



The Global Legal Network
Celebrating 40 Years

COVID-19: MITIGATING BUSINESS AND LEGAL RISKS

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PRESENTERS



Matthew C. Murphy
Nilan Johnson Lewis PA
Minneapolis, Minnesota
E: mmurphy@nilanjohnson.com
T: 612.305.7710



Shane P. Swilley
Cosgrave Vergeer Kester LLP
Portland, Oregon
E: sswilley@cosgravelaw.com
T: 503.276.6074



Courtney E. Ward Reichard
Nilan Johnson Lewis PA
Minneapolis, Minnesota
E: cward@nilanjohnson.com
T: 612.305.7539



HOW DID WE GET HERE? A
BRIEF PANDEMIC HISTORY



COVID-19: HOW DID WE GET HERE?

January 9: WHO announces pneumonia-like illness in Wuhan, China

January 21: First confirmed U.S. case

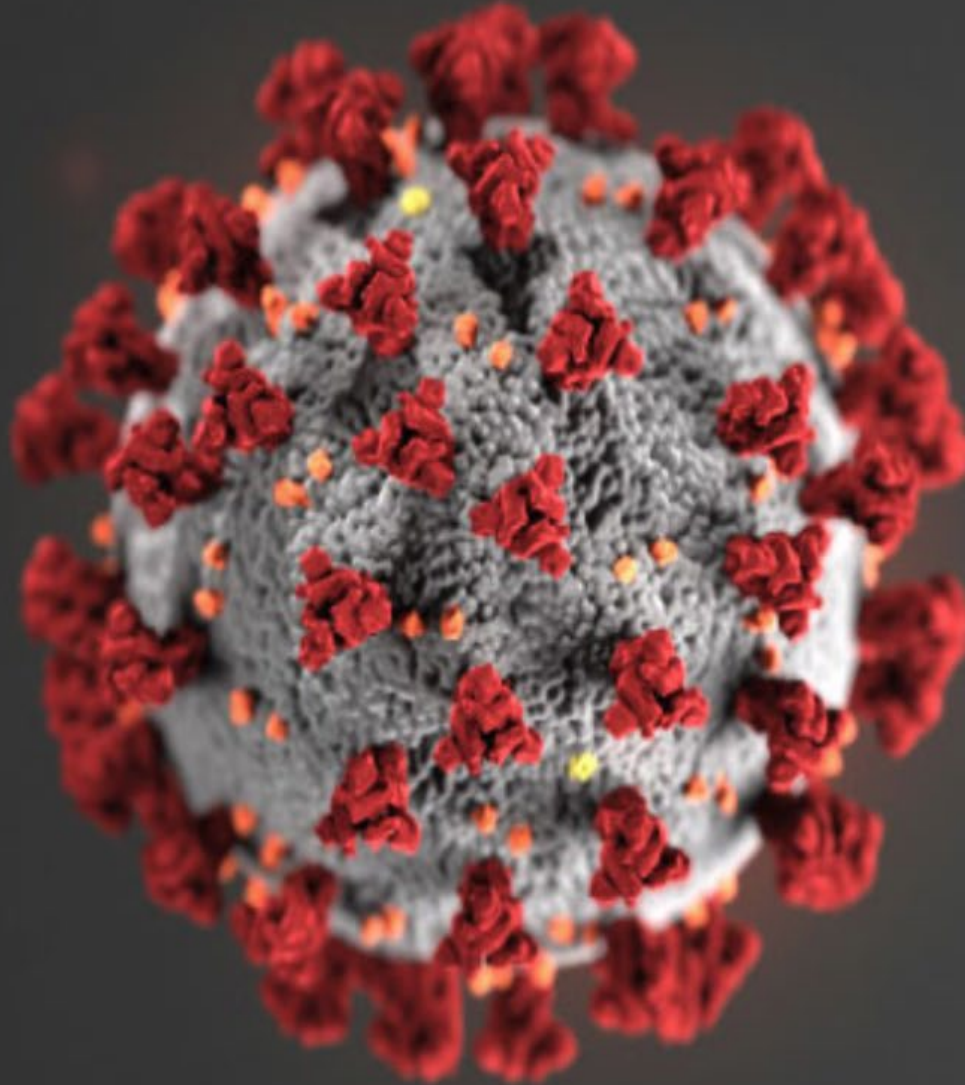
February 3: U.S. declares Public Health Emergency

