



Return to Business in Illinois: How to Reopen With the New Normal

Jennifer Kraft

Kristine Argentine

Sara Eber Fowler

Tobi Pinsky

Suzie Saxman

June 2, 2020

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential





Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Speakers



Jennifer Kraft
Employee Benefits
jkraft@seyfarth.com



Sara Fowler
Labor and Employment
sfowler@seyfarth.com



Suzanne Saxman
Corporate
ssaxman@seyfarth.com



Kristine Argentine
Litigation
kargentine@seyfarth.com

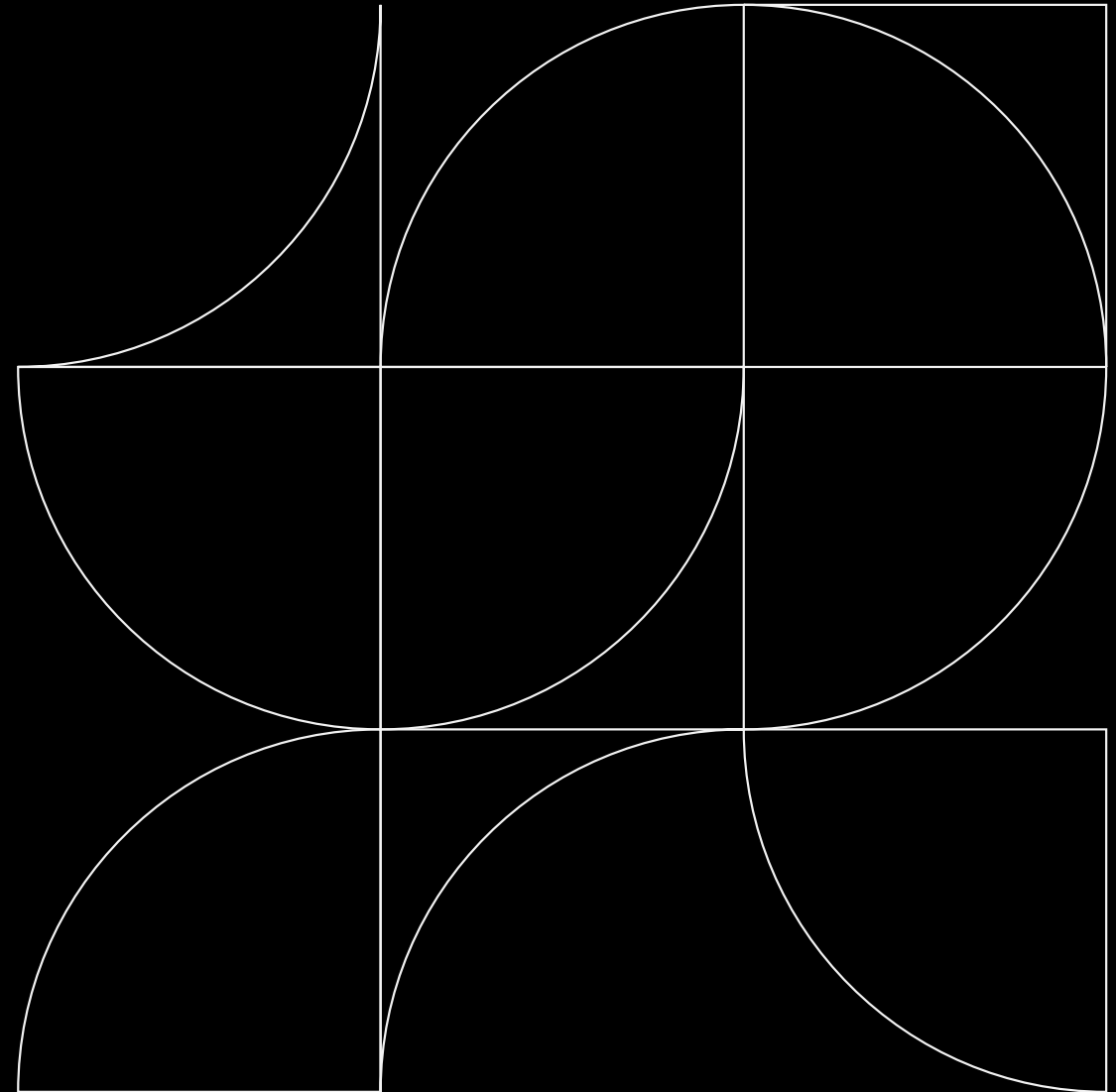


Tobi Pinsky
Real Estate
tpinsky@seyfarth.com

Agenda

- 01** Reopening in Illinois & Chicago
- 02** Employment issues to be mindful of when returning employees to work
- 03** Employee benefits considerations
- 04** Managing business stimulus options and the resources available
- 05** Potential risk for consumer-related liability
- 06** Guidance to commercial Landlords and Tenants

Reopening in Illinois & Chicago



State of Illinois – Phase 3

- Governor Pritzker issued Executive Order – 2020-38 on 5/29/20
 - Most of Illinois moved into **Phase 3** of reopening
- **Public health requirements for individuals**
 - Practice social distancing – 6 feet from those not in your household as much as reasonably possible
 - Wear a face covering in public places or when working
 - Applies to those over age 2 and able to medically tolerate face covering
 - Required when indoors or outdoors when 6 feet distance is not possible
 - Elderly people and those who are vulnerable as a result of illness urged to stay in residence and minimize in-person contact
 - Limit gatherings to 10 people or less
 - Conduct activities outdoors where possible

State of Illinois – Phase 3

- **Requirements for all businesses**

- Evaluate which employees are able to work from home, and facilitate remote work when possible
- Ensure employees practice social distancing and wear face coverings when social distancing is not always possible
- Ensure spaces where employees gather (e.g., locker rooms and lunchrooms) allow for social distancing
- Ensure visitors (customers, vendors, etc.) practice social distancing
 - if 6 foot distance not possible, encourage face coverings
- prominently post guidance from Illinois Department of Public Health (IDPH) and Office of the Illinois Attorney General regarding workplace safety during the COVID-19 emergency
- follow DCEO guidance

<https://www2.illinois.gov/dceo/Pages/RestoreILP3.aspx>

State of Illinois – Phase 3

- **Requirements for retail stores**

- provide face coverings to employees not able to maintain 6 foot social distance from customers and other employees at all times
- cap occupancy at 50% of store capacity, or, DCEO square footage limit
- in-store signage/public service announcements about social distancing and face covering requirements
- discontinue use of reusable bags

- **Requirements for manufacturers**

- provide face coverings to employees not able to maintain 6 foot social distance at all times
- ensure spaces where employees gather (e.g., locker rooms and lunchrooms), allow for social distancing
- modify and downsize operations (staggering shifts, reducing line speeds, operating only essential lines, while shutting down non-essential lines) to the extent necessary to allow for social distancing and to provide a safe workplace in response to the COVID-19 emergency

