant building or a large mall store, establish procedure for use of escalators and elevators to avoid crowding (e.g., elevator attendants, queue management for waiting passengers, etc.).
 - Protocol for monitoring occupancy in compliance with any applicable laws.
- **Screening:**
 - In multi-tenant situations, obtain clarity on what customer screening (e.g., temperature) may be required and who will perform it (landlord on behalf of all office tenants, landlord on behalf of all mall tenants, each individual tenant, etc.).
 - If visitor/customer screening is to occur within your office/store, identify an appropriate location for such screening (such that privacy and social distancing protocols are respected).
- **Adjacent Tenants:**
 - Develop a plan in the event of an outbreak at a nearby business.



Tenants - Signage



Familiarize yourself with new signage requirements and needs (occupancy, social distancing, customer flow, BOPIS, etc.).

Consider the public relations and **health and safety (e.g., capacity) concerns** related to any promotional signage you might otherwise normally employ.

Do you need to **limit quantities** per customer for certain items or implement **other anti-hoarding** signage?

Tenants – Planning for Social Distancing

Spacing

- Plan for spacing in workspaces, paths of travel and common spaces (hallways, lobbies, office conference rooms, open workspaces and kitchens) and in store aisles and check-out lines.
- Redesign or slow down production lines to allow for more space between employees.

Repurposing

- Repurpose conference rooms, lunch rooms, and other communal spaces to allow for more distance or close them altogether.
- Consider whether these closures or limitations impact required meal or rest periods.

Control Occupancy

Consider:

- Changing work schedules and/or shifts to limit the number of employees physically present in a specific office, store facility, plant, or other work location at any one time.
- Staggering of meal periods and rest breaks to the extent consistent with applicable law, and consider permitting employees to eat their work stations. Be careful to consider whether state or local laws regarding duty-free meal or rest periods impact your options regarding spaces used for meal or rest breaks.

Landlords and Tenants: Managing Your Supply Chain and Inventory

- **Assess supply needs:**
 - Explore options for sourcing additional supplies required for business operations and health and safety supplies; assess how to best leverage existing relationships with vendors.
 - Create a plan for how you will source and distribute cleaning products and PPE, accounting for existing and/or future shortages. Establish a protocol to monitor this on a frequent basis as rules and health guidance change.
 - If you have international operations, consider current challenges with respect to shipping certain products (such as PPE) across borders. You may have to modify your traditional supply chain routing.
- **Disinfection:** Establish procedure for regularly disinfecting inventory and newly-received deliveries. Establish protocols for handling and processing shipping and receipts (including disinfection).
- **Logistics:** Evaluate current situation as it relates to ports of entry and trucking logistics for your product. Will this impact your ability to timely re-supply, both now and in the medium term? Keep an eye out for future legislation which might have the effect of requiring truck drivers to quarantine upon crossing state-lines, etc., thereby further disrupting the supply chain.

Legal Considerations for Landlords and Tenants

- **Lease Issues:**

- Depending on the amount of leverage you have, review leases to address COVID-19 related issues whenever possible.
- Understand the effect of force majeure provisions in the lease and address if possible.
- Examine requirements for tenant build-out and how slowed permitted has affected ability to meet construction and delivery deadlines. Landlords can ask for a tolling of their delivery period for COVID-19 issues, but tenants should not be expected to wait forever.
- If your lease has a continuous operation covenant, ask for the ability to temporarily close for COVID-19 issues; or if upon reopening, governmental mandates social distancing and other requirements make it impractical or unprofitable to operate.
- If you have not already done so, address non-payments and restructuring of payment structure and extended term.
- Review what is required in the lease with regard to common areas and whether the landlord is required to provide enhanced cleaning and hot water, for example.

Legal Considerations for Landlords and Tenants (Continued)

- **ADA Considerations: Consult with legal counsel:**
 - ADA requirements for points of access, maintenance of at least one accessible entrance, and width of entry queues.
 - Whether you can impose a requirement of scanning for temperature and refuse admission if there is a fever.
 - When requiring face masks, whether to use alternative methods for communicating with customers/tenants, such as white board and pens.

