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**Hedge Fund University –
Employers Return to Work**

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Presenters



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Introduction

- Topics:
 - Refresher on return-to-work guidance and best practices for workplace safety
 - Overview of everything that hedge fund businesses need to consider with regard to reopening
 - Recap on potential legal claims and update on recent employment litigation
 - Look to the horizon
- Q&A

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Section 1: Workplace Safety and Reopening the Workplace

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Developing/Refining Safety Plans

- Many state/local orders require businesses to have a written safety plan—including social distancing and contamination mitigation procedures
- Key factors:
 - Physical workspace modifications, such as:
 - separating desks and work stations
 - modifying open floor plans by, for example, adding partitions
 - making only certain workstations available (i.e., every other/third workstation/cubicle)
 - closing or modifying common/conference rooms and break rooms/cafeterias;
 - modifying high-touch surfaces, such as replacing latch-based doorknobs or handles with doors that can be easily pushed open or closed; and
 - displaying markings or signs reminding customers and employees:
 - to maintain social distancing in areas where people congregate;
 - to avoid touching surfaces unnecessarily;
 - to wash your hands properly and regularly; and
 - to wear a face covering where social distancing is not possible or unlikely to be effective

Safety Communication Plan

- Develop a **safety communication plan** for returning employees that:
 - Explains safety protocols (what measures the company is taking and what precautions employees should take), and where to report any issues;
 - References any benefits or perks the company is making available (plus a potential reminder about employee assistance programs); and
 - Potentially establishes an employee safety committee to satisfy safety planning obligations in certain jurisdictions and provide a clear line of communication with employees.
 - *Note: These safety plans may take on particular importance given the likely increase in OSHA investigations and issues as workplaces reopen.*

Social Distancing Plan – Key Factors

- Limiting in-person interactions and physical contact, potentially including:
 - holding fewer in-person meetings and using increased conference calls or video conferences;
 - limiting the size of in-person gatherings/social events (e.g., less than five people);
 - instructing employees not to use other employees' workspaces or equipment;
 - developing or revising a crowd control plan that changes security processes and procedures, such as setting a maximum number of employees and members of the public on company premises;
 - establishing ongoing restrictions regarding travel, including to client/customer meetings and events, or for meetings/conferences; and
 - setting staggered or spaced meal schedules
- Make sure to check with local requirements or guidelines
 - NY: <https://forward.ny.gov>
 - CT: <https://portal.ct.gov/Coronavirus/Reopen-CT>

Social Distancing Plan – Key Factors

- Training employees on social distancing policies and protocols, including where to go if there are questions or complaints, with the following factors in mind:
 - Management may need additional training to understand its responsibility for enforcing these policies at the local level;
 - Individuals should be designated as responsible contacts for overseeing and ensuring implementation; and
 - Consider how to track compliance and consistently discipline employees for failure to follow protocols.
- Updates to employee scheduling.
 - Consider ways of reducing the number of employees present at the workplace. Possible options include staggered shifts, alternating teams, and/or continued telework.
 - Predictive scheduling obligations under preexisting law will likely restart at some future date and employers should not rely on pre-pandemic schedules to meet future estimates of employee hours.

Screening Protocols

- Implementation of regular **screening protocols** for employees, customers/clients, or other workplace visitors.
 - Note, NY requires daily self-assessments.
- Key considerations:
 - Whether to conduct temperature screenings or other symptom checks and training personnel on how to appropriately conduct screening and maintain medical/private information collected through screening.
 - Potential compensability of screening time:
 - reviewing the screening location (i.e., on employer-specific premises or in a shared office location); and
 - potential complications of telling clients/customers not to enter company locations if they do not pass the screening.