State of Illinois – Phase 3

- **Requirements for office buildings**

- provide face coverings to employees not able to maintain 6 foot social distance at all times
- consider capacity limits where physical space does not allow for social distancing
- allow telework where possible
- develop and prominently post plans and signage to ensure social distancing in shared spaces such as waiting rooms, service counters, and cafeterias

- **Requirements for restaurants and bars**

- Suspend service for on-premises consumption, except as permitted by DCEO guidance
- Delivery, drive-through, and curbside pick-up permitted
- Carry-out permitted if adequate social distancing
- Outdoor on-premises food and beverage consumption permitted in accordance with DCEO guidance and when permitted by local ordinance

State of Illinois – Phase 3

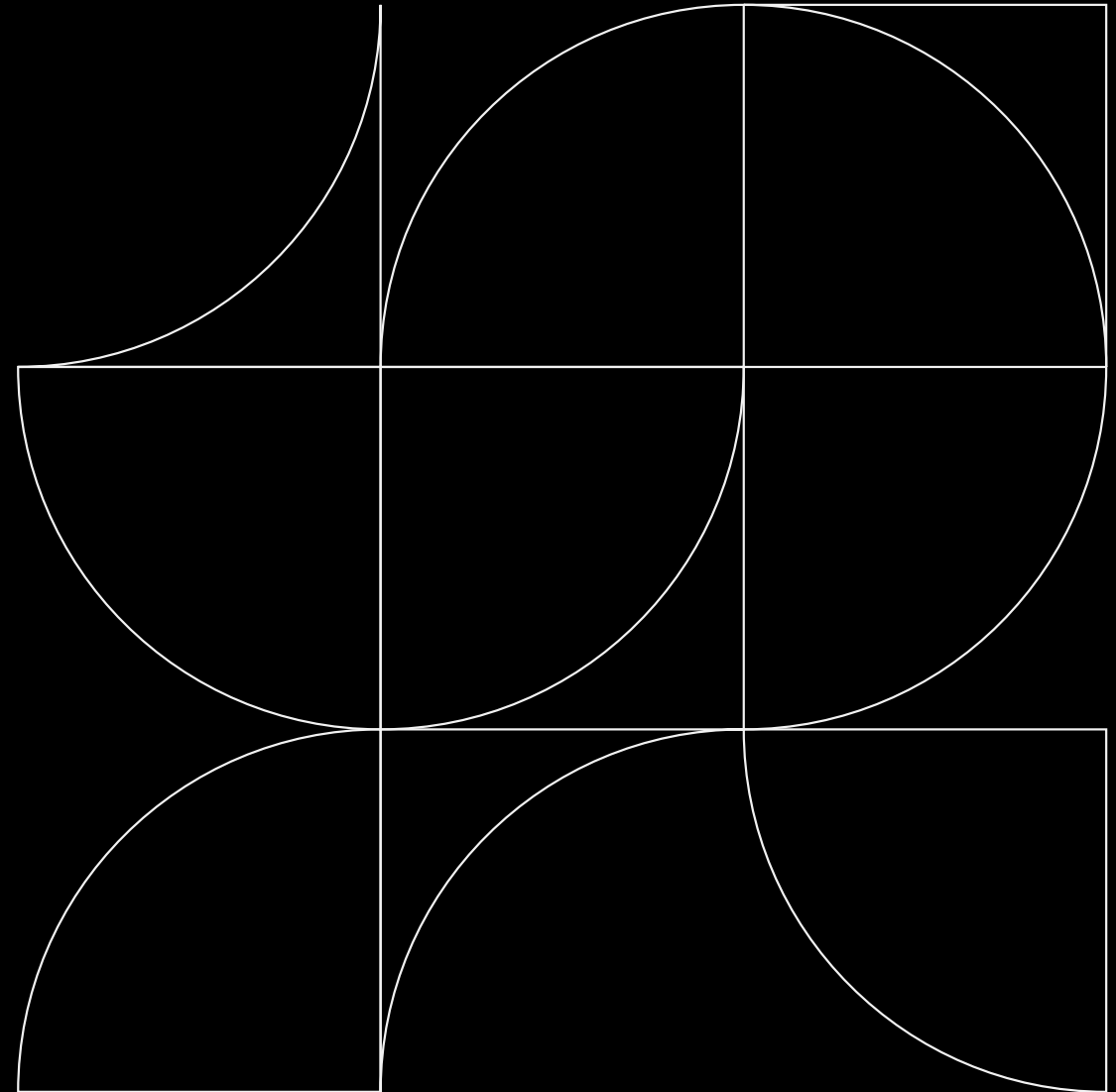
- **Requirements for fitness and exercise gyms**
 - May be open for the following activities:
 - Personal training sessions involving one trainer and one customer
 - Outdoor training in groups no larger than 10 with social distancing
 - Sale of retail merchandise
 - Onsite filming or streaming of remote classes conducted by a single trainer
- **Requirements for personal services facilities** (spas, hair salons, barber shops, nail salons, waxing centers, tattoo parlors, and similar facilities)
 - Ensure use of face coverings, adherence to social distancing requirements, and capacity limits in accordance with DCEO guidance
- **Requirements for outdoor recreation, youth day camps and youth sports**
 - Ensure use of face coverings, adherence to social distancing requirements, and take other public health steps in accordance with DCEO guidance

City of Chicago

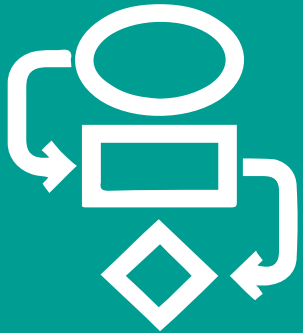
- Last week, Mayor Lightfoot announced Chicago on track to move to Phase 3 on **6/3/20**
- **Phase 3**
 - Non-essential workers begin to return to work in a phased way
 - When meeting others, physically distance and wear a face covering
 - Non-business, social gatherings limited to <10 persons
 - Phased, limited public amenities begin to open



Labor and Employment: Preparation for Reopening



Determine Which Federal, State and Local Laws and Orders Apply



- State and local shelter-in-place orders
- OSHA, DPH and other health and safety laws and orders (vary by location)
- Paid sick, paid leave, unpaid leave, and other relevant laws (e.g., FFCRA, FMLA, Chicago/Cook County Sick Leave, company 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
- Consider any industry-specific requirements or business considerations (e.g., healthcare, retail)

Federal, Illinois, and Chicago Reopening Guidance

Federal - CDC

- Business guidance, general and by industry
- “Interim Guidance for Businesses and Employers”
- “Change the way people work”

Illinois

- Executive Order 2020-28 (5/29/20)
- Phase 3 “Recovery Guidelines”
- Vary by industry (Office, Retail, Manufacturing, etc.)
- Checklists, Toolkits

Chicago

- Phase 3 “Cautiously Reopen” Guidelines
- Also industry-specific (Office, Retail, Healthcare, Transportation, Manufacturing, etc.)
- “Recommended Guidance”

Follow the most restrictive requirements where applicable!