TEMPORARY HOURS

Monday - Friday
10am - 4pm

STOP THE SPREAD | CDC.GOV

Retail Tenants - Business Hours

WE'VE CHANGED
OUR HOURS

Temporarily

Monday - Friday
9am - 4pm

stop the spread
cdc.gov

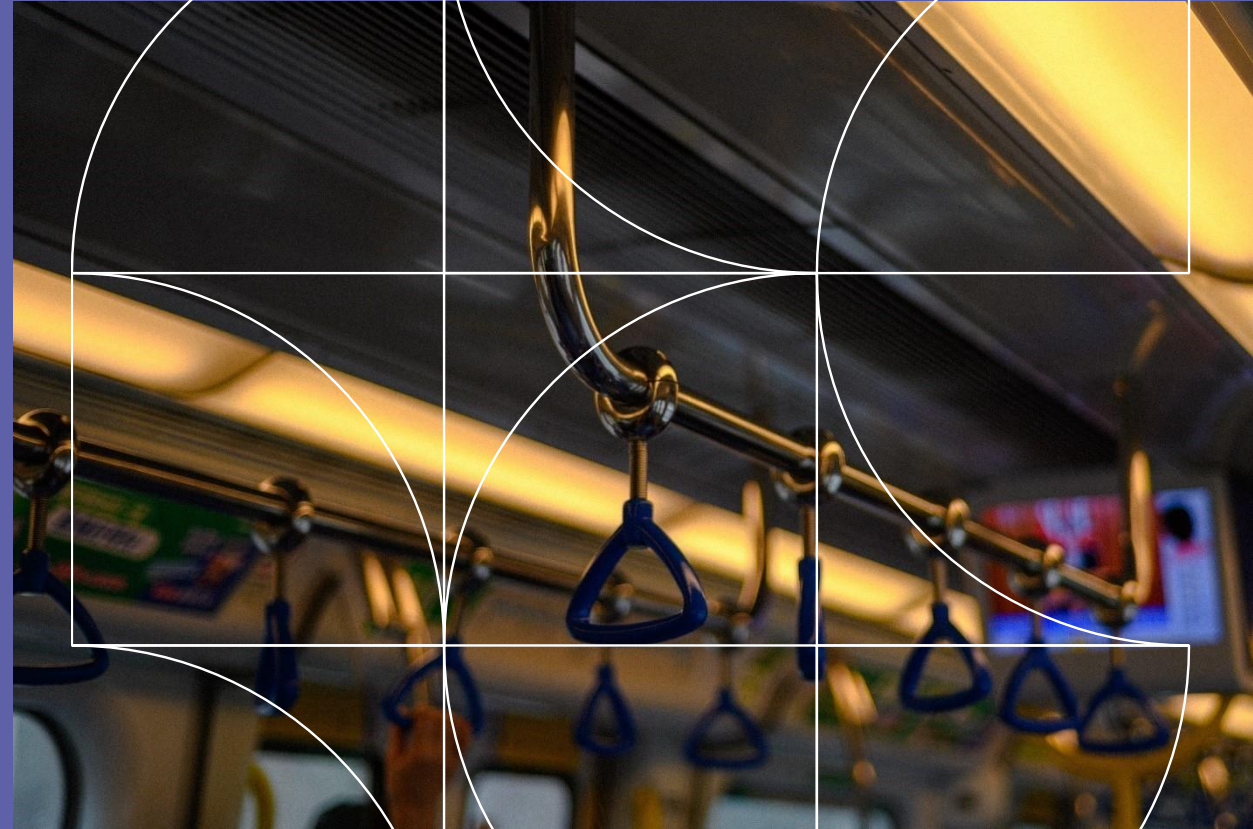
- **Adjust** store hours of operation, as necessary, to support social distancing efforts by limiting traffic.
- Ensure staff has **sufficient time** to rest, sanitize and restock inventory.
- Consider offering seniors and other high-risk individuals **exclusive early hours**.
- Consider increasing pickup hours to serve more online customers.
- Determine minimum legal requirements—OSHA (safety), EEOC (discrimination), CDC (health) guidance, state and local shelter-in-place orders; **identify a point person** to keep track of changes.
- Perform a hazard assessment as required by OSHA.
- Perform a thorough workplace cleaning prior to reopening an office, facility, or other work location and consider implementation of more frequent or robust routine cleaning.
- Should you retain an outside safety consultant to advise regarding COVID-19 measures?

