

NOW AND NEXT:

COVID: Contracts, Labor & Safety

April 30, 2020 – 1:00 p.m.
Presented by Auman, Mahan & Furry



1:00 pm – Contracts (Richard Carr)

1:25 pm – Labor (Amy Mitchell)

1:50 pm – Safety (Gary Auman)

2:10 pm – Q & A

Courtesy of ...



Association Resource
Webinar





CONTRACTS

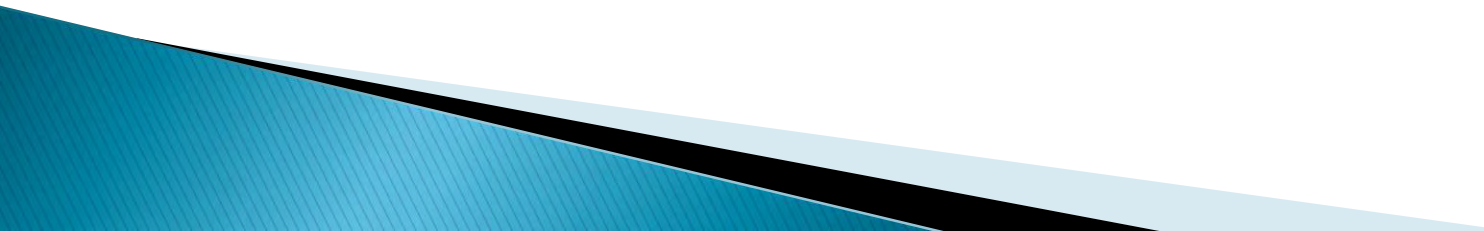


“Decision is a sharp knife that cuts clean and straight; indecision, a dull one that hacks and tears and leaves ragged edges behind it.”

– L. Gordon Graham



Choose to be a good business in bad times.

- ▶ Bad businesses cannot make decisions when all the options are undesirable.
 - ▶ Good businesses set a strategy and make decisions.
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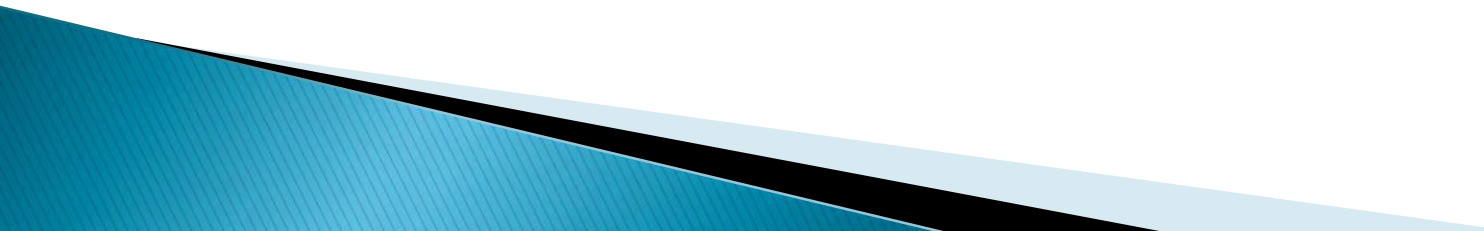
NOW AND NEXT

Now: We are at the end of the beginning.

Next: Presenting contractual claims and defenses.




You may think about this as an offensive situation, or a defensive situation.

- ▶ Claims may be made against you.
 - ▶ You may be making claims.
- 

As of NOW, you need to know your contracts:

Your contracts up the chain, your contracts down the chain.


- ▶ What does your contract with owner/prime/customer provide?
 - ▶ What do your contracts with subs and suppliers provide?
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Look up the contract chain first . . .

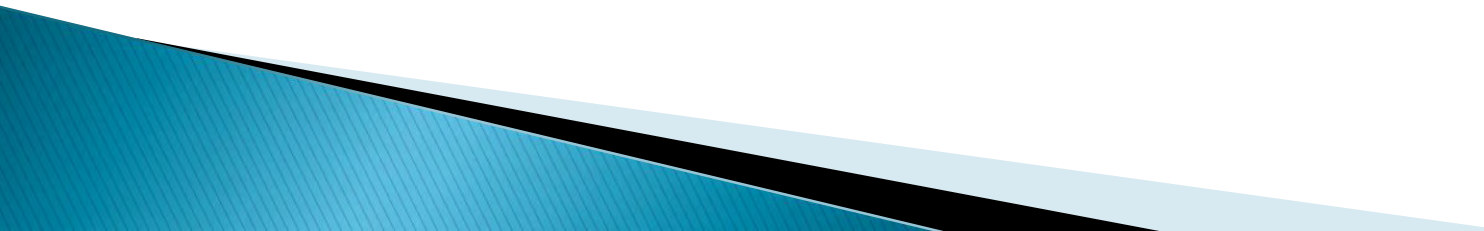
What is your owner/prime's position?

- ▶ Continued work
- ▶ Suspended work
- ▶ Additional directives

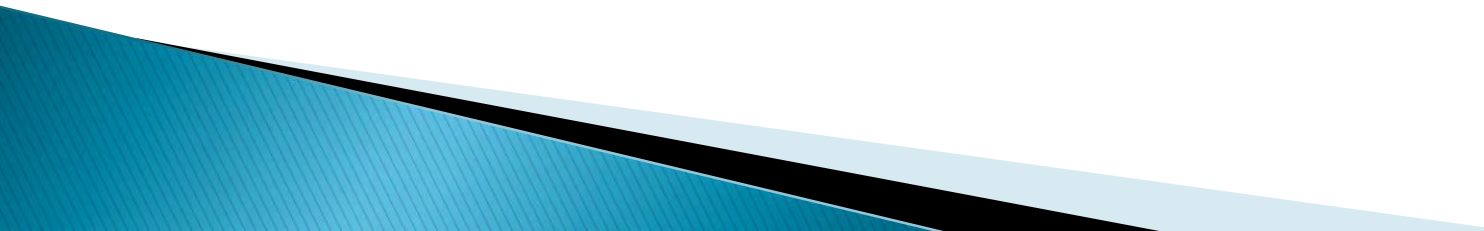
What is the position of the government above your owner/prime?