Key Aspects of Return to Work Plans in Illinois and Chicago



- **Health and Safety**
 - Facial covering requirements
 - Supplies for hand washing, sanitizing, cleaning
- **Physical Workplace / Structural Changes**
 - Re-designing workspaces
 - Changes to promote social distancing
 - Restricting/modifying use of common areas
- **Office Policies**
 - Health/safety training
 - Leave
 - Travel
 - Screening/testing, if applicable
- **Screening**
 - Plan for monitoring employee symptoms
- **Disinfection / Cleaning**
 - New protocols for cleaning workspaces, common areas
 - Follow CDC guidance
- **Staffing / Attendance**
 - Occupancy limits
 - Continued remote work

Poll Question

Have you prepared a Return to Business Plan?

- Yes
- No



Seyfarth Shaw LLP

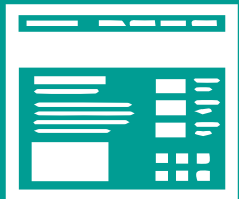
“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

Common Recommendations for Reopening Across Industries in Illinois



- Remote work should continue, where feasible
- Prepare physical spaces for social distancing
- Wear facial coverings when social distancing is not possible (6 ft.); provide to employees
 - Ex: hallways, restrooms, elevators, common spaces
- Employers should ensure adequate supply of tools for, and ensure sufficient access to, handwashing and hand sanitizing
- Keep symptomatic employees out of the workplace
- Limit non-essential business travel
- Implement health screening program
- Display signage for new social distancing and health and wellness protocols (IDPH & AG)

Resources



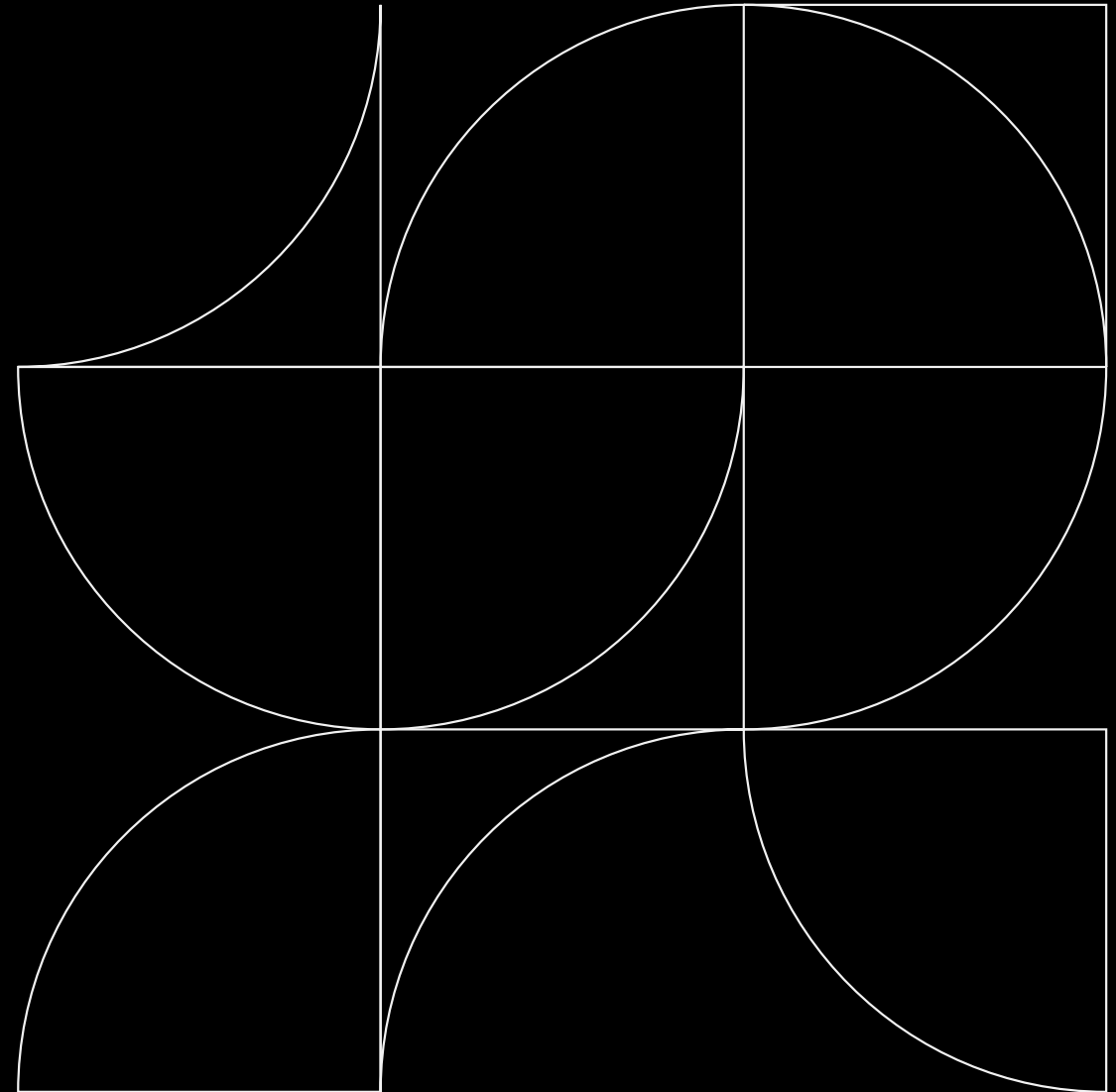
- Executive Order 2020-38:
<https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-38.aspx>
- Restore Illinois Guidance:
<https://www2.illinois.gov/dceo/Pages/RestoreILP3.aspx>
- CDC: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- City of Chicago Reopening Guidance:
<https://www.chicago.gov/city/en/sites/covid-19/home/reopening-business-portal.html>

Update Employment Policies and Other Practices



- Determine new COVID-19 legal requirements (and applicable sunset provisions)
- Update employee handbook or other policies as necessary
 - Visitor protocols
 - Leaves of absence / time off
 - Infection control
- Create and implement new COVID-19 related and other policies/protocols
 - Policies for symptomatic employees
 - Screening
- Think about how job changes / modifications may impact wage-hour requirements

Employee Screening and Testing



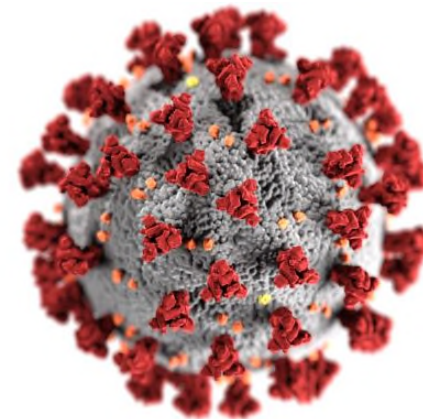
Legal Mandates

Screening

- Illinois Minimum Guidelines for Screening:
 - Make temperature checks available and encourage their use
 - Conduct in-person screening upon entry to the workplace and verify no presence of COVID-19 symptoms and mid-shift screenings (in-person preferred; virtual permitted).
- CDC: Recommends daily in-person or virtual health screening for symptoms