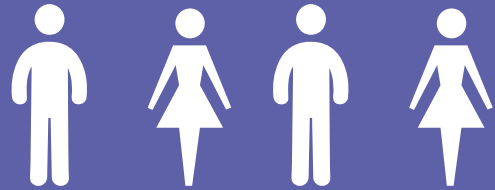


Best Practices for Safely and Sustainably Returning to Business

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Determine an Organizational Approach

- Designate a point person or core Return To Work team who can make company-wide policy decisions
 - HR
 - IT
 - Building Facilities
 - Health & Safety
 - Office Managers
 - Senior Management
- Determine an approach that is right for the business and the workforce



Determine Which Employees Will Return to Work (and How & When)

- Decide when to bring employees back
- Determine which employees are legally permitted to return to the worksite
- Decide which employees to return to the worksite immediately (and timing for others)
- Consider that certain employees may be prohibited from returning to the worksite due to actual COVID-19, symptoms, potential exposure, isolation or quarantine by a health care provide or public health officer, etc.
- Determine which employees are on legally-protected leaves (plan for business impact of anticipated future requests)
- Decide how to handle high-risk employees
- Decide how to handle employees with logistical/other barriers to returning to the worksite (e.g., child care, transportation)



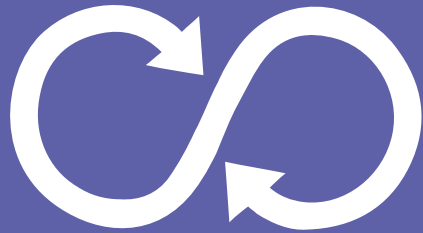
Update Employment Policies and Other Practices

- Determine new COVID-19 legal requirements (and applicable sunset provisions)
- Update employee handbook or other policies as necessary
- Create and implement COVID-19 related and other policies/protocols
- Social distancing protocols
 - Considerations for reconfiguring workspaces
 - Considerations for reconfiguring schedules
 - Anticipate more requests for time off, reasonable accommodations, remote work, etc.
- Specifying a complaint procedure



Communication of Updated Policies / Protocols

- Consider remote communication of new policies prior to employees' return to work
- Orientation or training for employees upon return to work, especially for HR and management
- Renewed communication of policies that are already in place
- Posting requirements for employers based on COVID-19 related orders
- Develop/communicate a plan to quickly respond to any COVID-19 diagnosis, symptom reports, or exposure



Stay Informed / Be Flexible

- Monitor for new legal requirements
 - CDC guidance on workplace safety, travel
 - EEOC guidance
 - OSHA guidance
 - State and local orders and laws – employer responsibility to stay informed
- Watch countries, states, and other businesses that open up first
- Recognize that guidance and the law in this space is rapidly changing; may need to update policies/protocols with little or no notice.

A Final Word: Addressing Anxiety

Employees

- Recent surveys suggest employees are anxious about returning to work
- Anecdotal information suggests the same
- Planning needs to be empathetic and flexible, while concrete and conspicuous
- Employee assistance plans need to prepare