February 11: WHO names the disease COVID-19

February 29: First U.S. death reported

March 13: U.S. declares national emergency

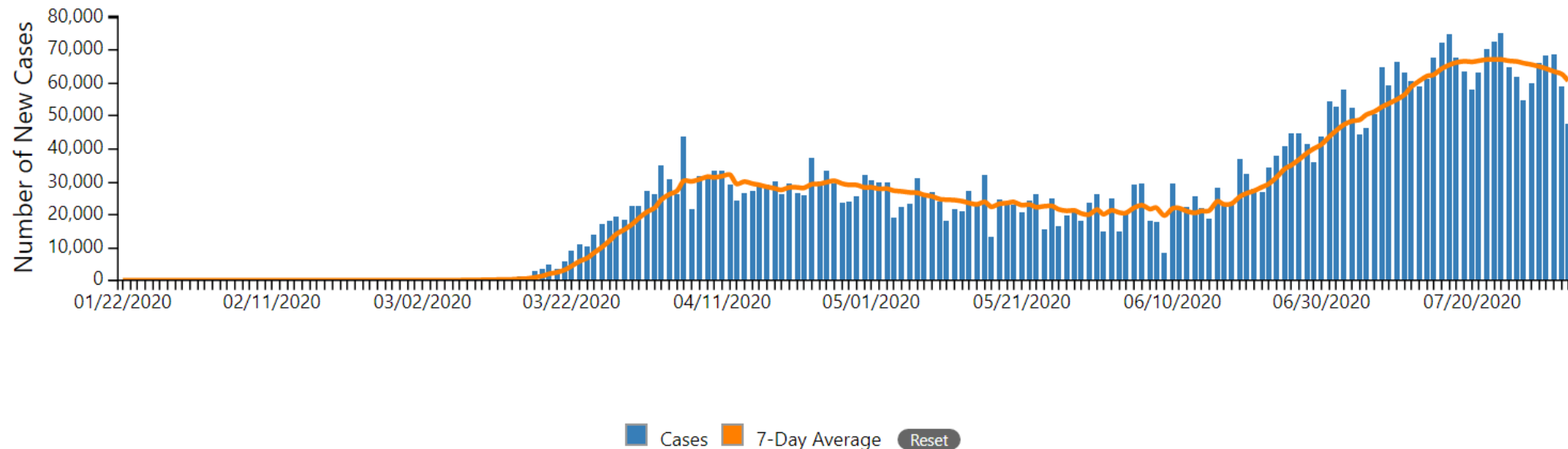
March 19: California issues first state-wide stay-at-home order, followed by many other states



U.S. CASE COUNTS

New Cases by Day

The following chart shows the number of new COVID-19 cases reported each day in the U.S. since the beginning of the outbreak. Hover over the bars to see the number of new cases by day.