Testing

- Not required
- Not part of recommended guidance
- But, generally permissible per EEOC



- Permitted only given the pandemic
- **Note:** Not all persons with COVID-19 have fevers
- Privacy and social distancing needs to be implemented, and PPE used
- Time spent before the start of regular work hours is considered compensable time
- Follow CDC guidelines

Temperature Checks

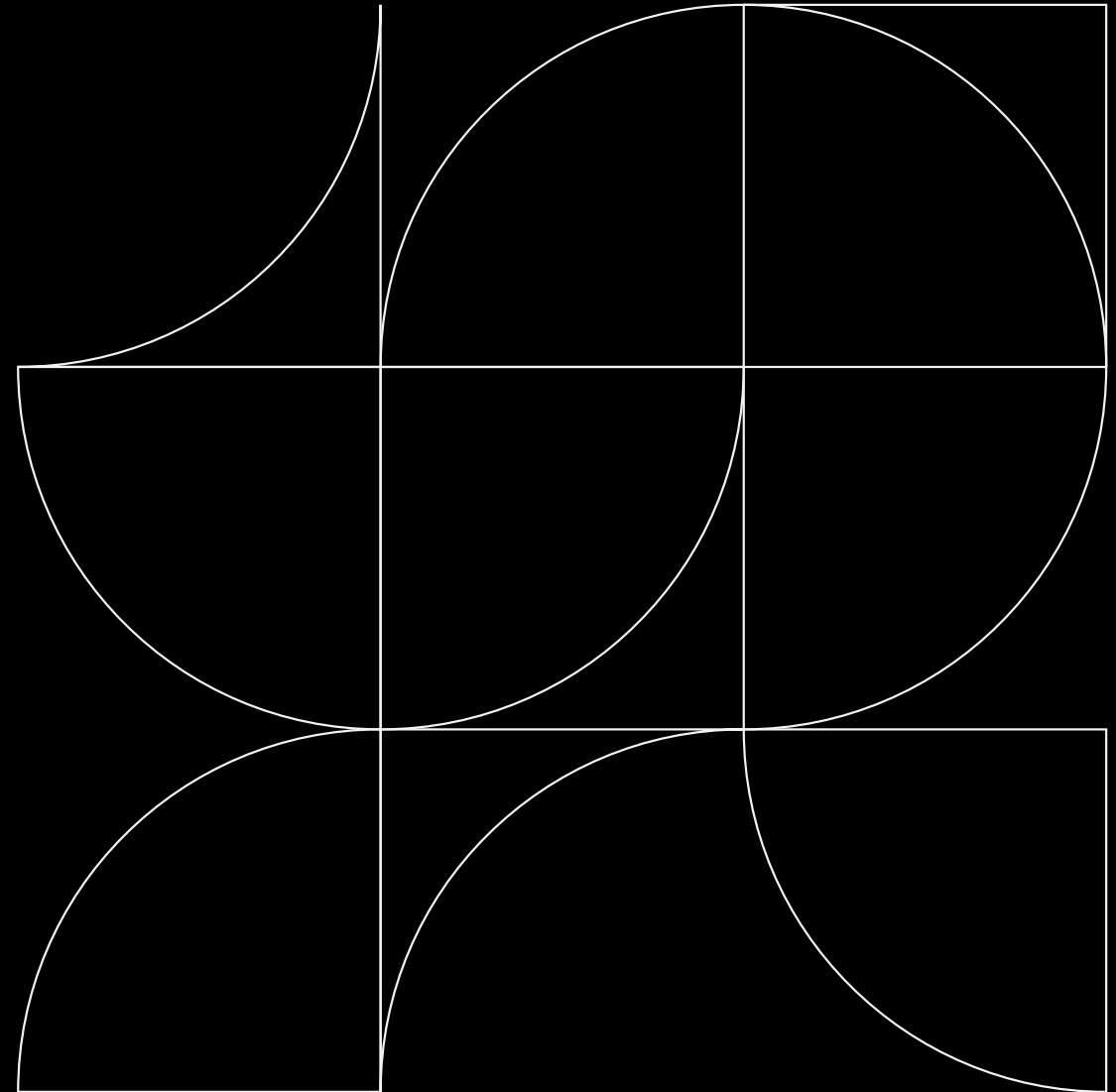


Testing Guidance and Considerations

- Virus testing vs. Antibody testing
- EEOC: “[A]n employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.”
- Testing **must be job-related and consistent** with business necessity
 - Goal: eliminate direct threat of virus in workplace during pandemic
- Must use a reliable and accurate method
- Provide reasonable accommodations
- Implement policy
- Information should be treated like other employee medical information – **CONFIDENTIALLY**



COVID-19 Leaves & Accommodations



Requests for “Accommodations”

- Assess the situation – has this triggered the ADA interactive process?
 - Is this a disability issue, or something else? (*Age, pregnancy, family member, childcare? Worry/concern?*)
 - Is there an applicable leave entitlement?
 - FFCRA, FMLA, statutory sick leave, company policies
- Potential Accommodations:
 - Leave (paid, unpaid)
 - Modifications to workspace (physical barriers, additional space)
 - Adjusted hours
 - Remote work
 - Facial coverings

How Do We Address...

An employee approached me, complaining that their co-worker has been coughing?

An employee who refuses to come to work?

The closure of an employee's child's camp, just as we are resuming in-person operations?