PPE/Cleaning Protocols

- Whether **personal protective equipment** (PPE) is required. Consider:
 - Whether to make the wearing of masks mandatory, and if so, whether the company will provide them or reimburse for them;
 - Whether gloves are necessary for any areas/duties (i.e., taking/giving money to customers); and
 - Whether additional PPE, if any, is required for employees in higher-risk positions.
- **Cleaning and disinfecting** may require additional steps (including reviewing and renegotiating contracts with vendors that provide these services), such as:
 - Extra cleaning and disinfecting, including attention to employee common use areas, and items handled by customers; and
 - Making cleaning supplies/hand sanitizer available to employees (and customers/visitors).

Third Parties: Inquiries and Screens

What can I ask visitors before they enter my worksite?

Title III of the ADA and Title II of CRA of 1964 may apply to contractors, customers, guests, and other third parties.

You can put up signs asking visitors, guests, and third parties not to enter if they:

- 1) Have traveled in the last 14 days to or through specific high-risk areas
- 2) Have been in close contact with someone who has traveled in the last 14 days to or through high-risk areas;
- 3) Have been informed by public health officials or healthcare providers that they are suspected of or confirmed to have COVID-19;
- 4) Have been in close contact with an individual who has been informed by public health officials or healthcare providers that he or she is suspected of or confirmed to have COVID-19; or
- 5) Are exhibiting COVID-19 or flu-like symptoms such as fever, cough, or shortness of breath.
Implementing this policy can be tricky. Do not discriminate based on race, national origin, color, or perceived disability.

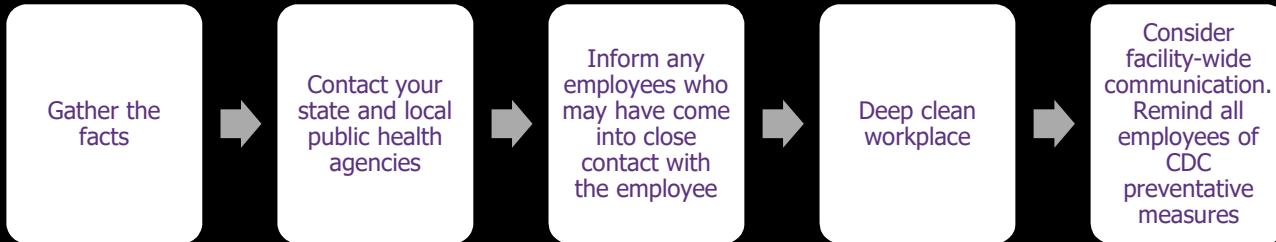
Travel Policies

- May prohibit all business travel (or nonessential business travel) period, or to:
- Countries on the Center for Disease Control and Prevention (CDC) travel list
 - Countries outside the United States (all international travel)
 - Large business-related gatherings
 - Locations with declared community spread (domestic and abroad)
 - May suggest (but not require) that employees not travel to hot spots, take cruises, etc.
 - Consider requiring employees to report personal travel to high-risk areas

Travel-Related Inquiries

- May ask:
 - Have you traveled in the last 14 days to or through specific high risk areas?
 - Consider referring to the CDC's COVID-19 Travel Index, State Department, WHO
 - Have you been in close contact with someone who has traveled in the last 14 days to or through high-risk areas?
- If yes, may require employee to self-quarantine for 14 days
- After 14 days, if asymptomatic, may return to work
- Consider implementing personal travel policy

KEEPING YOUR EMPLOYEES SAFE: AFTER AN EMPLOYEE TESTS POSITIVE



When Can an Affected Employee Return?

- Medical certification
 - Given concerns related to COVID-19, employers may wish to require that the employee obtain medical clearance prior to returning to work.
 - Note: In California, employers may have to pay for the medical certification (release to return to work).
- CDC and OSHA Guidelines
 - ***Do not*** require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.



Protocols for Tracking and Reporting COVID-19 Tests

- Consider whether to conduct COVID-19 tests and if so, what type of test to conduct (i.e., blood, saliva, or nasal swab)
 - Additional government guidance on the types of permissible tests likely will be forthcoming but companies intending to implement testing should consider:
 - what type of test they will run;
 - who will conduct the tests;
 - how these personnel will be trained;
 - whether the test must be performed in a clinical lab or by a licensed healthcare professional;
 - whether a physician order is required for testing;
 - who will be tested;
 - how often tests will be done; and
 - how test results will be maintained.

