

**COVID-19:  
Return to Work  
Preparedness & Response Plan**

**Maddin Hauser Roth & Heller  
Corporate and Employment Group**

# Maddin Hauser *Presentation* | COVID-19 – Legal Updates



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## Learning Objectives

- Review requirements, recommendations, and best practices for reopening the workplace amidst COVID-19 concerns:
  - Understand the Requirements and Recommendations
  - Create a COVID-19 Preparedness and Response Plan to Reopen Businesses
  - Strategies for Lawfully Recalling Employees

# Government Requirements & Recommendations

- President's Guidelines for Opening Up America Again
- CDC Guidelines
- OSHA
- Michigan Executive Orders
- Oakland County Health Department
- ADA/EEOC



## President's Guidelines for Opening Up America Again

- Provides a guide for reopening businesses in three phases based on meeting particular criteria related to:
  - **Symptoms:** Downward trajectory in 14-day period for both influenza-like illnesses and COVID-19-like cases
  - **Cases:** Downward trajectory in 14-day period of documented cases or positive tests as percentage of total tests
  - **Hospitals:** Treating all patients without crisis care and robust testing program in place for at-risk healthcare workers, including emerging antibody testing
- Ultimately Governor's decision to implement on a state-by-state basis

## President's Guidelines – Phase 1

### Employers

- Encourage telework “whenever possible and feasible with business operations”
- Return to work in phases, if possible
- Close common areas or enforce strict social distancing protocols
- Minimize non-essential travel and adhere to CDC guidelines regarding isolation following travel
- Strongly consider special accommodations for vulnerable populations

### Individuals

- Vulnerable individuals – shelter in place
- All individuals should maximize physical distance from others while in public
- Avoid gatherings of more than 10 people, where social distancing is not practical, unless precautionary measures observed
- Avoid socializing in groups of more than 10 without physical distancing
- Minimize non-essential travel and adhere to CDC guidelines regarding isolation following travel

## President's Guidelines – Phase 2

### Employers

- Encourage telework “whenever possible and feasible with business operations”
- ~~• Return to work in phases, if possible~~
- Close common areas or enforce strict social distancing protocols
- ~~• Minimize non-essential travel and adhere to CDC guidelines regarding isolation following travel~~
- Strongly consider special accommodations for vulnerable populations

### Individuals

- Vulnerable individuals – shelter in place
- All individuals should maximize physical distance from others while in public
- Avoid gatherings of more than **50** people, where social distancing is not practical, unless precautionary measures observed
- ~~• Avoid socializing in groups of more than 10 without physical distancing~~
- ~~• Minimize non-essential travel and adhere to CDC guidelines regarding isolation following travel~~
- **Resume non-essential travel**

## President's Guidelines – Phase 3

### Employers

- **Resume unrestricted staffing of worksites**

### Individuals

- **Vulnerable individuals – ~~shelter in place~~ resume public interactions, but should practice physical distancing and minimize exposure to settings where distancing may not be practical, unless precautionary measures are observed**
- **Low-risk populations – consider minimizing time in crowded environments**

## President's Guidelines for Employers During All Phases

- Develop policies related to:
  - Social distancing and protective equipment
  - Temperature checks
  - Sanitization
  - Use and disinfection of high traffic areas
  - Business travel
- Monitor workplace for symptoms and prohibit symptomatic employees from entering until cleared by medical provider
- Develop policies/procedures for contact tracing after positive test

## CDC Guidelines for Employers

- Whitehouse is not supporting this guidance. “Too Prescriptive”
- In all phases:
  - Monitor state and local mitigation levels in the community
  - Encourage employees at higher risk to telework or modified duties
  - Ensure entities sharing workspace follow guidelines
  - Provide employees from higher transmission options to reduce their presence in lower transmission areas (*e.g.* telework)

## CDC Guidelines – Employers

### – Phase I

- Reopen only if business can ensure **strict** social distancing, proper cleaning, and protection of workers and customers. Vulnerable workers are recommended to shelter in place.