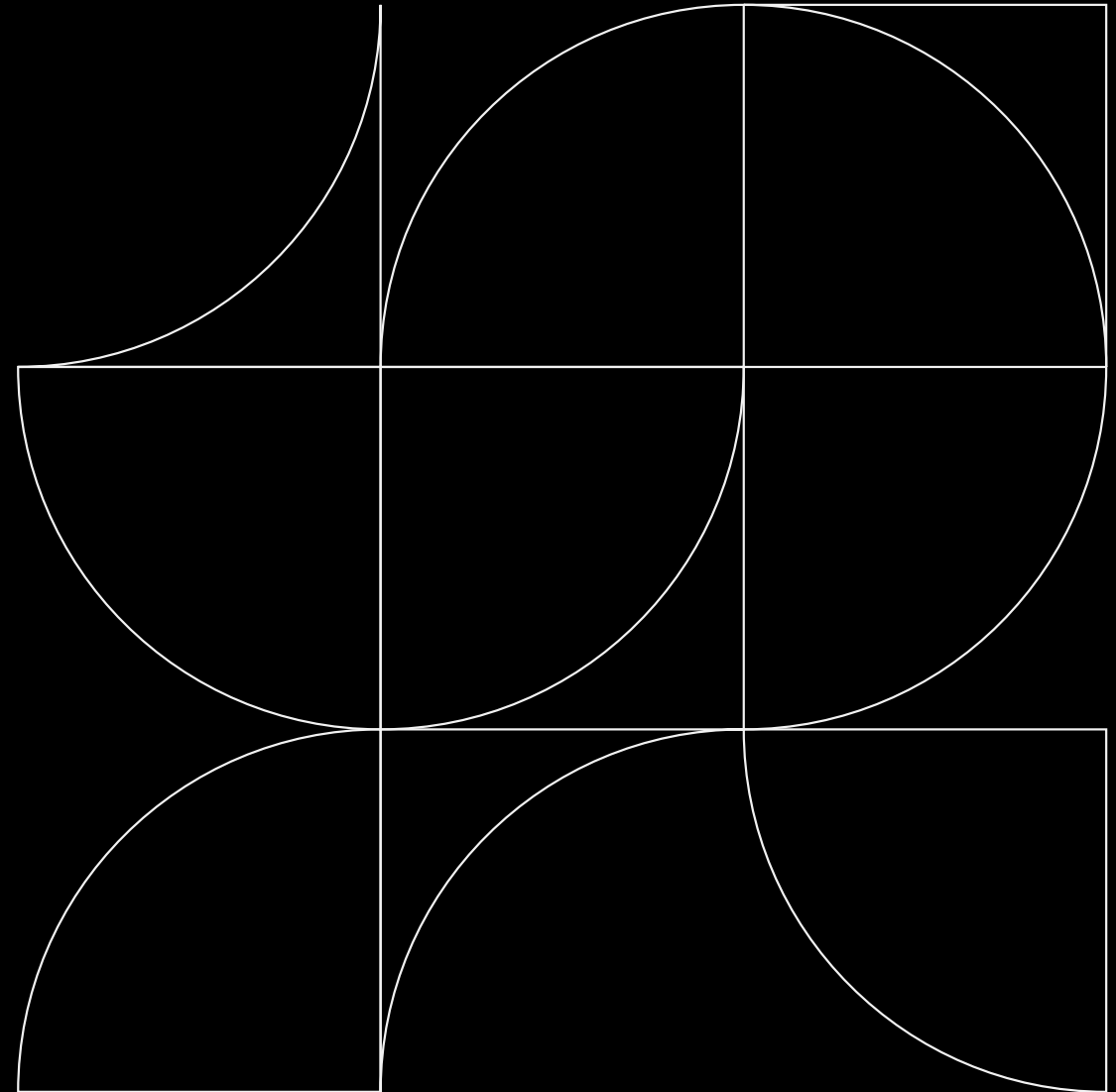
Poll Question

What is the most challenging aspect of managing Return to Business employment issues?

- Navigating Leaves and Accommodations
- Managing Health & Safety policies and procedures
- Employee Productivity / Morale
- Other



Other Local Mandates



Chicago Ordinances

- **Anti-Retaliation Ordinance (*Passed 5/20/20*)**

- Prohibits employers from demoting or terminating the employment of those who obey an order from Mayor, Governor, IDPH, or health care provider related to COVID.

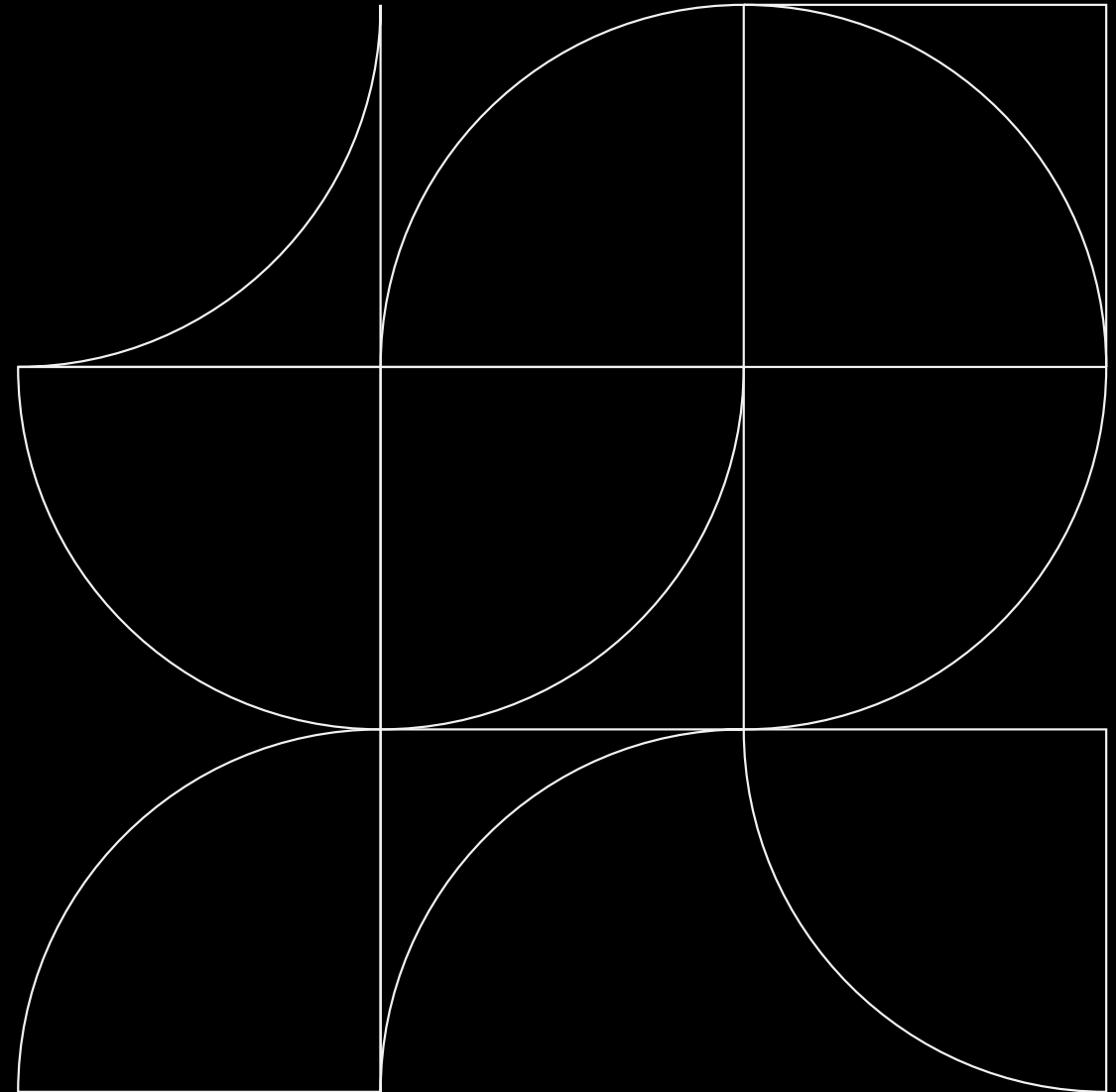
- **Chicago Paid Sick Leave and COVID-19**

