



# RETURN TO WORK

## PREPARING TO REOPEN: HOW TO SMOOTHLY TRANSITION BACK TO WORK

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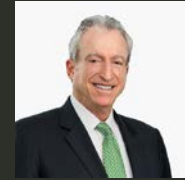
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# AGENDA AND SPEAKERS

- Overview of Return to Work (RTW) Series
- Developing a Transition Plan
- Transforming Your Policies
- Q&A

**Note regarding Q&A:** please use the Q&A feature in the Zoom window to submit your questions. All attendees will be muted and will be unable to verbally ask questions. Questions answered during the call will not be attributed to the participant who submitted the question. In the event we are unable to address all questions due to the time constraints, we will follow-up with you after the webinar.



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# OVERVIEW OF THE RETURN TO WORK SERIES

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## Session 2: Preparing Your Workplace

- Social distancing protocol
- Sanitization protocol
- PPE
- Symptom screening protocol
- Signage

## Session 3: Preparing Your Workforce

- Legal pitfalls in recalling/rehiring
- Scheduling and teleworking
- Pay-related issues
- Dealing with exigent COVID-19-related circumstances
- WARN obligations

## Session 4: Preparing Your Responses

- Manager and employee training
- Handling safety complaints
- Handling ADA and accommodation requests
- Handling leave requests, including paid sick leave
- OSHA

# OVERVIEW OF THE RETURN TO WORK SERIES

## Session 5: Preparing for the Unknown

- What to do when an employee tests positive
- Preparing for future waves
- Preparing for audits

## Session 6: Preparing for Battle

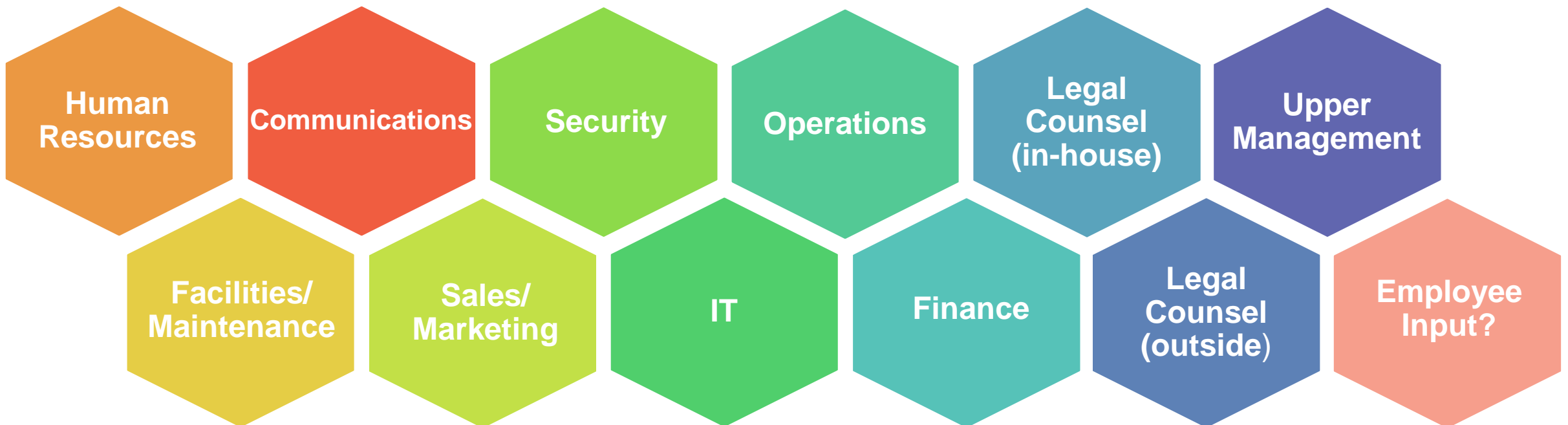
- The coming wave of COVID-19 employment litigation
- Tools to arm yourself
- Analysis of likely litigation battles



# DEVELOPING A TRANSITION PLAN

# WHO SHOULD BE INVOLVED?

- Cross-functional stakeholders, who have sway over:
  - High-level business decisions, finances, operations, human resources
- Depending on your size, structure and operations, could include any of the following:



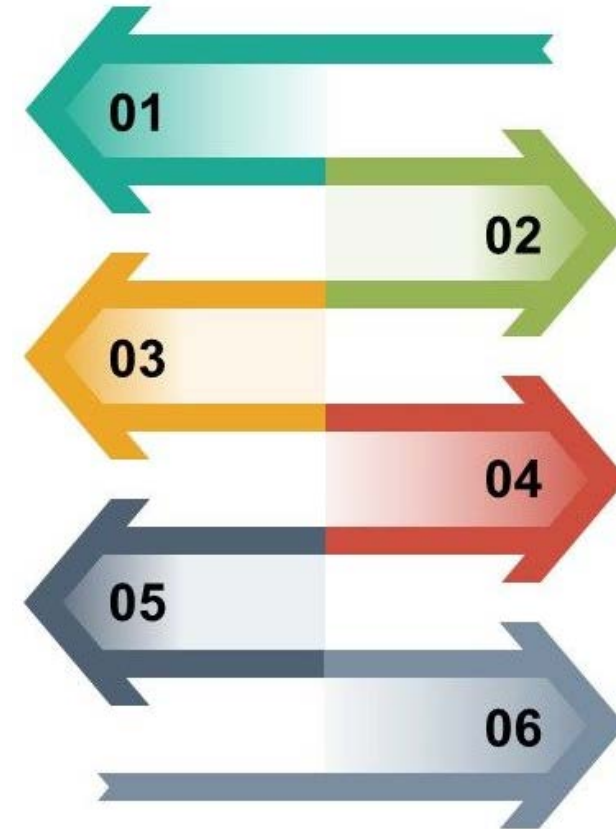
# HOW TO EFFECTIVELY USE LEGAL COUNSEL

- Attorney-client privilege
  - Involving counsel may allow certain communications to be protected under a/c privilege (i.e., where the predominant purpose is to seek or render legal advice)
  - Does not cover communications that involve purely business decisions
- Draft plans may not be protected by attorney work product doctrine just because they are prepared by in-house counsel
  - Portions may be protected under a/c privilege if they contain legal advice or deal with legal considerations
- Recommendations:
  - Be careful with your paper/email trail
  - Make sure minutes don't contain sensitive information
  - Have counsel keep notes/memos of their legal impressions/advice (as opposed to non-protected business advice)
  - Draft plans are more likely protected by a/c privilege if they are prepared for outside counsel's legal review



# WHY DO YOU NEED A TRANSITION PLAN?

- Effects of COVID-19 will not be short-term
- Employers must plan for short-term and long-term impacts
- Some states/localities require a written RTW plan as a condition of reopening
  - CA strongly recommends site-specific protection plans
  - MI requires essential businesses to develop preparedness and response plan
- Allows for effective crisis management
  - Provides clear procedures and delineates responsibilities of stakeholders
  - Provides defenses to potential litigation



# WHAT ARE THE TEAM'S OBJECTIVES?

## Your objectives are ongoing:

1. Develop a plan for resuming operations, while protecting employees and customers from COVID-19-related hazards and managing risk
  - Develop an external-facing plan for employees and public
  - Develop an internal-facing plan to guide management on plan and strategies
2. Oversee implementation of the plan
  - Where practical, designate individuals at each location to help oversee implementation
3. Monitor compliance with the plan
  - Routine compliance audits
  - Create mechanism for receiving/processing complaints/reports of noncompliance
  - Consider appointing a team member to monitoring compliance

Goal: Keep employees safe and to reduce missteps to prevent/minimize litigation

# WHAT IS IN THE TRANSITION PLAN?

## Safety Assessment

- How can you implement appropriate measures to protect employees and customers?
- Develop safety, sanitation, and social distancing protocols that comply with legal guidance/requirements

## Staffing Assessment

- Determine which workers and headcount based on needs and safety assessment (OSHA)
- Notify employees in advance to secure headcount and to confirm that they are healthy
- Establish objective criteria to ensure that you're implementing a fair selection process (ADEA/ADA)