- ▶ Federal Work, implies federal regulation
 - ▶ State law may still impact federal work
 - ▶ State law may create conditions that impede federal work
 - ▶ State law – Essential, Non-essential
- 


Look down the contract chain . . .

- ▶ Have your subs and suppliers performed?
 - ▶ Could your subs and suppliers perform?
 - ▶ Have your subs and suppliers presented claims for time and/or costs?
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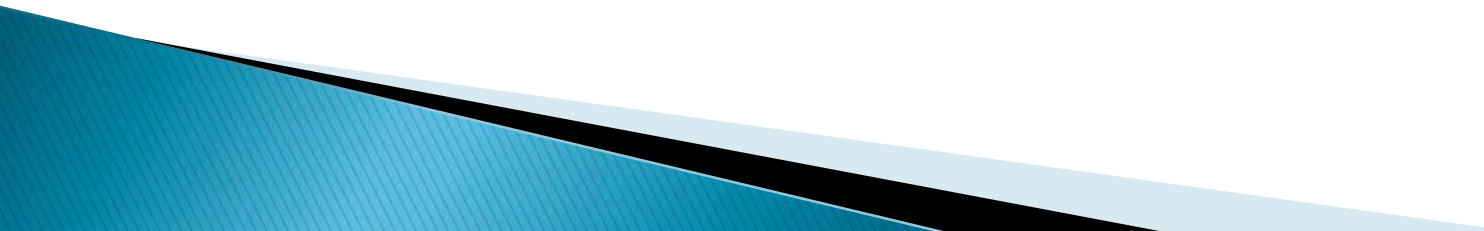
For each contract, you must know:

- ▶ Change and claim provisions.
 - ▶ Force majeure.
 - ▶ Governmental orders.
 - ▶ Notice provisions.
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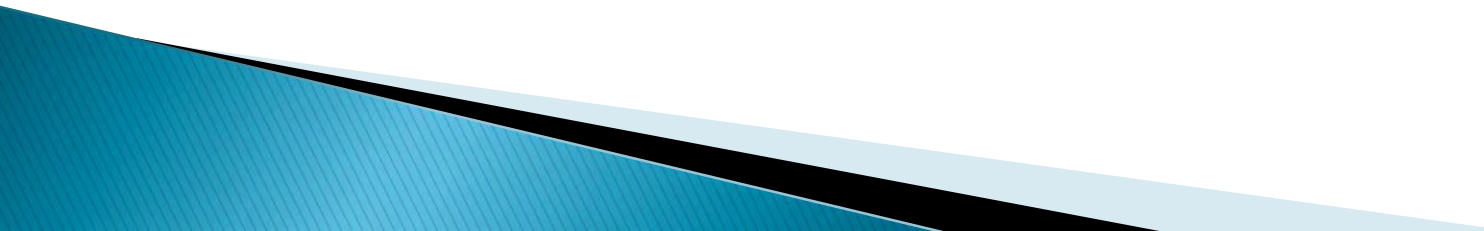
CHANGE AND CLAIM PROVISIONS

- ▶ Changes in the work
 - ▶ Termination of work
 - ▶ Suspension of work
 - ▶ Changes in conditions
 - ▶ Changes in law
 - ▶ Procedures for presenting claims
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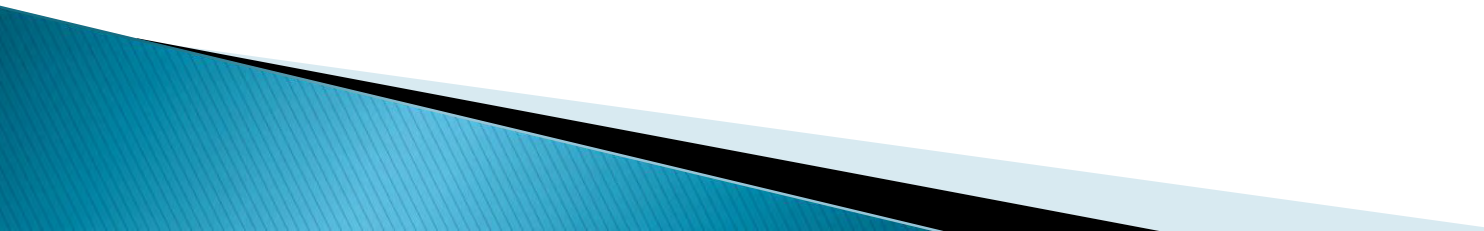
FORCE MAJEURE PROVISIONS

- ▶ Is there one?
 - ▶ What does it say?
 - ▶ Can you assert it?
The burden is on the asserting party.
- 

GOVERNMENTAL ORDERS

- ▶ Essential, Non-essential
 - ▶ Suspension/Non-suspension
 - ▶ Delay caused
- 

NOTICE PROVISIONS

- ▶ Written notice
 - ▶ Service
 - ▶ Follow up as to impacts
 - ▶ Time periods and calendars
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As of NOW, this contract analysis should be done.
The preliminary analysis is subject to ongoing review.