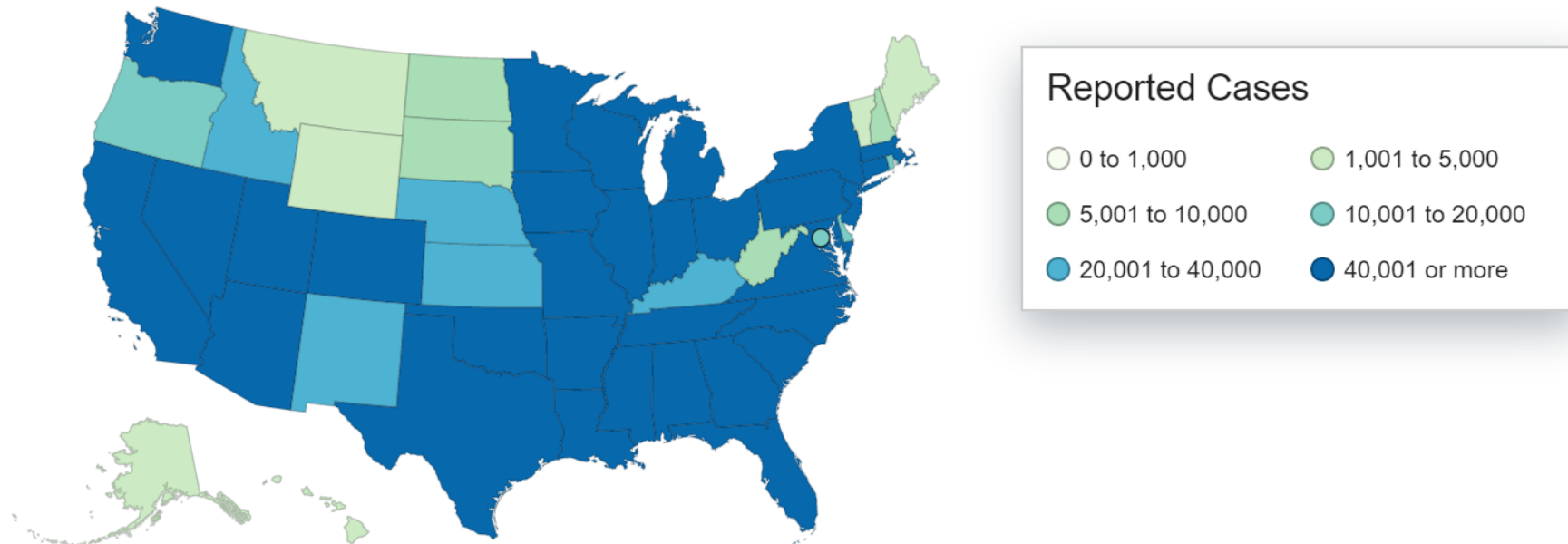


Source: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

CASES BY STATE

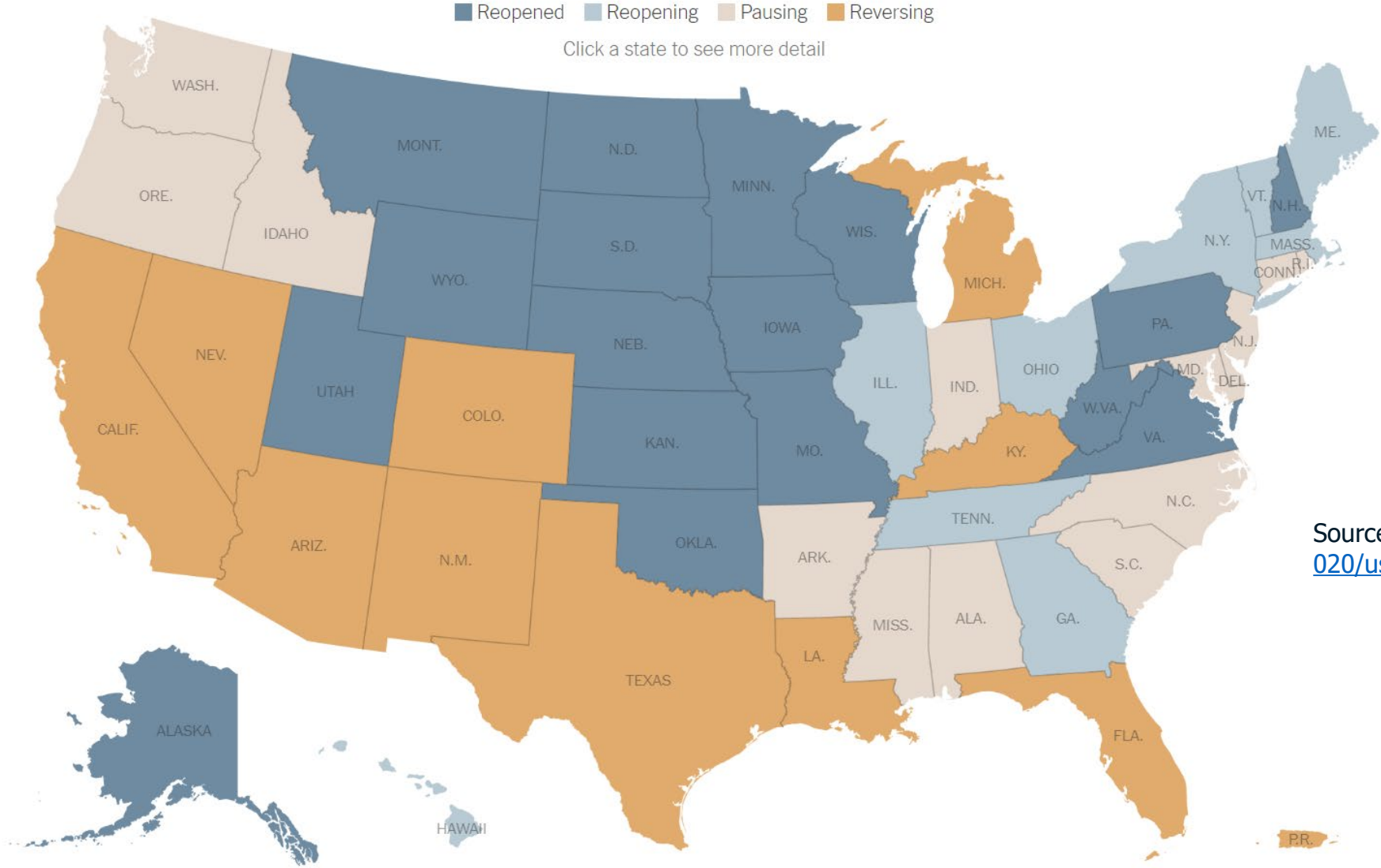
Cases by Jurisdiction

This map shows COVID-19 cases reported by U.S. states, the District of Columbia, New York City, and other U.S.-affiliated jurisdictions.



Source: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

PHASED REOPENING



Source: <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html>



EMPLOYEE SAFETY AND
WORKERS COMPENSATION



OSHA AND A SAFE WORKPLACE

OSHA General Duty Clause (29 U.S.C. § 654) - "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