- May be used for illness; when workplace or child's school has been closed due to public health emergency

- **Chicago Fair Workweek Law**

- Affects Retail, Restaurant, Hotel, Warehouse Services, Building Services, Healthcare, and Manufacturing industries with 100+ employees / 50 covered employees
- In effect July 1, 2020
- Changes to employees' schedules because of COVID-19: *no predictability pay*

Employee Benefit Considerations



Retirement Benefits



- If returning from furlough (unpaid leave) or if rehired
 - consider potential impact on deferrals
 - consider potential impact on loans
- Consider whether 401(k) plan will be amended to provide CARES Act distributions or loan relief
- Consider if/how time away from work could impact pension plans
 - Could amend plan if desired, depending on funded status
 - to provide for service
 - to change final average pay formula to exclude furlough period

Welfare Benefits



- If employees covered while out, but did not pay premiums, collect arrearages
- If employees lost eligibility or coverage while out, provide available re-enrollment
- Consider changes to elections under the welfare benefit plans
 - Return to work may trigger ability to change election
 - New IRS guidance regarding option to add new election change opportunities
- ACA Break in Service rules
 - Can be treated as new employee for measurement period purposes if not credited with an hour of service for 13 or more weeks

Poll Question

Are you implementing any of these new optional changes for welfare plans?

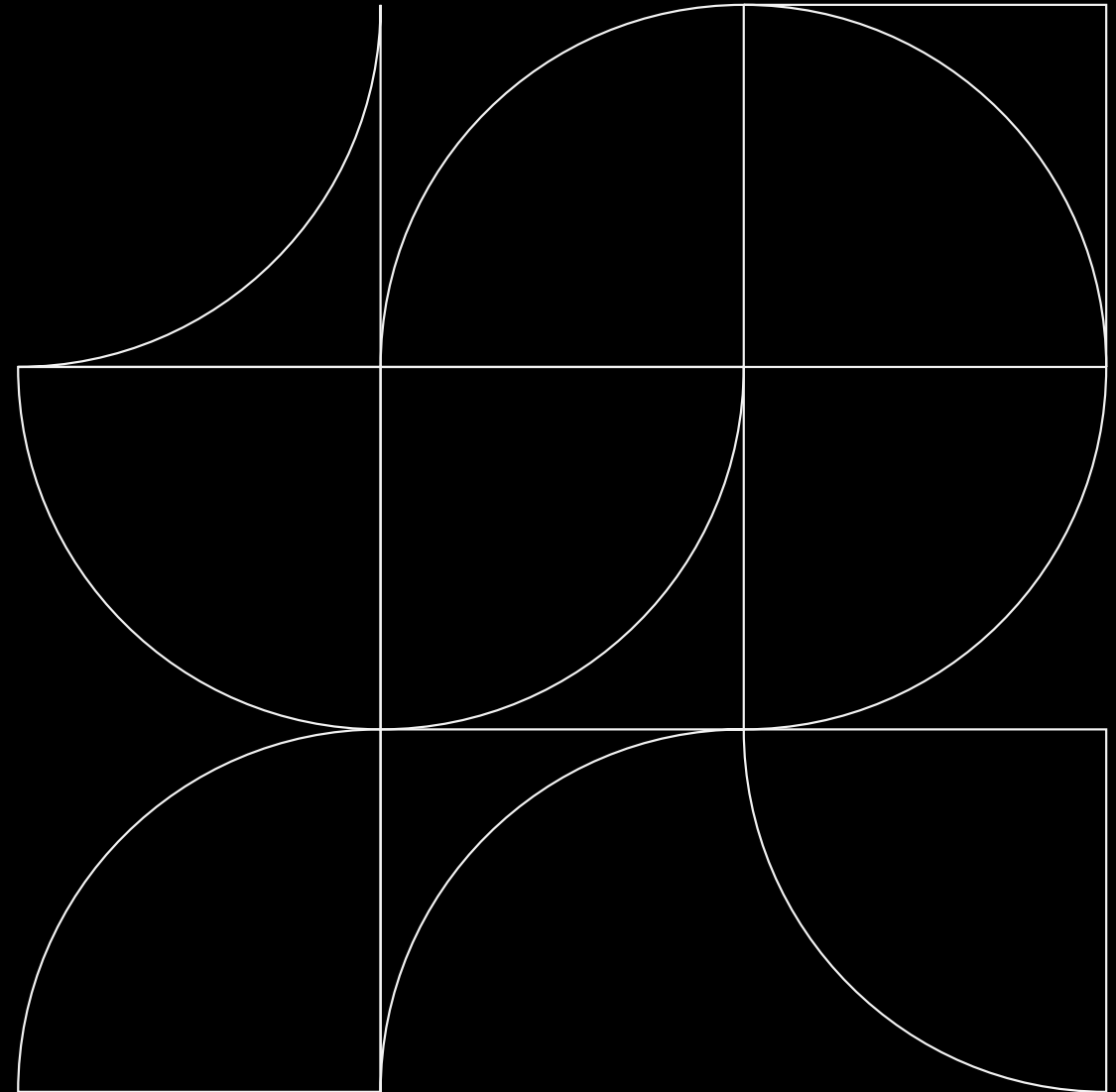
- Yes
- No



Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

**Corporate -
Managing business
stimulus options and
the resources available**



Economic Stimulus Loan and Forgiveness Programs

- Manage economic stimulus loan and forgiveness programs applicable to your business—monitor PPP “covered period” for calculating loan forgiveness (currently 8 weeks)
 - At least 75% of the loan proceeds used for payroll during the covered period
 - Choose most favorable payroll period option as provided in loan forgiveness instructions
- Optimize PPP loan forgiveness by restoring employee headcount/wage reductions that took place between February 15, 2020 and April 26, 2020
- PPP Flexibility Act passed by the House on May 28, 2020 may add flexibility to each of these requirements (24 weeks/60% payroll)

Poll Question

Does your business have a PPP loan?