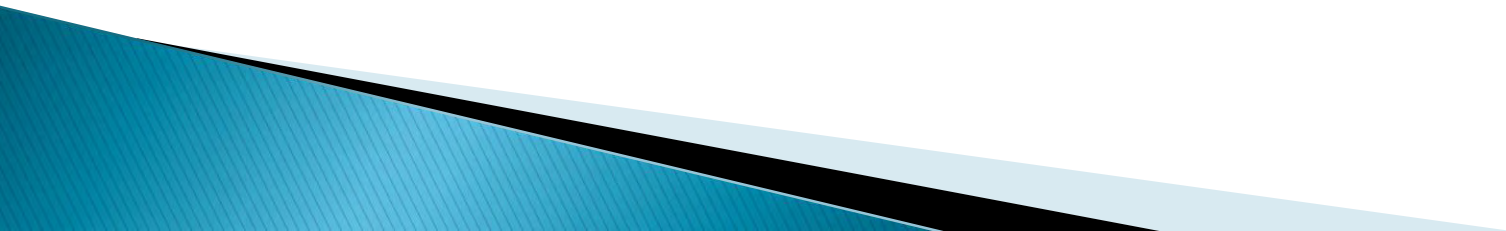
Ohio: Stay at home order: March 23, 2020 – it has been over a month.

Michigan: Stay at home order: April 7, 2020 – it has been three weeks.

New York: March 22, 2020 it has been over a month.




As of NOW, if you have not done your contract analysis, developed a strategy and served notices, you are behind.



ON EACH PROJECT:

Analyze the contract up

- ▶ Know the up party's position
 - ▶ Know your contract provisions and rights
 - ▶ Confirm notice prepared per contract
 - ▶ Confirm notice served per contract
 - ▶ Calendar ongoing supplementation as to impacts
 - ▶ Responses to notices from above?
- 

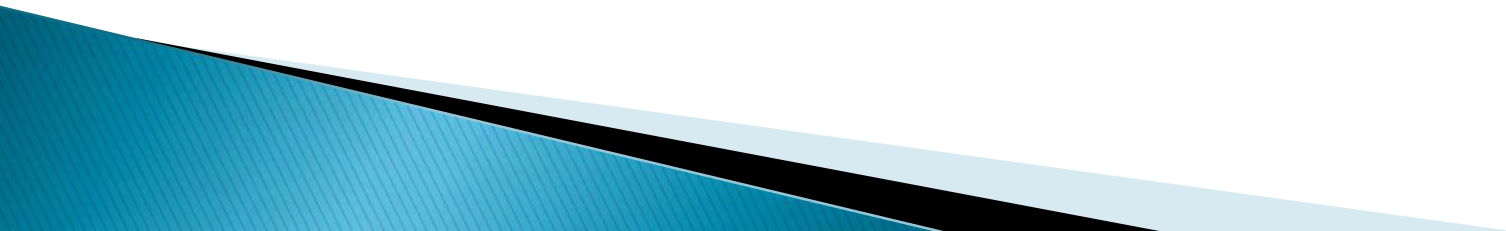
ON EACH PROJECT (continued...)

Analyze the down contracts

- ▶ Performance?
- ▶ Claims?
- ▶ Notices and responses

CONSIDER CREATING AN ATTORNEY CLIENT
PRIVILEGED CONTRACT ANALYSIS

NEXT, you need to carry out your strategy, make claims and defend claims.

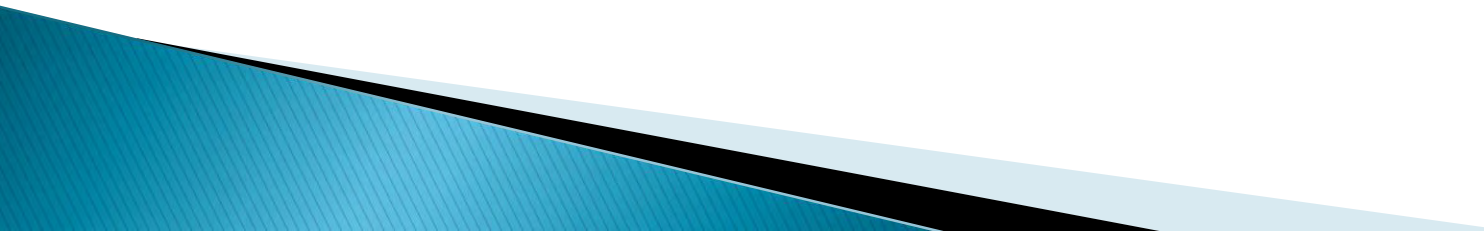


“In every battle there comes a time when both sides consider themselves beaten; then he who continues the attack wins.”