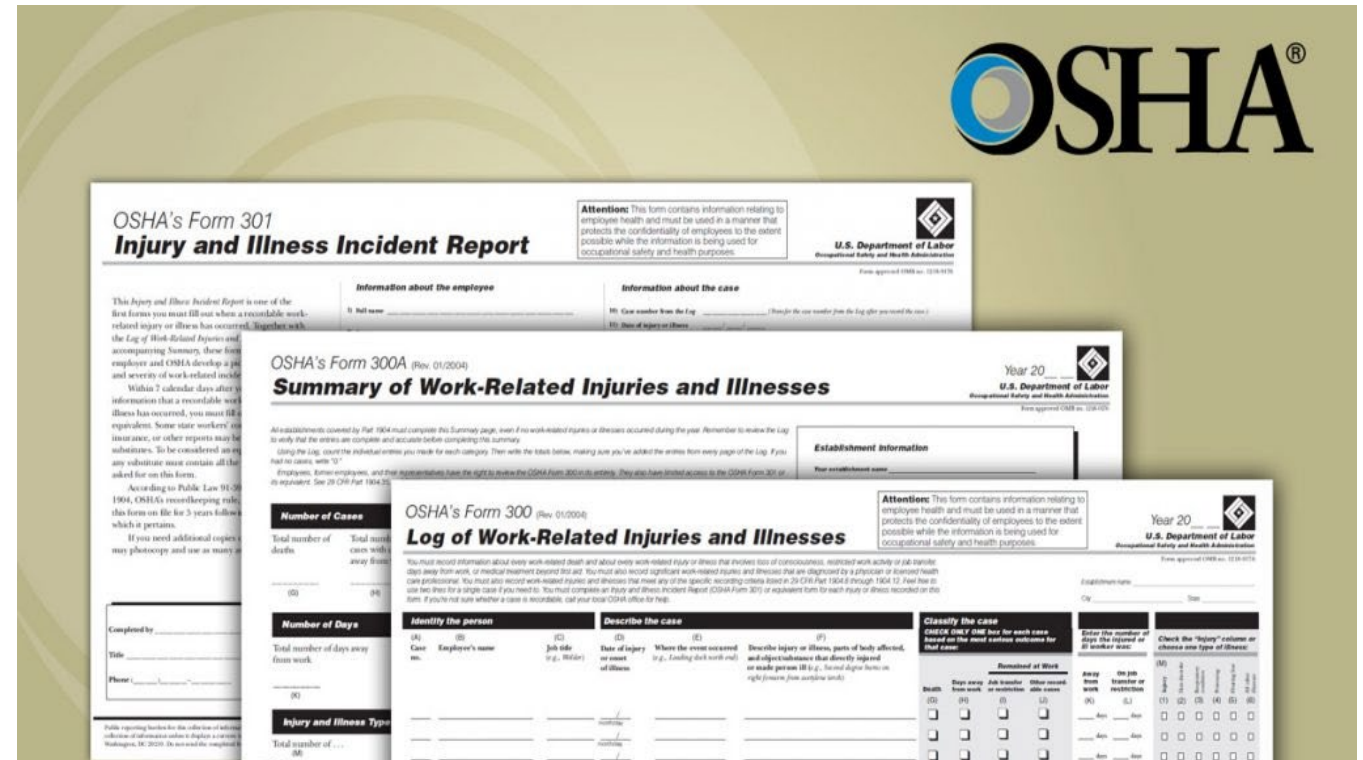
- COVID-19 = a hazard likely to cause death or serious physical harm
- Know and keep up to date on local, state and federal guidance and rules for your workplace
- Implement compliant policies and procedures
- Train employees and managers and ENFORCE policies
- Take employee reports seriously!



OSHA RECORD KEEPING

Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness if:

1. The case is a confirmed case of COVID-19, as defined by the CDC
2. The case is "work-related"
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7



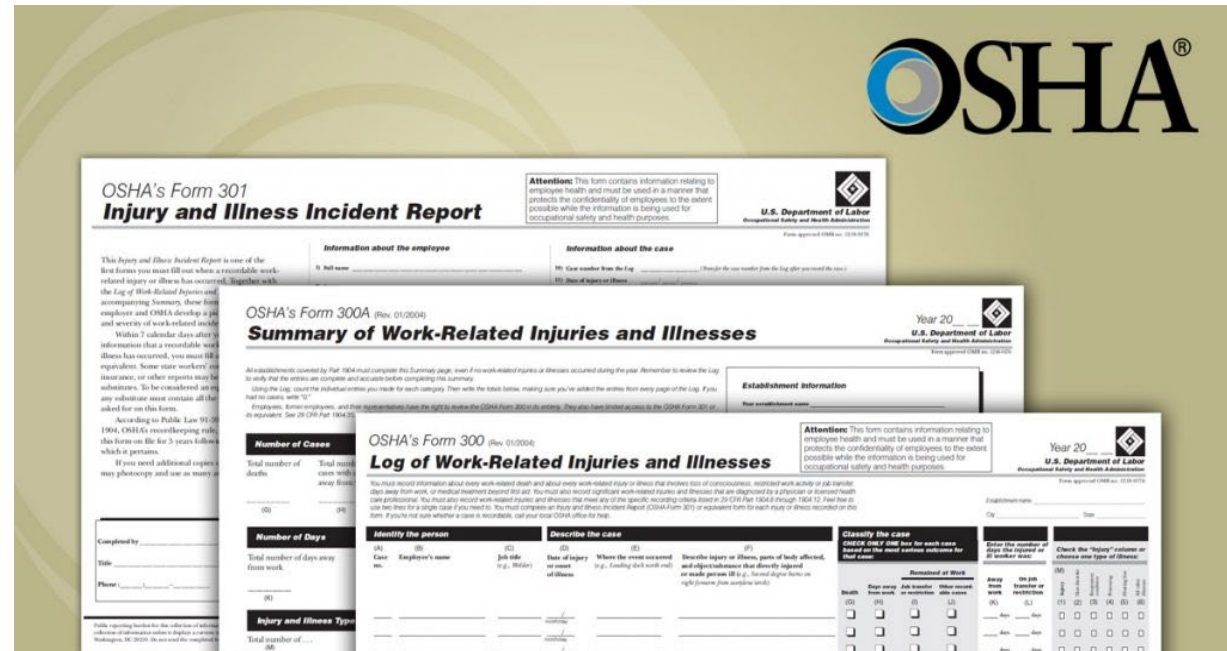
The image displays three OSHA forms related to recordkeeping. At the top right is the OSHA logo. The forms are:

- OSHA's Form 301 (Injury and Illness Incident Report):** This form is used to report a specific incident. It includes sections for "Information about the employee" (Name, Title, Department, etc.) and "Information about the case" (Date, Location, etc.). It also contains an "Attention" box regarding confidentiality and a "Public reporting burden" notice.
- OSHA's Form 300A (Summary of Work-Related Injuries and Illnesses):** This form provides a summary of all recordable injuries and illnesses for a given year. It includes a table for "Number of Cases" and "Number of Days" away from work, categorized by injury type.
- OSHA's Form 300 (Log of Work-Related Injuries and Illnesses):** This is the main log where detailed information for each case is recorded. It includes a table with columns for "Identify the person" (Case, Employee's name), "Describe the case" (Date, Location, Description), and "Classify the case" (OSHA OSHA OSHA, Injury type, etc.).

OSHA RECORD KEEPING

OSHA applies the following considerations to determine if an employer made a reasonable and good faith inquiry to determine whether a COVID-19 case was "work related" and needs to be recorded

1. The reasonableness of the employer's investigation into work-relatedness.
2. The evidence available to the employer.
3. The evidence that a COVID-19 illness was contracted at work.



COVID AND WORKERS COMPENSATION

- Employee must generally establish an injury/illness was sustained in the course of work to be compensable
- Coverage traditionally excluded "ordinary diseases of life"
- Some states have changed their laws to specifically address COVID and coverage:
 - *Presumption for first responders and/or health care workers: AK, KY, MN, MO, NH, OH, UT, VT, WA, WI*
- *Presumption for "essential workers" and/or other public servants/high risk positions: IL, KY, NM, ND*
- *Presumption for all workers: WY (CA*)*
- *W/C granted for workers who can show causation to employment: AZ, AR*
- *No currently enacted/issued change to W/C law: CO, CN, DE, GA, HI, ID, IN, IA, KS, LA, ME, MD, MA, MI, MS, MT, NE, NV, NJ, NY, NC, OK, OR, PA, RI, SC, SD, TN, TX, VA, WV*

COVID AND WORKERS COMPENSATION

Why does it matter?

- Workers comp immunity - Most states have enacted statutes immunizing employers from lawsuits arising out of a compensable injury.
- Some exceptions in statutes (vary by state), but none directly addressing COVID-19
- Typically excludes intentional acts
- If COVID-19 isn't covered, then employees may be able to sue their employer if they get sick at work.