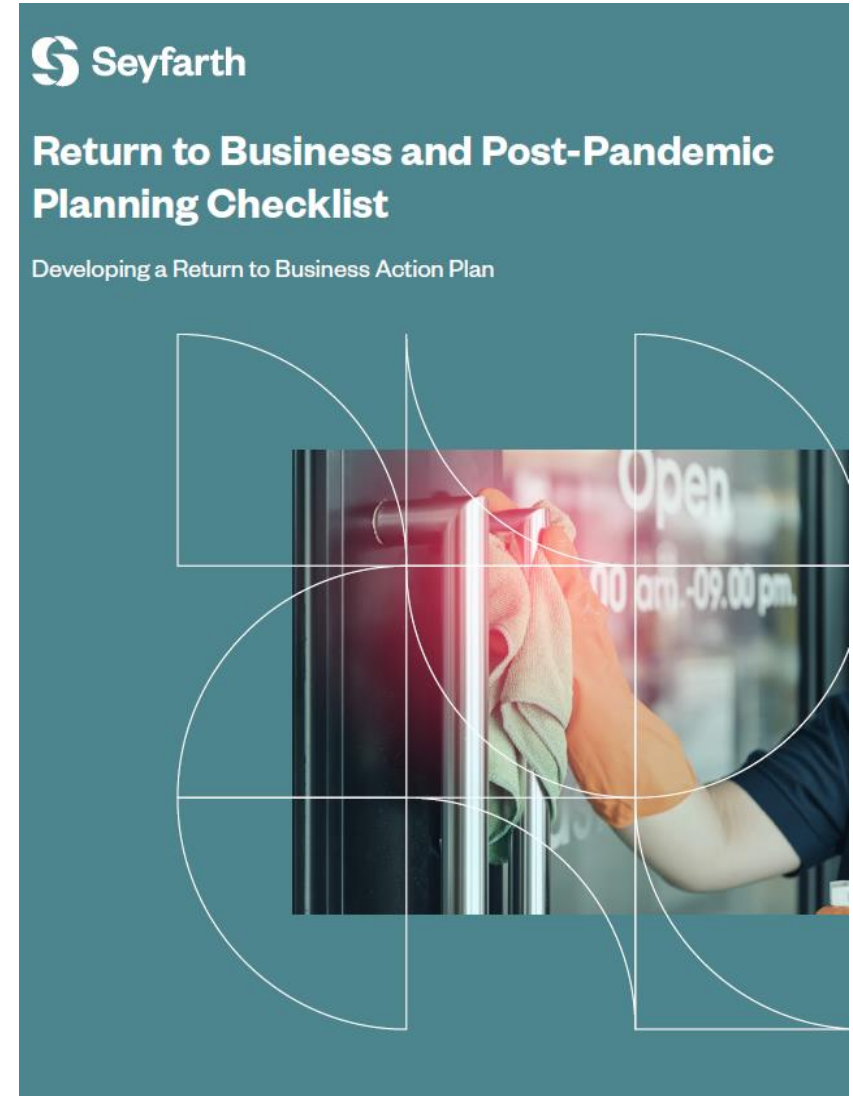
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Customers & Clients

- The marketplace is also anxious
- Businesses permitted to open under state “reopening” orders are considering whether to actually open
- Skepticism about safety could drag down benefits of opening
- Balance of labor and other costs must be weighed against those benefits
- Public relations planning is crucial

Resources

- Training through Seyfarth Shaw at Work
- Return to Business and Post Pandemic Checklist
 - Beyond COVID-19 Resource Center
seyfarth.com/covid-19-resource-center.html