Protocols for Tracking and Reporting COVID-19 Tests

- Types of Testing:
 - If considering serology (antibody) tests, be sure to consult counsel in advance as the US Food and Drug Administration (FDA) recently stated that most serology tests are considered “high complexity” tests under the Clinical Laboratory Improvement Amendments (CLIA), which means they can only be performed in properly certified laboratories.
 - If considering molecular tests for the SARS-CoV-2 virus, be sure to assess the restrictions for the specific tests to be used, as many molecular tests also are limited for use in CLIA-certified laboratories.
 - Although some molecular tests have been authorized by the FDA to be performed at the point of care and are considered CLIA waived, a CLIA Certificate of Waiver is still required.

Protocols for Tracking and Reporting COVID-19 Tests

- Companies should develop protocols for monitoring test results regarding employees, as well as contractors, and workplace visitors.
 - Protocols should also include identifying contacts and sharing such information as appropriate with public health authorities, employees, and workplace guests and customers.
 - Ensure consistent approach regarding requiring return-to-work and fitness-for-duty certifications and should monitor guidance from the CDC and local public health authorities regarding reporting and contact tracing.

Handling Telework Requests

- Companies should expect that for a wide variety of reasons, employees may request to continue teleworking even as workplaces reopen.
- In fielding such requests consider:
 - Impacts on management, communication, and staffing as certain operations are on site while other employees (or entire teams) continue to telework, perhaps permanently.
 - Ensuring that HR teams are prepared to respond to requests for reasonable accommodations/flexible work arrangements that would have been denied before the COVID-19 pandemic.

Other Issues to Consider in Re-Opening

- Reinstating security/IT access, reactivating credit cards, badges, etc.
- Ensuring recovery of any files or equipment/hardware that employees took home to assist them in working remotely
- Reimbursing employees for business expenses
- Review existing policies and employment agreements
- Navigating school and child care accommodation issues
- Can you require flu shots and/or COVID vaccinations when available

Other Preventative Measures

- Social distancing
 - Split shifts
 - Staggered shifts
 - Limit group interactions/number of attendees
 - Virtual meetings
 - Permit telework
- No-handshake policies

Comprehensive Review of Existing Policies

- Leave

- Employers should consider how to address leave entitlements for employees home and unable to work remotely as well as updates to policies going forward, including ensuring continued compliance with applicable and recently enacted sick leave laws.
- Employers may consider monitoring employees' personal/vacation travel as a safety measure.

- Benefits

- Furloughed employees may need to reenroll or update benefit/commuter information and consider any impact on 401(k) programs.
- Employees responsible for premium payments during furlough may be obligated to repay the amount the employer advanced for this purpose, but there are potential complications due to state deduction restrictions.

- Wage and hour/compensation plans

- Employers should calculate the effect of shutdown periods on existing bonus/incentive plans.
- Businesses should review wage-and-hour issues in light of such factors as continuous workday, reporting time and show-up pay, and split shifts, etc.
- Employers should review whether any pay equity issues exist and whether new hires can be used to offset that problem.

Pandemic Preparedness and Business Continuity Plans

- In light of their COVID-19 experiences, companies should review and revise their current pandemic response plans in order to respond to another potential outbreak of the virus.
- These plans should address:
 - what lessons have been learned and what new processes and procedures should be put in place to prepare for a potential recurrence;
 - management and HR succession in the event any leadership team is sidelined;
 - updates to public relations messaging regarding crisis management issues and having a plan in place in the event of another outbreak in the workplace or other potential disruption, such as hurricanes, earthquakes, terrorist attacks, or new viral/bacterial outbreaks; and
 - whether to require vaccination once a vaccine is developed, including partial workforce vaccinations if vaccines are not widely available or cost-effective (and related ER issues).