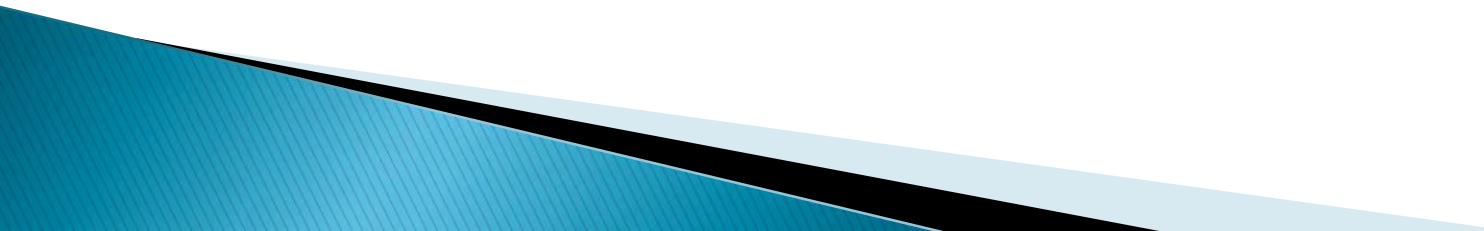
– General Ulysses S. Grant



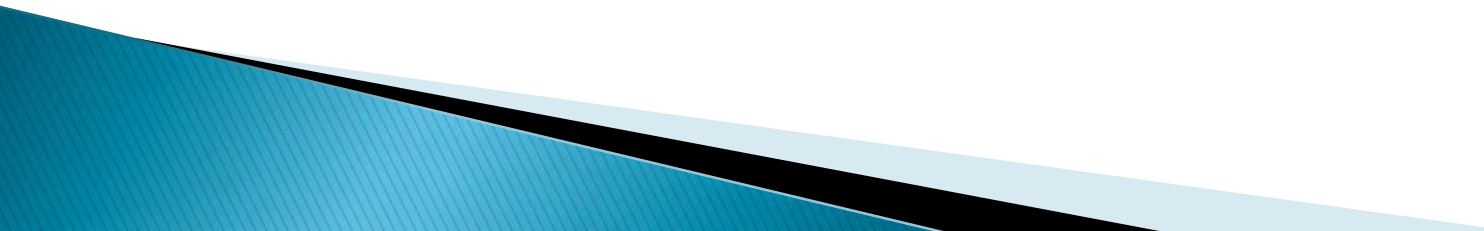
NEXT is the strong continuation of your strategy.

- ▶ Continue the notice process
 - ▶ Develop claims
 - ▶ Present and defend claims
- 

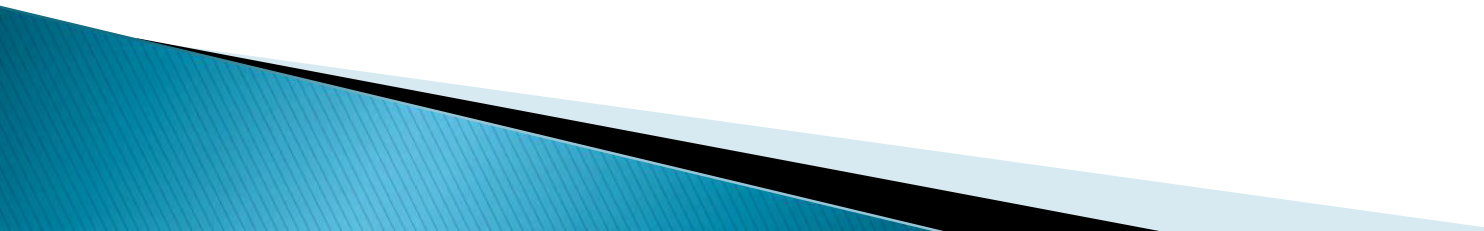
NOTICE OF IMPACTS

- ▶ Continue proper service of notices
 - ▶ Supplement of additional impacts
 - ▶ Costs associated with impacts
- 

RESPONSES TO CLAIMS

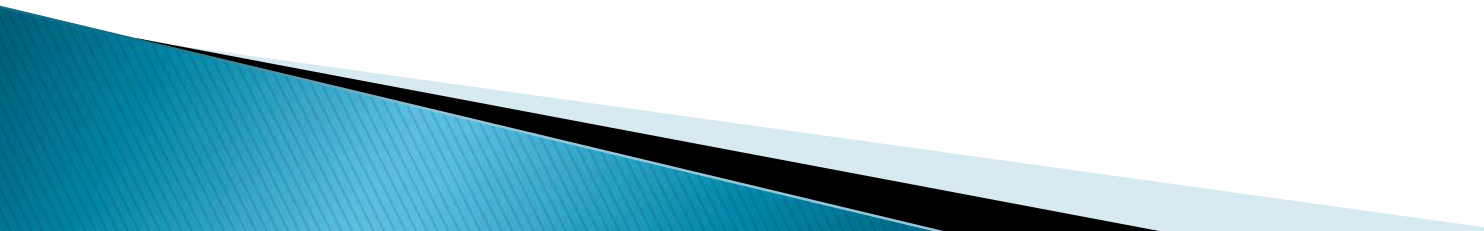
- ▶ Timely responses
 - ▶ Continuing responses
 - ▶ Ongoing governmental positions
 - ▶ Calendar follow up
 - ▶ Look for supplements and reserve rights
- 

DEVELOPMENT OF CLAIMS

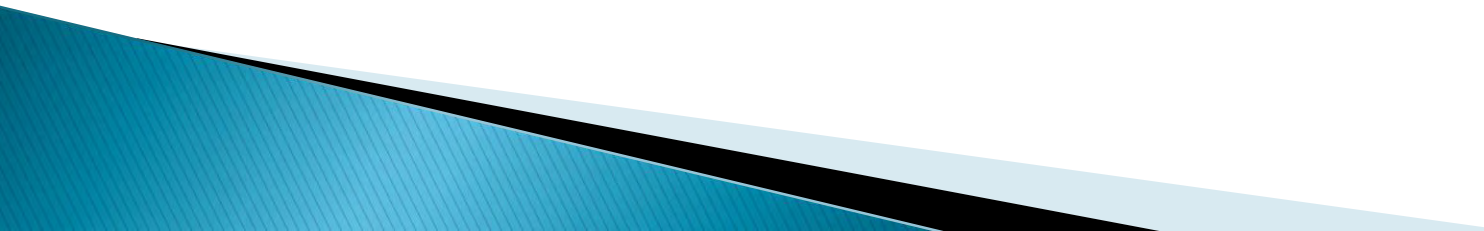
- ▶ Detail the directives and impacts
 - ▶ Explain entitlements/defenses – clause specific
 - ▶ Tie out schedule issues
 - processor work
 - relationships and critical path
 - ▶ Identification of costs
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DEVELOPMENT OF CLAIMS (continued)