# WHAT IS IN THE TRANSITION PLAN?

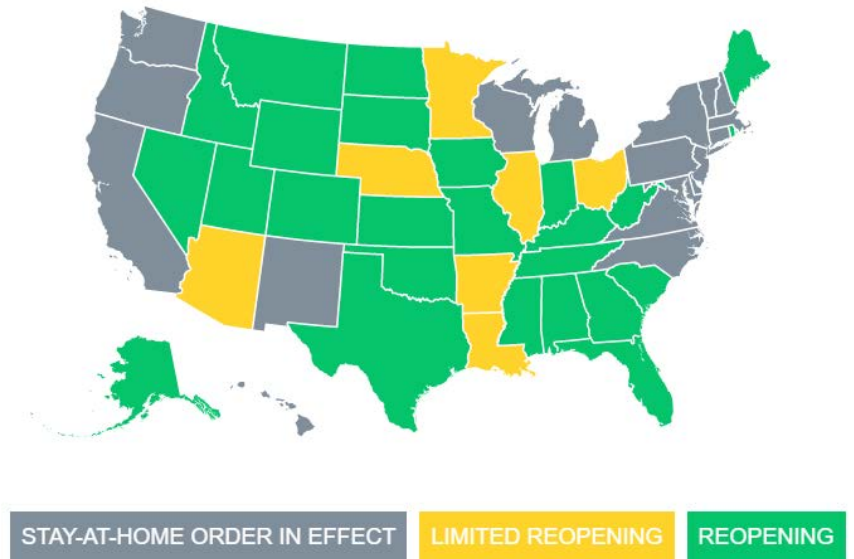
## Timeline for Reopening

- Make sure your timeline is consistent with state and local orders:
  - US Chamber of Commerce – interactive state-by-state guide:  
<https://www.uschamber.com/article/state-by-state-business-reopening-guidance>
- Consider factors specific to business’s location and operations:
  - Is the spread of COVID-19 in the community under control?
  - To what extent do I require employees to be on-site to operate?
  - Can I implement a phased reopening beginning with those who must be physically present?
  - Can employees physically get to work?
  - What equipment/supplies do I need to reopen?

## STATE-BY-STATE BUSINESS REOPENING GUIDANCE

Click any state below to find guidelines, timelines, and other reopening information for employers

Last Updated: May 10, 2020





# TRANSFORMING YOUR POLICIES

# TRANSFORMING POLICIES TO MATCH REALITY

- Review what you have
  - Do any policies require updating due to COVID-19?
  - Do you need to temporarily pause any policies due to COVID-19?
- Recognize what you don't have
  - What new (temporary) policies do you need?
    - Telework policy
    - Symptom screening/monitoring policy
    - Reimbursement policy for PPE
    - Emergency paid sick leave policy
- Change what needs to be changed
  - Consider a COVID-19 addendum/supplement



# THE NEW REALITY RE: SICK LEAVE

- Consider the spider web of emergency paid sick leave obligations
  - Even if FFRCA doesn't apply, state and local orders might
- Planning for staffing shortages
  - We anticipate greater reliance on staffing and temporary placement agencies to address staffing shortages
  - Comes with its own set of potential issues:
    - Joint employer issue – consider indemnification clause
    - May not escape emergency sick leave requirement



# RE-DEFINING EMPLOYEE DISCIPLINE

- Severe vs. moderate vs. minor COVID-19-related Infractions
  - Severe = Immediate termination
  - Moderate = Terminable or final warning
  - Minor = Warning (verbal or written)
    - CBA may dictate
- Examples
  - Intentionally exposing others to COVID-19
  - Intentionally circumventing pre-entry screening measures
  - Forgetting to wear PPE
  - Teasing a co-worker for refusing to return to the workplace due to COVID-19 concerns
  - Failure to respond to emails in a timely manner while working remotely
  - Falsifying information to obtain COVID-19 leave benefits
  - Falsifying RTW questionnaire responses

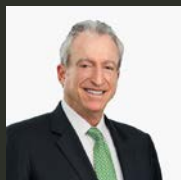


# THE NEW WORKPLACE

- Establish timekeeping procedures
  - How will time be recorded?
  - Will you limit overtime and require pre-approval?
- Address meal and rest break policies
  - Consider whether to establish specific break times
  - More rigid rules re: use of work laptop during breaks
  - How will meal breaks be recorded?
- Necessary equipment and reimbursement
  - Identify equipment that the Company will provide
  - What costs will the Company reimburse and at which rates?
  - Establish a procedure for seeking reimbursements



# THANK YOU / QUESTIONS?



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## Upcoming in our Return to Work Virtual Toolkit:

- Part 2. Preparing Your Workplace: How to Navigate Safety Mandates and Recommendations | **May 19**
- Part 3. Preparing Your Workforce: How to Avoid Legal Landmines When Bringing Employees Back | **May 21**
- Part 4. Preparing Your Responses: How to Tackle Opening-Day Obstacles | **May 26**
- Part 5. Preparing for the Unknown: How to Anticipate and Address Future Workplace Problems | **May 28**
- Part 6. Preparing for Battle: How to Build Your Litigation Defenses Now | **June 2**

For additional information, please visit  
[www.mwe.com/coronavirus](http://www.mwe.com/coronavirus)