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Section 2: Potential Legal Claims and Issues on the Horizon

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Potential Legal Claims

- **Workplace Safety/Nuisance Claims** (litigation for alleged violation of safety/health standards or state laws requiring safe workplaces and related whistleblower/retaliation complaints)
- **Failure-to-Accommodate Claims** (Is fear of coronavirus a disability? Is the provision of private transportation a reasonable accommodation?)
- **Wage and Hour Claims** (e.g., reimbursable expenses; overtime/meal breaks when working from home; being “on-call”; time waiting for medical screenings and temperature checks; wage reduction claims)
- **Workers’ Comp or Tort Claims** (including whether WC laws will be exclusive remedy, possible wrongful death claims and third-party liability claims from visitors, employees’ family members, etc.)
- **Claims Arising Under Local, State, and Federal Leave Laws**

Potential Legal Claims

- **Furlough and Layoff Claims** (e.g., failure to pay timely final payments, or failure to provide timely termination/benefit eligibility notices)
- **Invasion-of-Privacy Claims** (e.g., disclosure of confidential medical information; disclosure of confidential customer information by employees to family members or otherwise during remote working periods)
- **Discrimination and Retaliation Claims** (e.g., claims challenging process or decision-making for furloughs, layoffs, salary reductions; claims relating to employees' actual or perceived disabilities)
- **Labor Claims** (e.g., violations of collective bargaining agreements, failure to negotiate actions taken in response to the virus, failure to abide by collective bargaining provisions relating to recall rights)

Recent COVID-Related Employment Litigation

- Significant uptick in employment-related COVID-19 lawsuits filed across the country since March
 - More than 30 COVID-related cases have filed in federal and state courts in New York.
 - Many more threatened litigations that are yet to reach public dockets.
- Both individual claims and class actions (including class actions alleging wage and hour, traditional labor, and breach-of-contract violations).
- Many discrimination and leave claims sound similar to traditionally recognized workplace disputes but wrapped in a COVID-19 context.
 - This was somewhat predictable, as the pandemic has led to a significant number of adverse employment actions, including furloughs, reductions in pay and hours, and terminations.

Recent COVID-Related Employment Litigation

- Most prevalent allegation in lawsuits: safety-related concerns and wrongful death.
 - Claim that employer failed to implement a proper workplace safety policy, including that it failed to provide N95 masks and medical testing for employees.
 - Another alleges that an employer forced employees to work in an unsafe workplace by failing to require a negative COVID-19 test result as a condition of returning to work.
 - And of course, employees are bringing claims for retaliation when they are subjected to adverse actions after allegedly speaking out about their safety concerns.
- Takeaway: employment litigation is continuing, if not increasing in certain areas.

Recommendation for Hedge Fund Employers

- Employment best practices remain very important, particularly as we are operating in difficult and unprecedented times.
 - E.g., documentation and consistent treatment of employees remains of paramount importance.
- Given that many of these lawsuits focus on the alleged incorrect application of COVID-related laws, employers should ensure that managers and HR personnel are well versed in all of the new legal requirements (federal, state, and local).
- Further, in order to ensure that employers are taking reasonable measures to best prevent the spread of COVID-19 in the workplace, employers should
 - continue to monitor and adhere to the ever-changing rules and guidelines on reopening,
 - strive to create and maintain a “cultural of compliance,” and
 - reach-out to counsel with any questions.

Look to the Horizon

- Forthcoming federal, state, and local legislation on COVID-19 leave and employee benefit eligibility
- Forthcoming stimulus package meant to address continued economic downturn related to pandemic
- Continued uptick in COVID-19 related employment claims and lawsuits
- Issues regarding schools
- Issues regarding testing
- Issues regarding vaccines
- What will transmission rates look like as we move into the fall and winter

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple “Stay Up to Date” button.