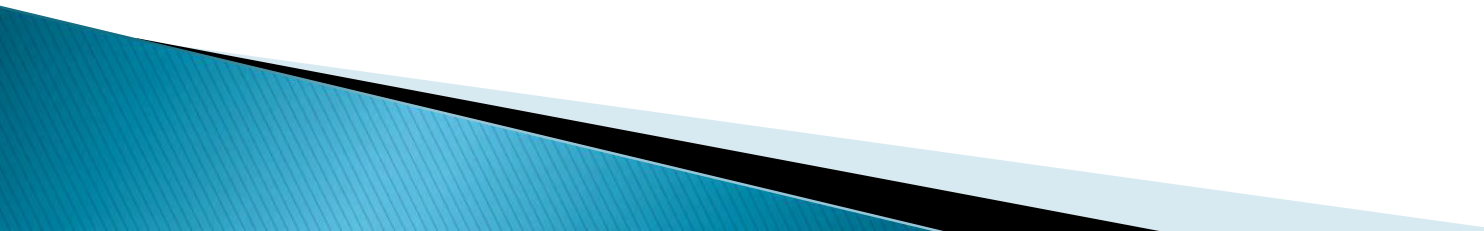
Build the Claim Supporting Data

- schedule impacts
 - labor inefficiencies
 - equipment costs
 - collecting all project level information
 - dailies
 - hire a claims consultant?
- 

PRESENTATION OF CLAIM OR DEFENSE

- ▶ Review the contract and build in contract provision
 - ▶ Present according to contract
 - ▶ Provide claims/defenses subject to supplementation
- 

DISPUTE RESOLUTION

- ▶ Prepare dispute process
 - ▶ Check the contracts
 - ▶ Calendar time limits
 - ▶ Contractual statute of limitation?
- 

“When I am getting ready to reason with a man, I spend one-third of my time thinking about myself and what I am going to say and two-thirds about him and what he is going to say.”

Abraham Lincoln, 16th President of the United States and former Captain in the Illinois state militia during the Black Hawk War.

LABOR




Now and Next – Employment Issues

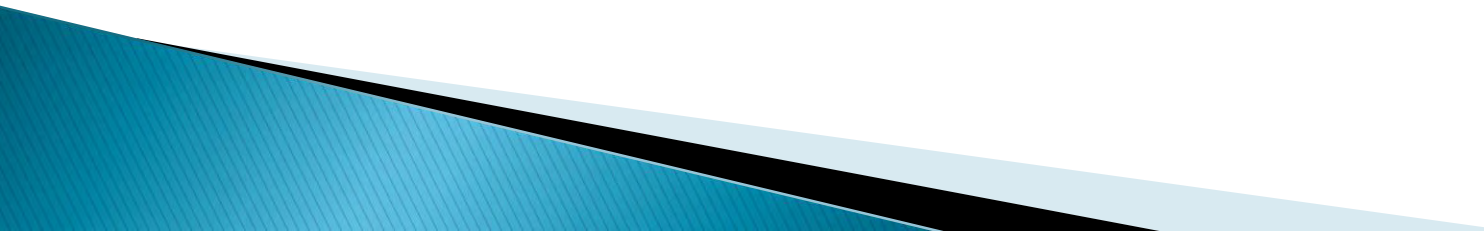
▶ NOW

- Can I operate my business?
- How do I handle employee time off requests/illness?
- What if I need to lay off employees?

▶ NEXT

- How do I recall employees?
 - What if my employees refuse to return to work?
- 

NOW

- ▶ Can I Operate My Business?
 - State orders: “essential” business
 - Reopening plans: manufacturing, distribution and construction
 - ▶ How Do I Handle Employee Illness?
 - CDC guidance/check applicable state dept. of health guidance
- 

NOW

▶ CDC Guidance

- Employees Who Appear To Have Symptoms (i.e., Fever, Cough, Or Shortness Of Breath) Upon Arrival At Work Or Who Become Sick During The Day Should Immediately Be Separated From Other Employees, Customers, And Visitors And Sent Home
- ▶ Positive Test:
 - Inform of their possible exposure and send home for 14 days any coworker who had close contact (less than 6 ft) for at least 10–30 minutes in the 48 hours before symptoms appeared in the workplace
 - or
 - Notify local Department of Health (depending on State Guidelines) and follow guidelines
- ▶ Maintain Confidentiality Of Employee's Name Who Had Symptoms Or Positive Test

NOW – FFCRA

- ▶ How Do I Handle Employee Time Off Requests?
 - Determine if the employee's need for leave is covered by the Families First Coronavirus Response Act
 - Effective **April 1 – Dec. 31**
 - Employers with <500 employees
 - Emergency Paid Sick Leave Act
 - Expanded Family & Medical Leave Act

NOW: More on the FFCRA...