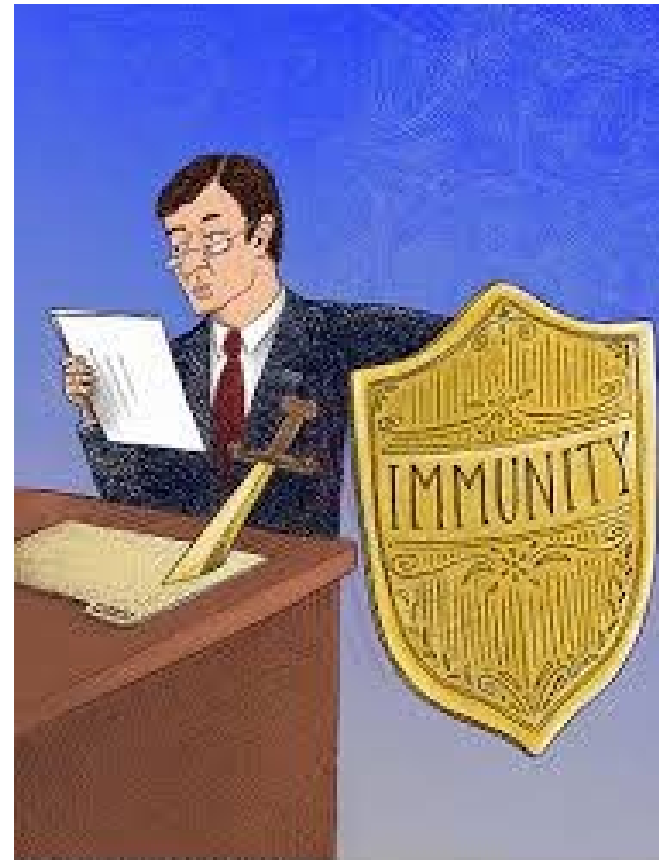


Illustration by Barbara Kelley

COVID AND THE ADA

- Employee health information must be kept separate and confidential
 - Health Screenings
 - Exposure Notifications
- Reasonable accommodations
 - Face coverings
 - Telework
- Don't make assumptions about an employee's risk of exposure or harm
 - Perceived as disabled claim



ADA Compliant

EMPLOYEE LEAVE RIGHTS

- FFCRA Leave
 - Up to 80 hours of leave for qualifying reason
 - Leave is paid (with limits)
- Expanded FMLA Leave
 - Up to 12 weeks of leave if employee unable to work because they need to care for their child due to school or childcare closure
 - First 10 days of leave is unpaid, the remainder is paid (with limits)
- FMLA and state equivalents
- Reasonable accommodation



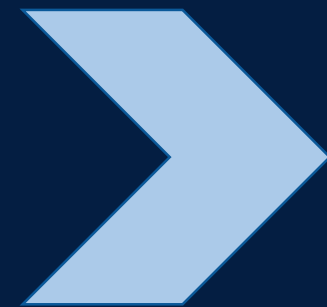
OTHER RISKS TO BE AWARE OF...

- Discrimination claims based on decisions about who is returned to work
 - Age and disability most likely
 - Be careful using COVID-19 as an excuse to get rid of underperforming employees
- Whistleblower claims
 - OSHA
 - State whistleblower statutes
- Wage Issues
 - Unaccounted Telework
 - Salary Exempt Status





CUSTOMER SAFETY



REOPENING GUIDELINES – NATIONAL, STATE AND LOCAL



Guidance on Preparing Workplaces for COVID-19

MASK POLICIES



- Develop a policy following local guidance
- Consider risks specific to your business
- Determine guidelines for uniform enforcement

MAKE EXPECTATIONS CLEAR



MODEL EXPECTED BEHAVIOR

- Make sure staff is trained to model expected behavior
- If masks are required, make sure staff is wearing them at all times
- Confirm staff is observing appropriate social distancing



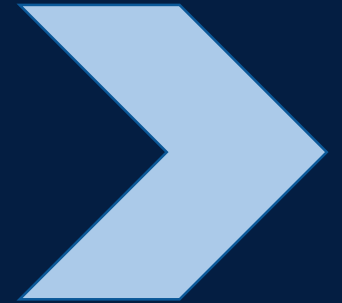
ENFORCING MASK POLICIES

- Train staff to clearly communicate and enforce expectations:
 - Stay calm, but remain firm
 - Support employees in enforcing rules
 - Provide options – free masks or service outside business
- Enforce uniformly and without discrimination





WHAT ABOUT WAIVERS?