### – Phase II

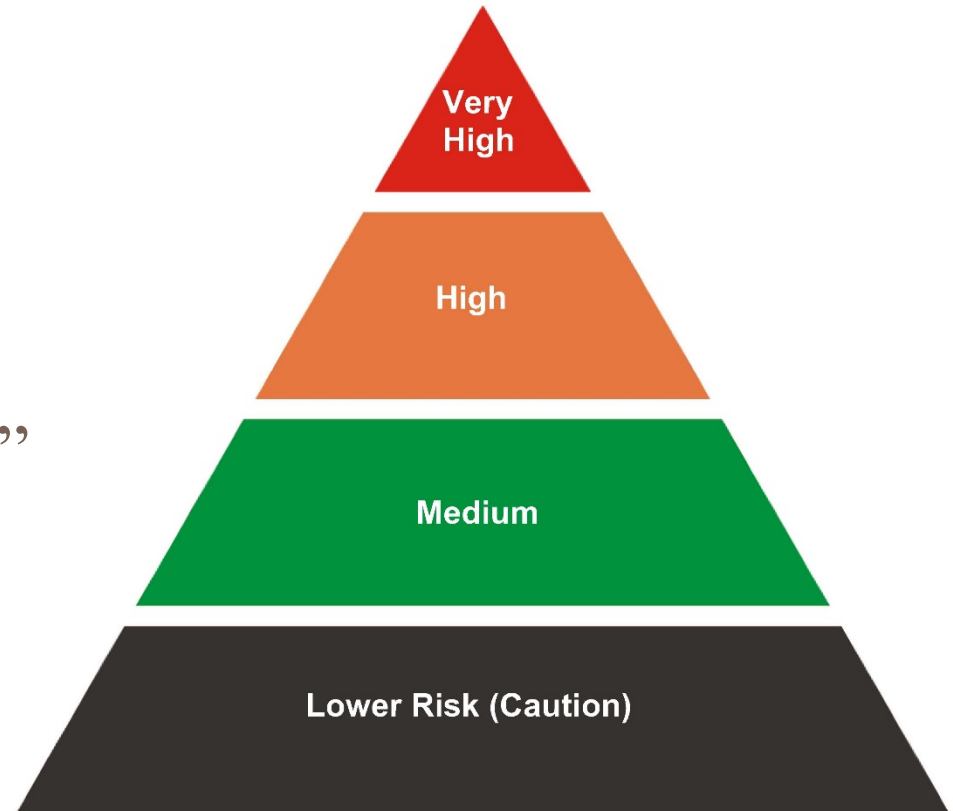
- Reopen only if business can ensure **moderate** social distancing, proper cleaning, and protection of workers and customers. Vulnerable workers are recommended to shelter in place.

### – Phase III

- Reopen only if business can ensure **limited** social distancing, proper cleaning, and protection of their workers and customers. No recommendation for vulnerable workers.

## OSHA Guidelines

- Preparedness and Response Plan
  - Classifies worker exposure from “Lower” to “Very High” risk based on job duties



Occupational Risk Pyramid for COVID-19

## Michigan Executive Order 2020-77

- Who can work?
  - Critical infrastructure workers
  - Basic minimum operations
  - Workers who perform resumed activities
- Must make designations in writing
  - Order must be construed broadly to “prohibit in-person work that is not necessary to sustain or protect life”

## Michigan Executive Order 2020-77

### Resumed activities include:

- Workers to process or fill orders for delivery or curbside pickup
- Bike maintenance or repair
- Gardening stores, nurseries, pest control, and landscaping operations
- Workers for moving and storage operations
- Work that is traditionally and primarily performed outdoors (*e.g.*, forestry, outdoor power equipment technicians, parking enforcement)
- Outdoor workers at places of outdoor recreation not otherwise closed under Executive Order 2020-69
- Construction, including building trades (*e.g.*, plumbers, electricians, HVAC technicians)
- Real estate industry, including agents, brokers, inspectors, surveyors, and registers of deeds, with limitations on specific activities and no in-person open houses

## Michigan Executive Order 2020-77

Resumed activities continued (*italics are new as of 5/7/20*):

- Workers necessary to manufacture goods that support workplace modification to forestall the spread of COVID-19
- *Workers necessary to train, credential, and license first responders*
- *Workers necessary to perform start-up activities at manufacturing facilities*
- *Effective at 12:01 am on May 11, 2020, workers necessary to perform manufacturing activities, subject to the workplace safeguards*
- *Workers at suppliers, distribution centers, or service providers whose in-person presence is necessary to enable, support, or facilitate another business's or operation's resumed activities*

## Michigan Executive Order 2020-77

- Business which remain open during the term of this order must:
  - Develop a **COVID-19 Preparedness and Response Plan** (see OSHA link).
  - Limit amount of workers present on premises to no more than is strictly necessary to perform the in-person work
  - Promote remote work “to the fullest extent possible”
  - Maintain at least 6 feet of distance between workers and patron
  - Increase cleaning and disinfection
  - Adopt **policies to prevent workers from entering the premises** if displaying respiratory symptoms or have had contact with person with confirmed diagnosis of COVID-19
  - Adopt **any other social distancing practices and mitigation measures recommended by the CDC.**
  - (and additional limitations for specific resumed activities)