▶ Emergency Paid Sick Leave Act

- Up to 80 hours
- Categories for Paid Sick Leave eligibility
 1. Employee subject to govt quarantine or isolation
 2. Employee advised by healthcare provider to self-quarantine
 3. Employee experiencing COVID-19 symptoms and seeking medical diagnosis
 4. Employee caring for individual in #1 or #2
 5. Employee caring for his/her child if school or place of care is closed or childcare provider is unavailable due to COVID-19 precautions
 6. Other govt specified substantially similar condition

NOW: More on the FFCRA...

- ▶ Compensation for Paid Sick Leave
 1. Paid at employee's regular rate of pay and capped at \$511 per day and \$5,110 total
 2. (Same as #1)
 3. (Same as #1)
 4. Paid at 2/3 the employee's regular rate and capped at \$200 per day and \$2,000 total
 5. (Same as #4)
 6. (Same as #4)

NOW: More on the FFCRA...

- ▶ Expanded Family & Medical Leave Act
 - After 30 days of employment, up to 12 weeks of leave for one reason:
 - Employee unable to work or telework due to need to care for employee's child if school or place of care is closed or childcare provider is unavailable due to COVID-19 public health emergency declared by govt authority
 - First 10 days unpaid
 - Remaining leave paid at 2/3 employee's rate; capped at \$200/day, \$10,000 total
- ▶ If The Time Off Request Is Not Covered By FFCRA, Review Company Policies And Consider Relaxed Use Of PTO/Vacation

NOW: Lay Offs

- ▶ Develop Lay Off Plan:
 - Objective criteria
 - Position, seniority, performance
 - Avoid subjective/risk factors
 - Time off for COVID reasons, underlying medical conditions, protected class status

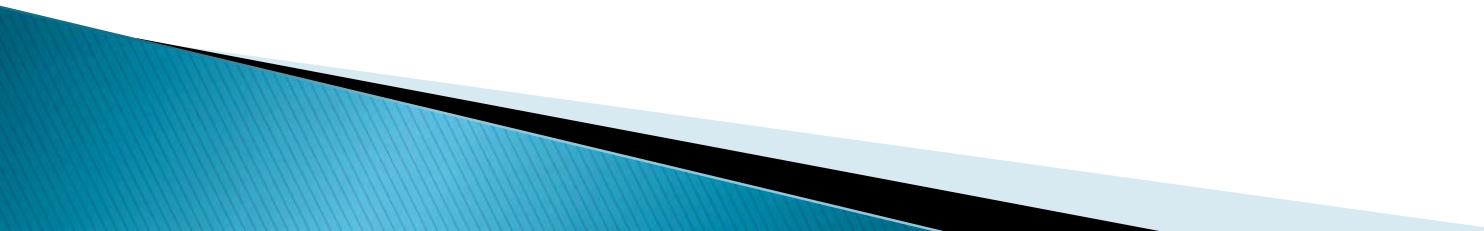
NOW: Lay Offs

▶ Notice Required:

- WARN Act
 - Employers with 100 or more full-time employees
 - 60 days written notice
 - Temporary layoff (less than 6 months) exception to notice
- Mini-WARN Act/state laws

NEXT: Recall

▶ Recall Plans

- Consider it reverse lay offs
 - Risk of claims
 - Objective criteria
 - Reasonable notice
 - Explain new safety procedures
- 

NEXT: Recall

- ▶ What If My Employees Refuse To Return To Work?
 - Document reason provided
 - COVID-19 reason
 - Fear
 - Not covered by FMLA/STD/unemployment
 - Vulnerable/high risk
 - Consider Americans with Disabilities Act
 - Reasonable Accommodation
 - Additional precautions at work
 - Work at home
 - Unpaid leave

SAFETY

NOW

Safety enforcement by OSHA still under General Duty Clause

Still NO – Emergency Temporary Standard



PLANNING

You must have a COVID-19 pandemic protection plan in place for your employees.

Model it after your emergency action plan.

Site Specific

Must include training and enforcement.



TYPES OF OCCUPATIONS

Very High Risk

High Risk

Medium

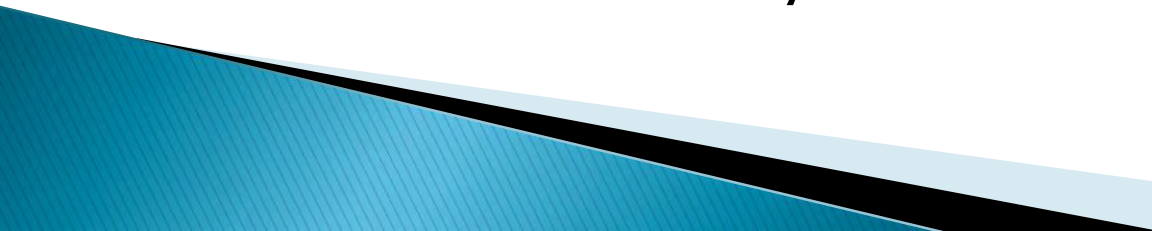
Lower Risk

Construction appears to fit with Medium or Lower (?)