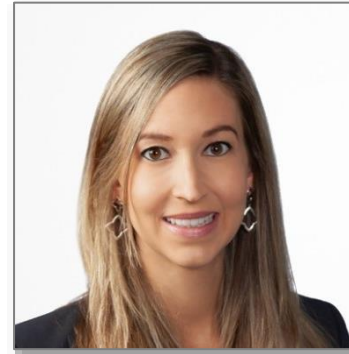
Contact Information



Brett Bartlett
Moderator | Atlanta
bbartlett@seyfarth.com



Stan Hill
Labor & Employment | Atlanta
shill@seyfarth.com



Christina Meddin
Labor & Employment | Atlanta
cmeddin@seyfarth.com



Fritz Smith
Labor & Employment | Charlotte
fsmith@seyfarth.com



Esther Slater McDonald
Commercial Litigation | Atlanta
emcdonald@seyfarth.com



Rebecca Woods
Commercial Litigation | Atlanta
rwoods@seyfarth.com



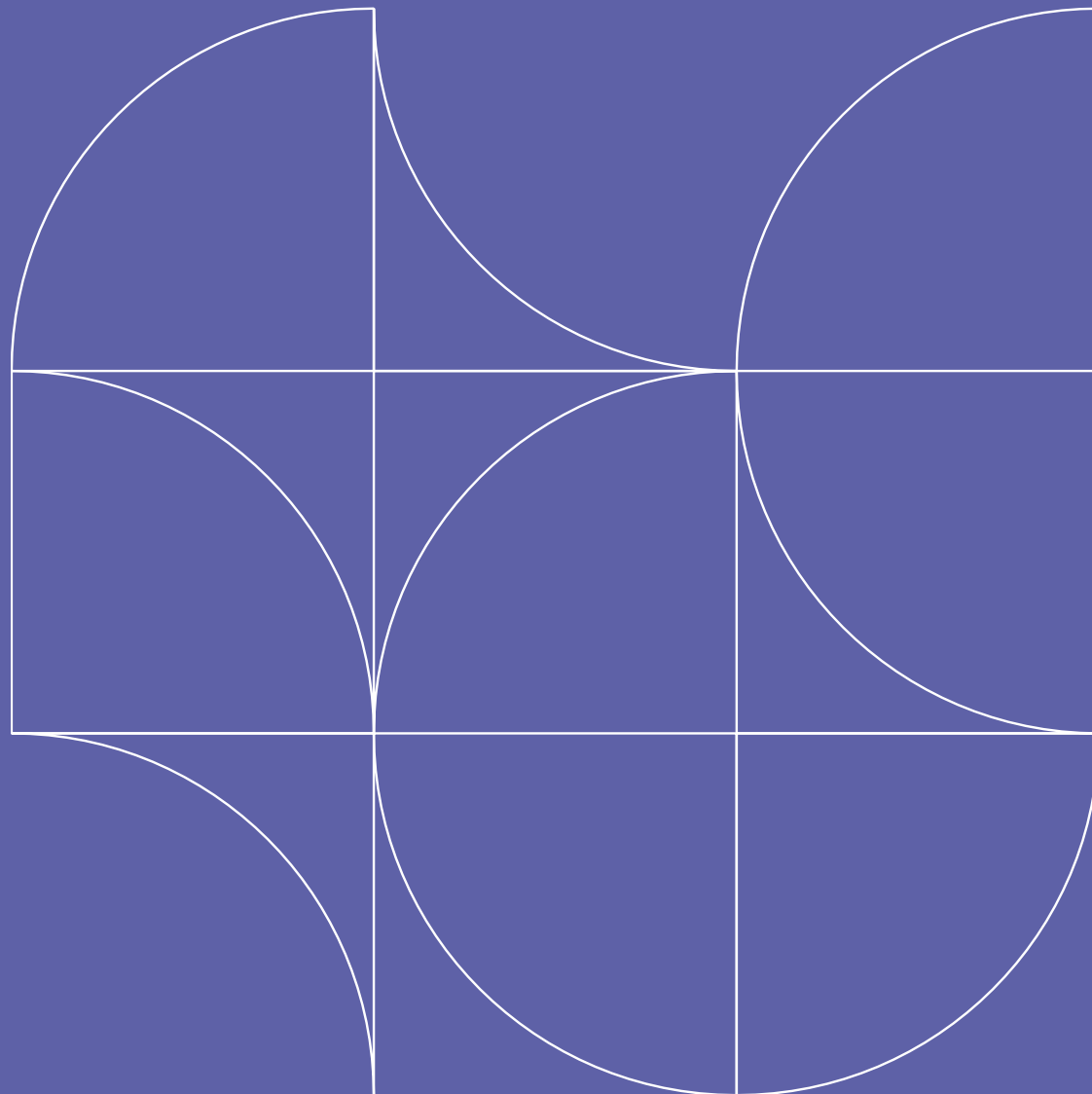
Gale Evans
Real Estate | Atlanta
gevans@seyfarth.com



Questions?

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you**

**Seyfarth Shaw LLP
(404) 885-6690 (Atlanta)**

(704) 925-6060 (Charlotte)