ARE WAIVERS AN OPTION?



- Create distrust among patrons and hurts employee morale
- Must prominently waive rights
- Cannot disclaim liability for reckless or intentional conduct
- Unenforceable if violates public policy
 - Disparity of bargaining power
 - Essential or public service
- Unintended effects – could show business doesn't take the crisis seriously

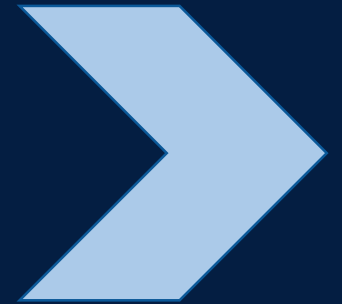
WHAT ABOUT SIGNS?



- Signage can help – though probably not this direct!
- Signs should focus on explaining safety protocols and the rules that patrons should follow to be safe
- Use concise directed signage at appropriate locations:
 - Signs at tables reminding patrons to wear a mask if they leave their table
 - Signs at entrance, reminders when reservations made
 - Signs in bathrooms



LITIGATION RISKS



LITIGATION RISKS

- Types of Cases
 - Employment
 - Discrimination
 - Negligence
 - Public Nuisance:
“Unreasonable interference with a right common to the general public.”



PUBLIC NUISANCE DEFENSES



- Causation
- Reasonable Safety Measures
- OSHA or Worker's Compensation Bar
- Lack of Control
- Public Policy

POST-COVID LITIGATION LANDSCAPE

- Court access will be a challenge
- Cases will move slowly
 - But now is when to collect evidence about the circumstances of any outbreak
- Courts will expect litigants to attempt to resolve issues
- Litigants will be confronted with judges and juries who have lived through the pandemic – there will be a full understanding of the circumstances



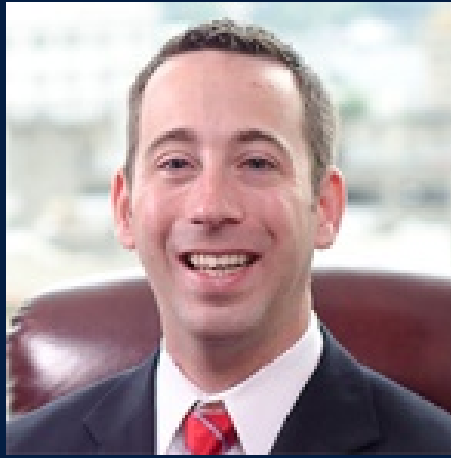
POP UP QUESTION

- All of the following may reduce risk of litigation related to COVID-19 except:
 - A. Uniform enforcement of mask policies
 - B. Following CDC cleaning and sanitation guidelines
 - C. Posting names of employees with positive COVID-19 tests in the breakroom
 - D. Placing signage throughout the business with COVID-19 policies

THANK YOU! IF YOU HAVE ANY QUESTIONS,
PLEASE CONTACT ONE OF THE PRESENTERS



Matthew C. Murphy
Nilan Johnson Lewis PA
Minneapolis, Minnesota
E: mmurphy@nilanjohnson.com
T: 612.305.7710



Shane P. Swilley
Cosgrave Vergeer Kester LLP
Portland, Oregon
E: sswilley@cosgravelaw.com
T: 503.276.6074



Courtney E. Ward Reichard
Nilan Johnson Lewis PA
Minneapolis, Minnesota
E: cward@nilanjohnson.com
T: 612.305.7539

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