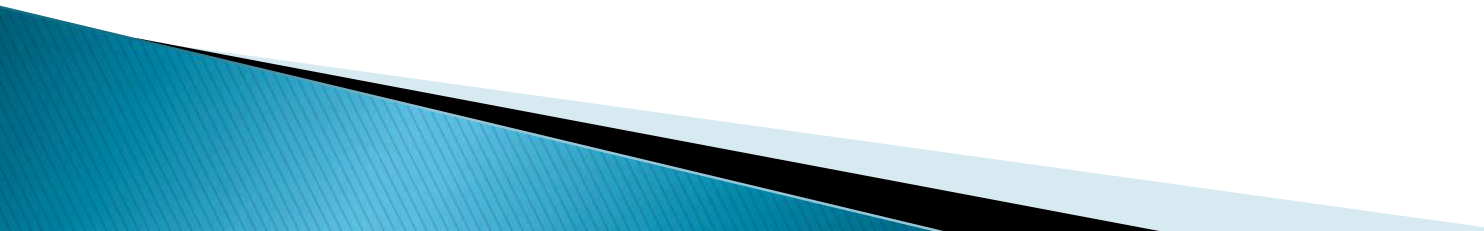


IN YOUR PLAN

OSHA/CDC RECOMMENDS

- Employees to stay home, if sick.
 - Take temperature before coming to work.
100.4 and higher: self-quarantine
 - Frequent and regular handwashing
 - Cough or sneeze into tissue and properly discard
– OR– into elbow.
 - Avoid/do not touch others. No hand shaking, etc.
 - Prohibit (my word) employees sharing tools, equipment, and/or phones.
 - Do not touch your face.
- 

OSHA/CDC RECOMMENDS cont'd.

- Maintain social distancing (6 ft.) between employees on all sites.
 - Use respirators when available.
 - Be aware and comply with state laws, regulations, and guidance.
Ex: Nevada – No crew cab trucks/only one employee at a time in AWP.
 - Manufacturing – sneeze guards, etc.
- 

WORKERS' COMPENSATION

In most states – COVID-19 diagnosis and treatment and disability – not automatically compensable disease claim.


W/C is state law, so you need to look at your state's laws and emergency regulations. Ex: Illinois



OPENING UP AMERICA AGAIN

GUIDELINE FOR EMPLOYERS (All Phases)

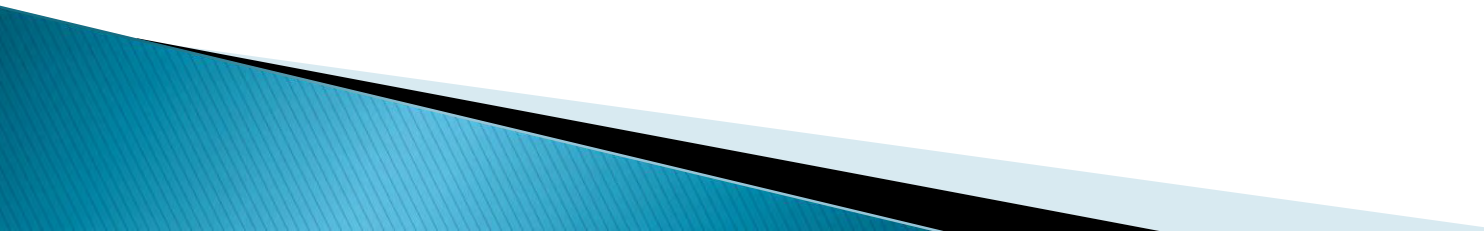
Develop and implement appropriate business practices in accordance with Federal, State, and Local regulations and guidance.

- Social distancing
 - Temperature checks
 - Sanitation
 - Testing, isolating, and contact tracing
 - Use and disinfection of common and high traffic areas
 - Business travel
 - People who feel sick — stay home
- 

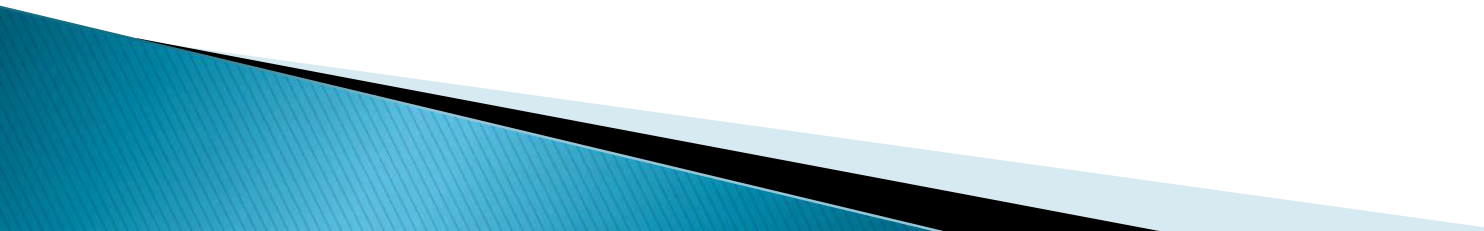
NEXT-OPENING UP AMERICA AGAIN

Three phases (timing – not defined)

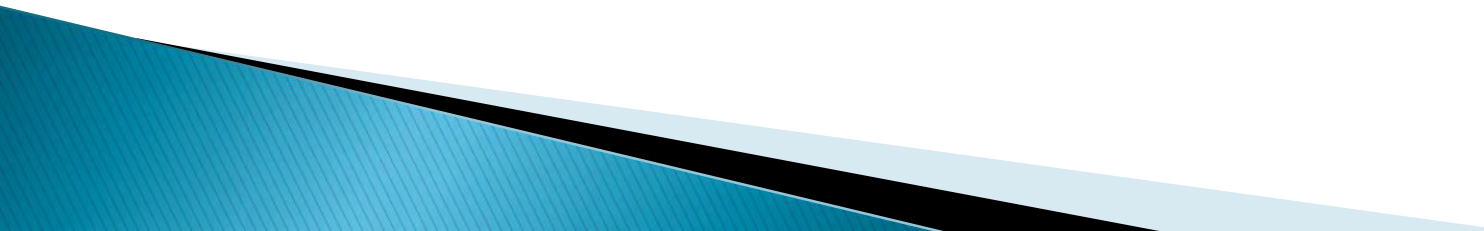
For all three phases (employees)