## Michigan Executive Order 2020-77

- Face Masks
  - Any individual medically able to tolerate a face mask must wear one (covering his or her nose and mouth) when in any enclosed public space.
  - *Businesses must require that masks be worn when cannot maintain 6 feet (except when entering space for identification purposes) and require face shields when cannot maintain 3 feet*
  - All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
  - Employers must protect employees from discrimination of individuals who wear a face covering under this order.

## Michigan Safe Start Plan

- **Six Phases - focus is on the spread of the virus in the community**
  - Criteria for moving to a less restrictive phase include:
    - A consistent decrease in the daily number of new cases
    - The likelihood of the health system to become overwhelmed
    - Improved testing in place and containment capacity
    - Availability of therapy or a vaccine
  - **Phase I Uncontrolled Growth**
    - Daily increase in number of cases, health care system likely to become overwhelmed
    - Strict social distancing required, travel restrictions, face coverings, increased hygiene, remote work

## Michigan Safe Start Plan

### Phase II Persistent Spread

- Continue to see high numbers of daily infection, concern about health system capacity
  - Strict social distancing required, travel restrictions, face coverings, increased hygiene, remote work
  - Additional types of recreation are allowed

### Phase III Flattening (\*Governor says we are here\*)

- Case growth gradually declining
  - Continue distancing, increase face covering, no gatherings
  - Lower-risk business can resume with strict workplace safety measures

## Michigan Safe Start Plan

### Phase IV Improving

- Cases and deaths are declining
  - Continue distancing, face coverings, safe workplace practices, small gatherings allowed
  - Additional low risk business can reopen (retail, offices), telework required if possible

### Phase V Containing

- Continued case and death rate improvements and outbreaks can be quickly contained
- Continued distancing, face coverings, mitigated workplaces, increase in size of gatherings

### Phase VI Post-Pandemic

- Community spread not expected to return, community immunity and availability of treatment
- All businesses open
- Events and gatherings of all sizes allowed with new safety rules

## Oakland County Health Department Order 2020-10

- Employers **must publish a notice** at the entrance
- Employers **must screen all staff daily**, including:
  - COVID-19 symptoms? (fever, cough, shortness of breath, *or two of the following symptoms: chills, repeated shaking with chills, muscle pain, headache, sore throat, new loss of taste or smell and/or diarrhea, and extreme fatigue*). Strongly recommends touchless thermometer for temperature checks in lieu of verbal confirmation
  - Close contact in last 14 days with someone diagnosed with COVID-19?
  - Travel internationally or *outside of Michigan* in the last 14 days?
- **Face covering** required for essential services providing goods or services and face-to-face interaction with public or close contact with goods that public purchases (*e.g.*, groceries, restaurants, pharmacies, and locations where social distancing is not possible)
  - Include any covering that snugly covers the face and mouth, store bought or homemade, and secures with ties or ear loops
  - Review **CDC guidelines for safely applying, removing, and cleaning face coverings**
  - Recommends facial covers in public settings
- Health care organizations with infection control program in place are exempt

## Preparedness and Response Plan

- Ensure the workspace is functional after a period of closure
- Communicate a plan for an organized return of your workforce
- Communicate with employees regarding expectations and what the company is doing to keep them safe

## Communicate Your Plan

- Company Commitments
  - Preparation for Reduced Risk
  - Responding to Risk
- Employee Responsibilities
  - Before Returning to Work
  - General Operations
  - What to Do if Sick



## Company Commitments: Preparation for Reduced Risk

- Evaluate the number of workers needed in-person in the workplace
- Stagger hours and/or schedules for being in the workplace
- Assess employees' symptoms as they come to work
- Require appropriate protective equipment
- Provide facial coverings
- Evaluate need for additional equipment or supplies, to avoid sharing
- Increase cleaning of commonly touched surfaces
- Add flexibility to leave policies