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Attorney Biographies

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Recognized by legal industry observers for his labor and employment work, Leni D. Battaglia defends clients in a variety of employment litigation in courts, arbitral tribunals, and agencies around the United States. Leni also develops proactive litigation-avoidance strategies for clients in various industries, including financial services, technology, media, entertainment, retail, hospitality, ecommerce, and transportation. Additionally, he currently serves as co-leader of the firm's fashion and luxury brands initiative.

In addition to unpaid overtime, minimum wage, and other wage and hour class and collective matters, Leni litigates sexual harassment, defamation, age, race, sex, national origin, and disability discrimination, and whistleblower claims. He also represents clients in contract, denial of employee benefits, noncompete, and trade secret matters.

In the realm of preventative practice, Leni counsels on gig-economy and on-demand workforces, sexual harassment prevention and #MeToo issues, arbitration agreements and class action waivers, compensation plans, independent contractor and exemption classification, restrictive covenants and trade secrets, and employment policies. He regularly conducts internal wage and hour audits and navigates employers through investigations brought by federal and state agencies. Leni also trains employees and managers on how to prevent harassment and discrimination in the workplace, and regularly authors articles and conducts seminars on developments in New York employment law and class and collective action litigation.

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Sharon Perley Masling, a director of Workplace Culture Consulting at Morgan Lewis, helps companies and organizations create safe, respectful, and inclusive workplaces, focusing on preventing and responding to issues of workplace harassment and misconduct. Having served for eight years as chief of staff and senior counsel to Commissioner Chai Feldblum at the Equal Employment Opportunity Commission (EEOC), Sharon provides insight on the enforcement of all employment civil rights laws and advises employers on issues of employment discrimination.

Sharon partners with employers to conduct workplace culture assessments, using qualitative and quantitative tools, and helps employers devise and implement strategic plans that address leadership, accountability, policies, procedures, and training. She guides companies in understanding the potential costs—including the impact on productivity and job turnover—that can be tied to harassment and misconduct, and she helps employers develop proactive and concrete approaches to creating workplace environments where harassment and misconduct do not occur in the first place. Sharon also counsels employers on a wide range of employment compliance issues.

While at the EEOC, Sharon helped develop, prioritize, and implement the commissioner's multi-year policy agenda on a broad range of issues, including harassment prevention, disability rights, LGBT rights, and EEOC governance. She also co-led the agency's Harassment Prevention Action Team, directed the work of the Select Task Force on the Study of Harassment in the Workplace, and drafted and edited key sections of the agency's 2016 report on harassment prevention.

Before serving at the EEOC, Sharon was senior legislative counsel at Workplace Flexibility 2010, a policy enterprise focused on finding common ground between employers and employees on workplace flexibility issues. Previously, Sharon was the director of legal services at the National Disability Rights Network, where she oversaw provision of legal training and technical assistance to attorneys and advocates in the national Protection and Advocacy (P&A) network. She also served as senior counsel on disability policy to Senator Tom Harkin of Iowa, Senate sponsor of the Americans with Disabilities Act (ADA). In that position, she provided legal and political advice on a range of disability issues and drafted related legislative language, memoranda, floor statements, and talking points.

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Jedd H. Wider focuses on global private investment funds and managed accounts, particularly global hedge, private equity, secondary, and venture capital funds. As co-leader of the global private funds practice, he represents leading financial institutions, fund managers, and institutional investors in their roles as fund sponsors, placement agents, and investment entities. He assists clients through all stages of product development and capital raising as well as customized arrangements, seed and lead investor arrangements, and joint ventures. He specializes in all aspects of secondary transactions, and complex financial structurings.

Jedd concentrates on all aspects of bespoke fund products and arrangements including funds of one and managed accounts and regularly advises clients on all aspects of regulatory compliance.

Members of the international media often seek out Jedd for his views on the hedge fund and private equity fund industries and capital markets. His analysis can be found in US and international publications, including *The Wall Street Journal*, *The Economist*, and *Financial Times*, as well as on television networks such as Bloomberg and CNN.