- Yes
- No



Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Taxes, including Credits and Deferrals

- Manage federal tax credits and payroll tax deferral to the extent available, including taking an advance of tax deferrals/credits if available
 - Employers that pay sick leave and expanded family and medical leave required by the Families First Coronavirus Response Act (FFCRA) from April 1, 2020 through December 31, 2020 (“qualified wages”) are entitled to a tax credits to cover the costs of such leave
 - Eligible employers are allowed an employee retention credit equal to 50% of “qualified wages” (up to total of \$10,000 in wages and qualified healthcare expenses) for each employee during the period March 13, 2020 through December 31, 2020
 - Payroll Tax deferral available for taxpayers prior to the time PPP loans forgiven
- Manage new filing dates for tax filings and payments—federal, state, and local

- Review business interruption (BI) insurance policies and evaluate claims
- Currently over 100 COVID-19 BI lawsuits are pending in federal court, with more BI lawsuits filed at the state level
- The central question in these cases is whether the novel coronavirus amounts to a physical loss of property that triggers insurance coverage for business income lost due to government closures
- At least 7 states have legislation or bills pending to require BI carriers to honor BI insurance claims under the current circumstances

Insurance Policies and Claims



- Review supply chain, vendor and other commitments to determine long-term stability of your business partners and prepare for financially distressed-counterparty situations—terminate, modify or replace vendors
- Consider alternatives to manage contract defaults, and consider proactive options for restructuring contracts
- Take appropriate action to terminate or modify contracts with performance issues
- Revisit contracts with force majeure clauses and adapt as needed
- Evaluate potential affirmative litigation claims and areas of litigation exposure, and prepare appropriate prosecution, defense, and mitigation strategies

Contracts - Including Supply Chain and Vendor Commitments



Credit and Liquidity

- Evaluate existing lines of credit and renegotiate where necessary
- Access Main Street Lending Program and other credit facilities as available
- Contact your lender if you are eligible

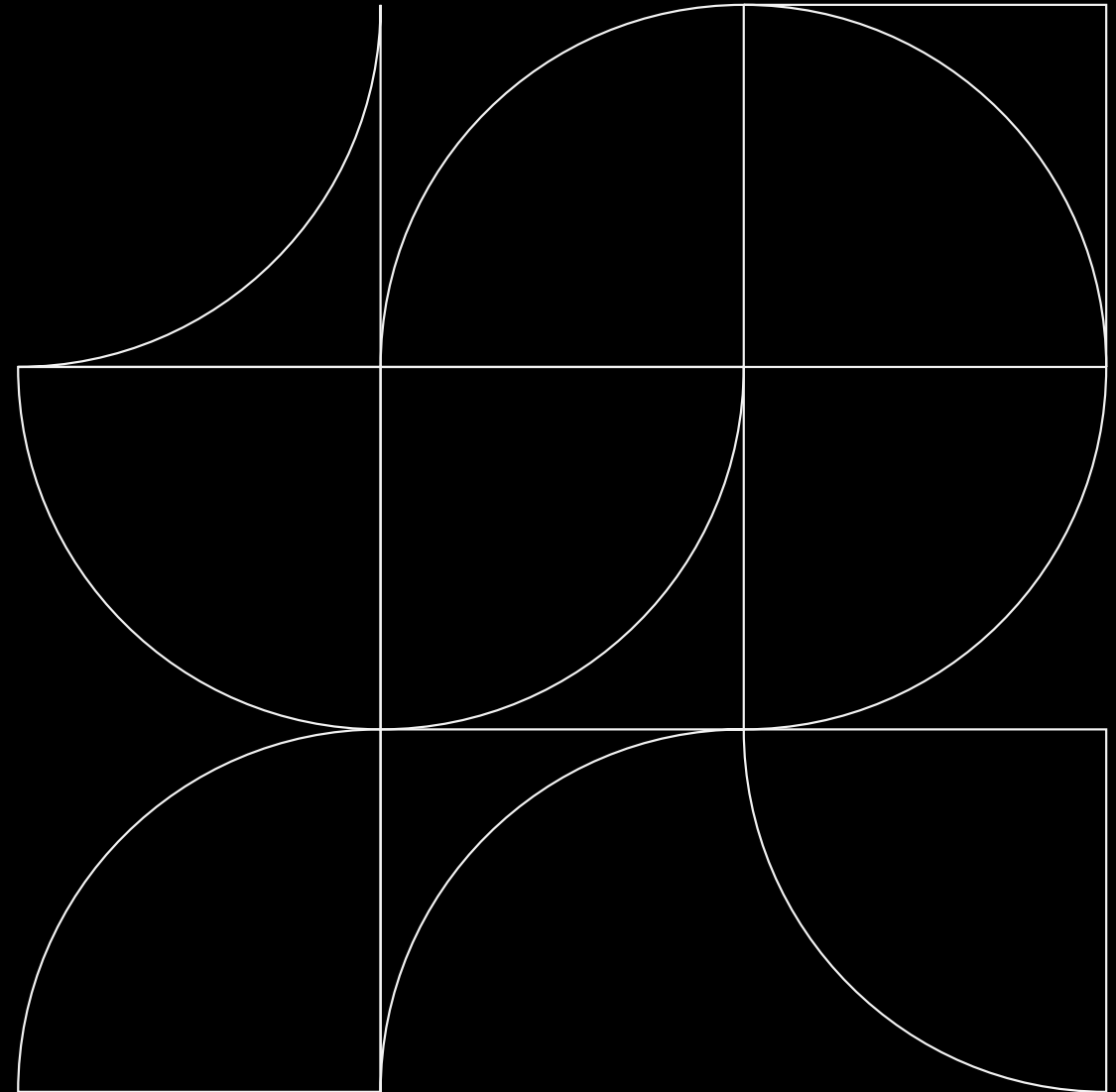
Corporate Governance

- Proactively engage with your Board of Directors to allow Board input and facilitate prudent decision making for extraordinary actions
- Establish an adequate written record of Board proceedings and decision making, including as it relates to PPP loan needs

- Identify and consider alternatives to manage financing and loan defaults
 - Consider options for **relief and restructuring** including execution of pre-negotiation agreements, followed by forbearance or modification agreements
- Review and manage accounts receivable aging to manage bankruptcy preference claw-back risks from customer bankruptcies
- Evaluate **opportunities for acquiring distressed assets** in your industry
 - Consider a representation and warranty insurance (RWI) policy to mitigate risk when seller indemnity is not feasible

Workouts and Distressed Situations

Litigation – Potential risk for consumer-related liability



Restore Illinois Guidelines: Customers and Invitees

Requirements

- Social distancing
- Face coverings
- Capacity limits
- Posted notices
- Common areas/shared products

vs.

Encouraged Practices

- Visual 6-foot markers
- Barriers
- Touchless transactions
- Increase air turnover

**Additional guidance can be found at
<https://www2.illinois.gov/dceo/Pages/RestoreILP3.aspx>**

- Negligence and Breach of Contract Claims
 - Failure to protect or comply with standard of care
 - membership and subscription services
- Consumer Fraud Class Actions
 - Price gouging
 - Labeling
 - Refund and return policies
 - Unfair/deceptive business practices
- Consumer Privacy and Illinois Biometric Privacy Act
- Remote Advertising/Marketing
- Fraud, Phishing, Cybersecurity Attacks

Potential Claims by Customers and Invitees



- Brand and reputation
- Provide notices and disclosures
- Revisit contracts
- Document, prepare policies and action plans, evolve
- Confirm potential insurance coverage

Mitigation of Risks



- Property/Business Interruption
- Event Cancellation
- General Liability Coverage
- Other (EPLI, E&O, D&O)

Insurance That May Respond to COVID-19 Claims



Poll Question

Have you or do you intend to seek business interruption coverage in light of losses associated with COVID-19?