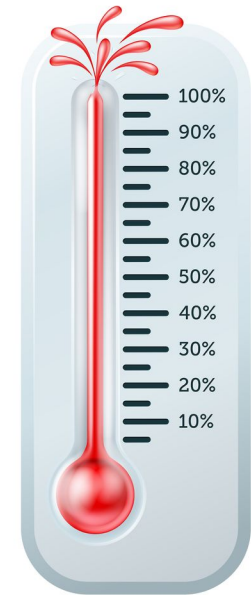


## Company Commitments: Responding to Risk

- Expectations of Managers
  - Enforce Social Distancing
  - Confidentiality
  - If employee tests positive, establish path of potential contact
- Have employees sign an agreement to abide by the plan, with violations potentially resulting in disciplinary action up to termination

## Employee Responsibilities: Before Returning to Work

- Comply with state and local orders requiring isolation under certain circumstances
- Screening procedures of employees and visitors
  - Temperature (fever 100.4)
  - Survey
- Provision of face mask



# Employee Responsibilities: General Operations

- **CDC Guidelines – Stop the Spread of Germs**
  - Avoid close contact with people who are sick
  - Cover your cough or sneeze with a tissue, then throw the tissue in the trash
  - Avoid touching your eyes, nose, and mouth
  - When in public, wear a cloth face covering over your nose and mouth
  - Clean and disinfect frequently touched objects and surfaces
  - Stay home when you are sick, except to get medical care
  - Wash your hands often with soap and water for at least 20 seconds

# Employee Responsibilities: General Operations

- Other topics to address:
  - Traffic patterns within the office
  - Limitations on entry into someone else's personal workspace
  - Restriction on sharing common tools and equipment
  - Encourage video and teleconferences, when possible
  - If necessary to hold in-person meetings, establish criteria for guests
  - Consider potential need for accommodations / no discrimination policy regarding face masks
  - Encourage flexibility in responsibilities
  - Outside of work activities posing increased risk on employees, customers, and visitors

## Employee Responsibilities: What to Do if Sick

- Explain expectations of sick employees
  - Sick employees should stay home
  - Separate employees who show up to work with respiratory symptoms or develop them during the day
  - Comply with leave policies



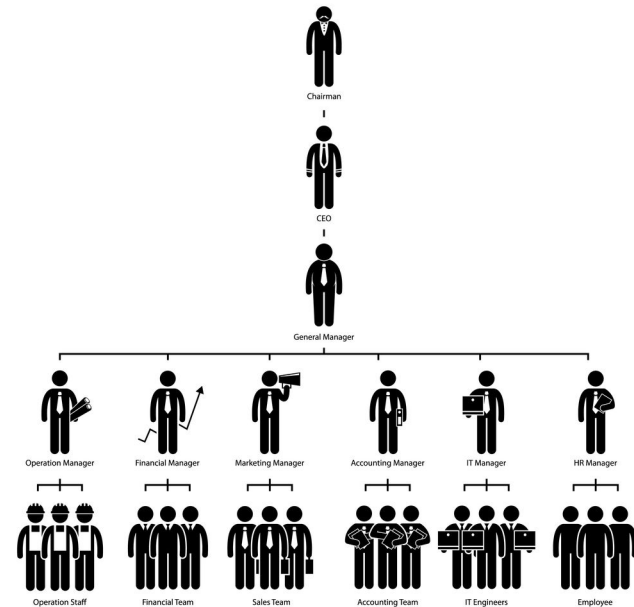
# Lawfully Recalling Employees: Potential Business Decisions

- Return to Work
  - \*Respond to Refusal to Return
- Temporary Leave
- Temporary Layoff
- Termination of Employment
- Bankruptcy and Restructuring



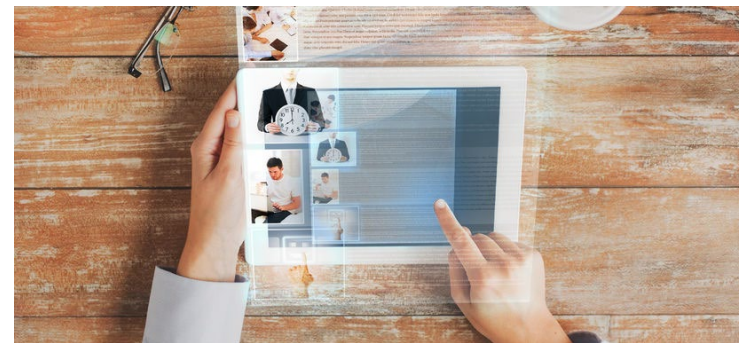
# Lawfully Recalling Workers: Factors to Consider

- Business Need for In-Person Work
- Shared Work Plan (UIA)
- Remote Work
- Adverse Impact Study
- Unemployment Benefits
- Health Insurance
- COBRA