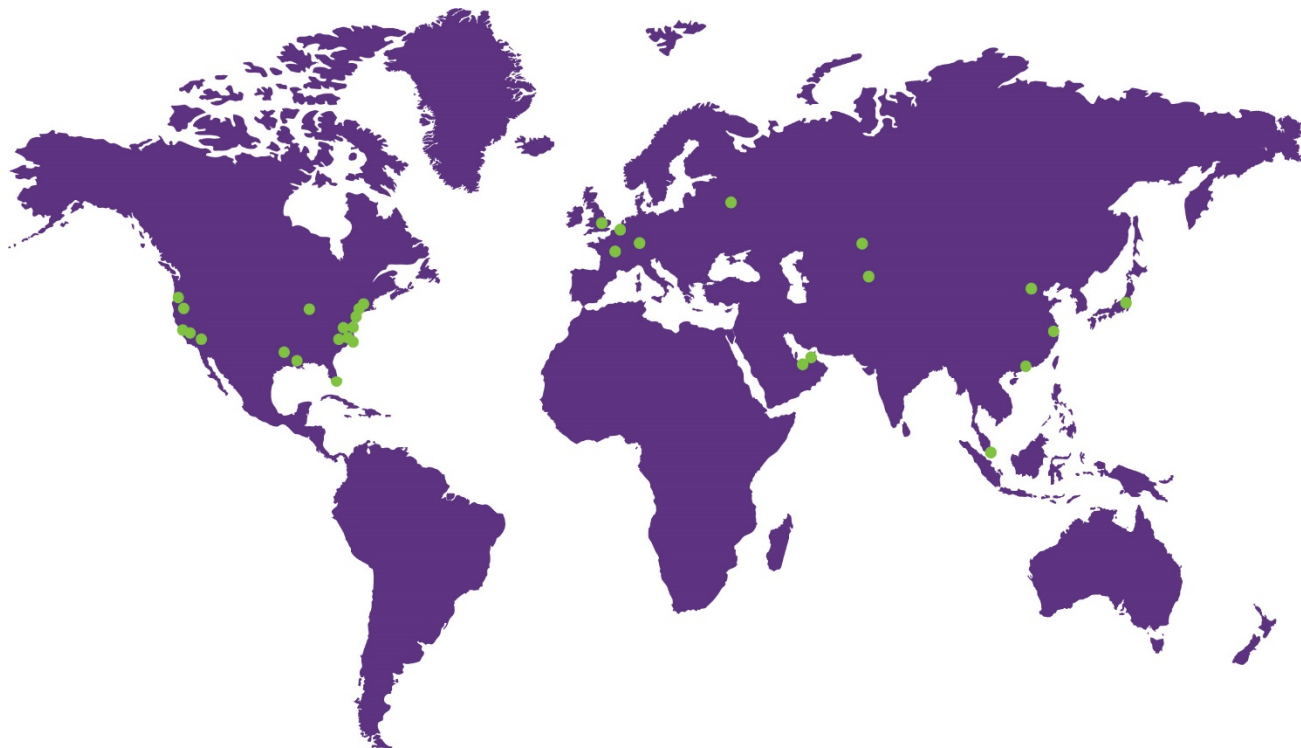
Jedd lectures and serves as a panelist on private investment fund topics for trade programs and organizations around the world. He has delivered speeches and presentations to numerous private fund conferences such as the Hedge Fund Institutional Forum, Dow Jones Private Equity Analyst Limited Partners Summit, Endowments & Foundations Roundtable, Association of Life Insurance Counsel, National Association of Public Pension Fund Attorneys (NAPPA), West Legalworks, InfoVest21 Hedge Fund Conference, the Annual Euromoney Summit of European Hedge Funds in London, Capital Roundtable Fund Conferences, the Annual International Conference on Private Investment Funds in London, the Wharton Private Equity and Venture Capital Conference, the On Point Investors and Hedge Fund Risk Summit, and the Lazard Capital Markets Hedge Fund Conference.

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