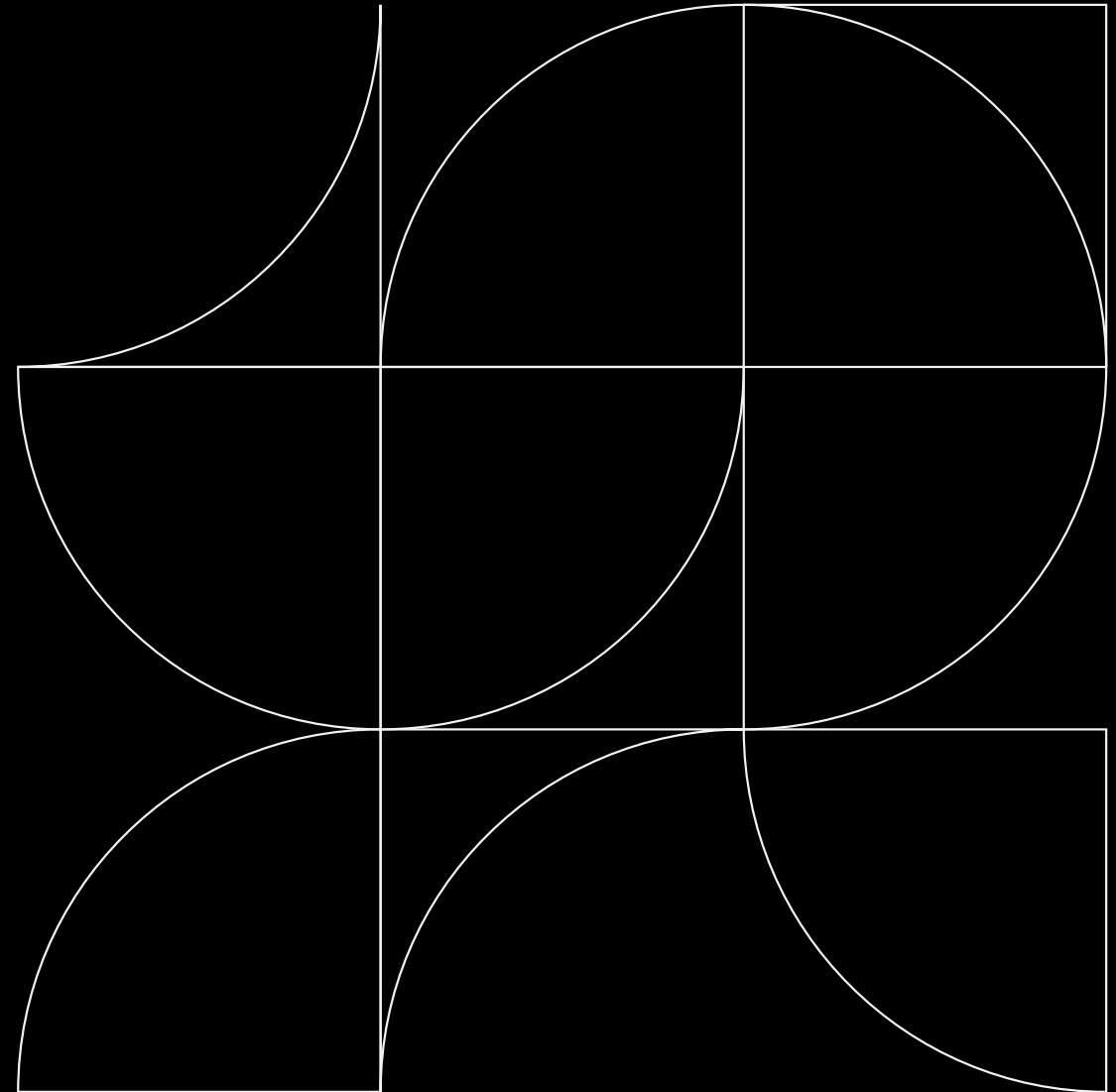
- Yes
- No



Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

Real Estate – Guidance to Commercial Landlords and Tenants



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

Planning



- 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



- 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.

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
- Social Distancing - Tenants, vendors and contractors
- Social Distancing - Landlord employees and brokers
- Social Distancing – Elevators
- Common Areas and Amenities
- Security and Building Access
- Signage
- Training

Tenants - Deciding Which Location/Office to Open



- Economic Analysis
- Co-Tenancy Considerations
- Evaluate the Landlord/Tenant Relationship
- Sublease / Assignment / Give Back / Repurposing Opportunities

Tenants - Planning for Social Distancing

Spacing

- Plan for spacing in workspaces, paths of travel and common spaces.
- Redesign or slow down production lines to allow for more space between employees.

Repurposing

- Repurpose conference rooms, lunch rooms, and other communal spaces.
- Consider partitions in common spaces to convert them to private workspace to avoid shared offices.

Control Occupancy

Consider:

- Changing work schedules and/or shifts to limit the number of employees physically present.
- Staggering of meal periods and rest breaks to the extent consistent with applicable law, and consider permitting employees to eat at their work stations.
- Continue virtual meetings and work from home to the extent possible.

Poll Question

What length of delays are you seeing in your supply chain?

- All is operating as normal
- 1-5 day delay
- 5-10 day delay
- 10-15 day delay



Landlords and Tenants –

Managing Your Supply Chain and Inventory



- **Assess supply needs:**
 - Explore options for sourcing additional supplies
 - Create a plan for distribution and establish a monitoring protocol.
 - If you have international operations, consider shipping challenges.
- **Logistics**

Additional Legal Considerations for Landlords and Tenants

- **Lease Issues:**

- Understand the effect of force majeure provisions.
- Examine requirements for tenant build-out
 - Slow permitting
 - Construction delays
 - Material delays
- Continuous operation covenants
 - Will social distancing work for your business?
- Address non-payments and restructuring of payment structure and extended term.
- Review what is required with regard to common areas.



Poll Question

What type of relief, if any, did you provide or receive during April and May?

- None
- Rent abatement
- Rent reduction
- Extension of term
- Combination of rent reduction or abatement and term extension



Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Legal Considerations for Landlords and Tenants (Continued)

- **ADA Considerations: Consult with legal counsel:**
 - ADA requirements for points of access.
 - Face masks and alternative communication methods.

Questions?



Jennifer Kraft
Employee Benefits
jkraft@seyfarth.com



**Sara Eber
Fowler**
Labor and Employment
sfowler@seyfarth.com



**Suzanne
Saxman**
Corporate
ssaxman@seyfarth.com



**Kristine
Argentine**
Litigation
kargentine@seyfarth.com



Tobi Pinsky
Real Estate
tpinsky@seyfarth.com

Thank You!