## Business Need for In-Person Work

- Confirm permitted to work in person under Executive Orders
- Designation Notice
- Promote remote work to fullest extent possible



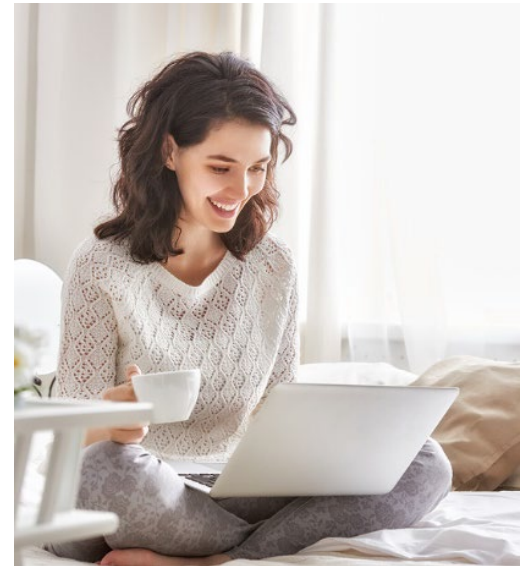
## Shared Work Plan (UIA)

- The UIA must approve plan
  - Provides employees with partial unemployment benefits upon reduction in work hours between 10% and 60% (expanded from typical limitation of 15-45%) and provided other criteria are met
  - Plan must apply to an affected unit of employees that is no fewer than 2 employees



## Remote Work Opportunities

- Document expectations
- Identify temporary duration
- Evaluate needs to work remotely
- Consider pay (exempt/non-exempt)
- Confidentiality/privacy
- Policy and agreement



## Adverse Impact Study

- List all employees and protected class details
  - Age, gender, race, and others, as relevant
- Evaluate composition
- Consider voluntary recall



## Returning Employees to Work

- Confirmed in role permitted to work in person / remote work
- Define scope of responsibilities / location for performing work
- Define terms of payment (reduced or enhanced?)
  - **Non-exempt:** pay for hours worked
  - **Exempt:** pay salary of no less than \$684 per week (\$35,568 per year)
- Identify support for payment of wages
  - **PPP Loan**
  - **Shared Work Plan**
- Continue health insurance, provided eligibility criteria met
- Obtain agreement to comply with Preparedness and Response Plan

## Employees Reluctant to Return

- Consider the underlying reason and related protections/support
  - Is employee required to stay home?
    - Local and State Orders
  - What support is available to/required for employee?
    - Michigan paid medical leave
    - Emergency PSL / Expanded FMLA
    - FMLA / ADA accommodation
    - Shared Work Plan / Unemployment / SUB
    - Health Benefits / COBRA
  - Voluntary resignation? Unemployment fraud?



## Michigan Executive Order 2020-36

- **Individuals who test positive to COVID-19 OR who display one or more of the principal symptoms:** stay home until 3 days have passed since their symptoms have resolved\* AND 7 days\* have passed since their symptoms first appeared or they were swabbed for their positive test (does not apply to anyone who received a negative test after showing symptoms)
  - \*CDC recommends 3 days since recovery without fever-reducing medication and 10 days after symptoms appeared
- **Individuals who have had close contact with person who has tested positive for COVID-19 OR with individual who displays one or more of the principal symptoms of COVID-19:** self isolate until either 14 days have passed since their last contact or the sick or symptomatic person OR symptomatic individual receives a negative test (does not apply to healthcare professionals, health care facility, first responders, child protective service, child caring institutions, and correctional facility workers)

# Michigan Executive Order 2020-36

- Employer must:
  - Not discharge, discipline, or retaliating against employees who stay home for the required periods under this order
  - Treat such employees as if they were taking leave under Paid Medical Leave Act
  - If no PMLA, then must provide leave (whether paid or unpaid)
- Employer may:
  - Discharge or discipline employee who returns to work prior to the required periods
- \*No private right of action



## FMLA and/or ADA Issues

CDC recommends individuals at a higher risk of severe illness from COVID-19 stay home if possible and avoid close contact with people who are sick. High risk includes people 65 years and older and those with the following underlying health conditions:

- Blood disorders
- Chronic kidney disease
- Chronic liver disease
- Compromised immune system
- Current or recent pregnancy in last two weeks
- Endocrine disorders
- Metabolic disorders
- Heart disease
- Lung disease or moderate/severe asthma
- Neurological and neurologic and neurodevelopment conditions (e.g., cerebral palsy, epilepsy, stroke, etc.)
- Severe obesity