- Wash hands frequently with soap and water, especially after touching surfaces or items
 - Avoid (DO NOT) touch face
 - Sneeze or cough into tissue or elbow
 - Disinfect frequently used items as much as possible
 - Strongly consider using face covering while in public
 - If sick, stay home
- 

PHASE I (Employers)

- Continue to encourage telework
 - Return to work in phases (if possible)
 - Close common areas
 - Minimize all non-essential travel and adhere to CDC guidelines regarding isolation following travel
 - Strongly consider special accommodations for personnel who are members of vulnerable population. (HBP, auto-immune disease, chemo, COPD, congestive heart failure, diabetes, etc.)
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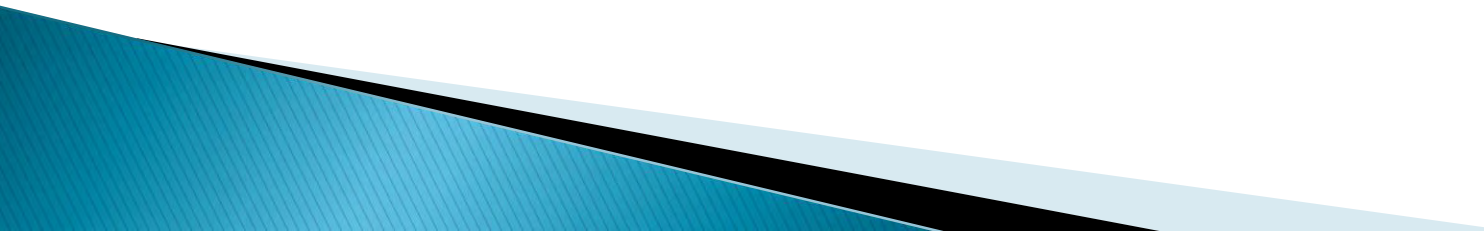
PHASE I (Additional)

- Large venues – sit down dining, etc. can operate under STRICT physical distancing protocols
 - Bars remain closed
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PHASE II (Employers)

- Continue to encourage telework whenever possible
- Close common areas
- Non-essential travel can resume
- Strongly consider SPECIAL ACCOMODATIONS

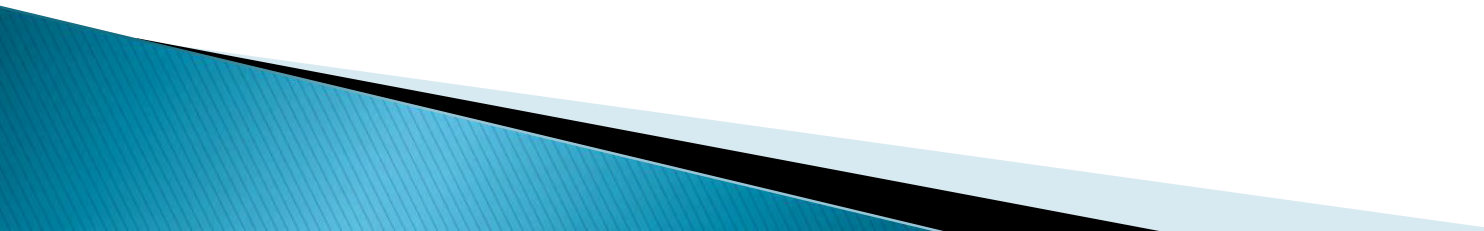
PHASE II (Other)

- ▶ Large venues such as restaurants may resume with moderate physical distancing
 - ▶ Bars may operate with diminished standing room occupancy where applicable and appropriate
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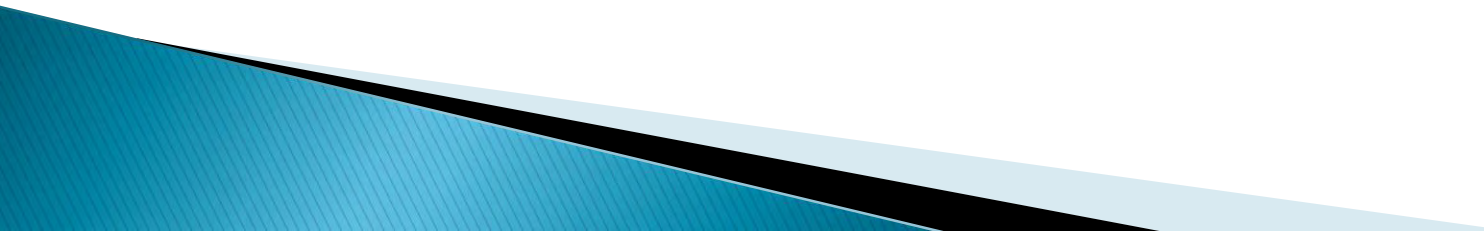
PHASE III (Employers)

- Resume unrestricted staffing of worksites

PHASE III (Others)

- Large venues – sit-down dining – operate under limited physical distancing protocols
 - Bars may operate with increased standing room occupancy where appropriate
- 

WHAT DOES IT ALL MEAN?

- You, as an employer, is still mandated to comply with General Duty Clause whether you are essential industry or not.
 - That is the way it is going to be for the foreseeable future.
 - Employee complaints to OSHA may increase as you try to return to new normal.
 - Workers' Compensation
- 

Questions?