## Unemployment Benefits (Michigan)

- Michigan Executive Order 2020-76: Effective March 16, 2020, an employee is eligible if leaves work because of:
  - **Self-isolation or self-quarantine** in response to elevated risk from COVID-19 due to being immunocompromised;
  - **Displaying at least one of the principal symptoms of COVID-19** (fever, atypical cough, and atypical shortness of breath);
  - **Having contact in the last 14 days** with someone with a confirmed diagnosis of COVID-19;
  - **The need to care for someone** with a confirmed diagnosis of COVID-19; or
  - **A family care responsibility** as a result of a government directive.
- Charges are transferred to UIA's non-chargeable benefit account for employees "laid off or placed on leave of absence."

# Unemployment Benefits (Federal)

- **Benefits:** Expanded eligibility for 39 weeks (through Michigan and Federal expansion)
  - Plus additional \$600 per week until July 31, 2020
- DOL has expressly stated that “**quitting work without good cause to obtain additional benefits under the regular UI program or the CARES Act qualifies as fraud** ... if an individual has obtained these benefits through fraud, the individual is ineligible for any additional benefit payments, **must pay back the benefits, and is subject to criminal prosecution**”

# Unemployment Benefits (Federal)

Question: If an individual refuses to return to work when called back by the employer because he or she wanted to receive unemployment benefits, would he or she be eligible for PUA?

Answer: No. If the individual refused work in order to file for unemployment benefits, he or she is not unemployed, partially unemployed, or not able or not available to work for one of the COVID-19 related reasons listed in section 2102(a)(3)(A)(ii)(I) of the CARES Act. Thus, the individual would not qualify for PUA.

Question: If the jurisdiction's stay at home order due to the COVID-19 emergency is lifted and an employer has called his or her employees back to work, is an individual who refuses to return to work due to a general fear of exposure to the coronavirus still eligible for PUA?

Answer: To qualify for PUA, the individual must be unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason listed in section 2102(a)(3)(A)(ii)(I). An individual who does not go to work due to general concerns about exposure to COVID-19, and who does not meet any of the other COVID-19 related criteria for PUA, is not eligible for PUA because general concerns about exposure to COVID-19 is not one of the reasons listed in section 2102(a)(3)(A)(ii)(I).

## Health Insurance / COBRA

- **Health Insurance:**
  - Most health insurance policies require active employment/30 hours
  - Potential waivers for COVID-19 periods
  - Establish expectations for premium payments
- **COBRA:**
  - 20 or more employees – consider controlled group

## Temporary Leave

- Evaluate leave policies:
  - Michigan Paid Medical Leave
  - Emergency paid sick leave and expanded FMLA leave, if work is available
  - ADA and traditional FMLA
  - Unpaid leave (permissive, or required by local/state orders)
- If no paid leave is available, consider whether employee is eligible for unemployment benefits
- Continue health insurance, if required and/or provided eligibility criteria met (consider waivers from insurance and COBRA)

## Temporary Layoff

- Eligible for unemployment benefits
  - Provide Unemployment Compensation Notice (Updated March 2020)
- Health insurance ends according to plan (consider waivers from insurance and COBRA)

## Termination of Employment

- Eligible for unemployment benefits
- Health insurance ends according to plan; COBRA
- Consider Warn Act (applies if employment loss greater than 6 months to large employers)
  - \* Conduct exit interviews/checklists
  - \* Maintain morale for remaining employees

## Resignation from Employment

- Eligible for unemployment if for expanded reason
  - Consider whether fraudulent application if none of the expanded reasons apply; provide information requested by UIA
  - Confirm resignation in writing
- Health insurance ends according to plan; COBRA
  - \* Conduct exit interviews/checklists

## Bankruptcy & Restructuring

- If business is insolvent, consider consulting with attorneys to:
  - Prioritize financial concerns
  - Communicate with lenders, landlords, vendors, customers and employees
  - Evaluate restructuring options for debt
  - Evaluate viability of bankruptcy and non-bankruptcy alternatives



## Thank you!

- The recommendations in this presentation are just a guideline and based on rapidly changing laws, regulations, and orders. You may have other corporate, financial, and employment concerns that we are happy to discuss with you.
- Our many years of experience in navigating our clients through their business challenges has enabled us to deliver prompt and efficient solutions. Our commitment to this mission will not change, even during these compelling and rapidly changing times.

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