Morgan Lewis

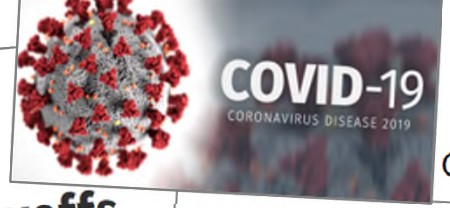
COVID-19 AND LABOR LAW

WHAT EMPLOYEE ACTIONS ARE "PROTECTED," UNION BARGAINING ISSUES, THE NLRB, AND MORE

David Broderdorf, Nicole Buffalano, Jonathan Fritts,
Doug Hart, Harry Johnson, and Philip Miscimarra
March 26, 2020

Agenda

- Protected Concerted Activity Issues
- Bargaining Issues
- Contract Interpretation Issues
- Workforce Planning Issues
- Government Intervention Issues



USA TODAY

MONEY

COVID-19 job cuts: Layoffs accelerate as coronavirus disrupts American economy

Nathan Bomey, USA TODAY

Published 3:06 p.m. ET Mar. 17, 2020 | Updated 2:37 p.m. ET Mar. 18, 2020

For kitchen cabinet seller Wayzata Home Products, the coronavirus outbr
the worst possible timing.

The Connersville, Indiana-based home improvement company ceased o
on Friday "due to significant and recent unforeseeable business circums
including the market and financial impact of the global spread of COVI
senior vice president Keith Hug told the state of Indiana in a letter.

Wayzata's abrupt closure, which Hug said came after investors lost co
future, comes amid an expected wave of layoffs and jo
demic.
wers plan to downsize,
wealth ma

Detroit Free Press

Layoff or leave? Small businesses grapple with what to do with employees

Meredith Spelbring, Detroit Free Press

Published 8:00 a.m. ET March 21, 2020

Michigan's labor department tried this week to help clarify what small
businesses should do to help their workers collect unemployment benefits
world tries to rebound from coronavirus.
he state's advice: Put workers on leave, bu
l, for some metro Detr
e too late

CNBC

ECONOMY

Weekly jobless claims jump to 281,000 ahead of surge in coronavirus layoffs

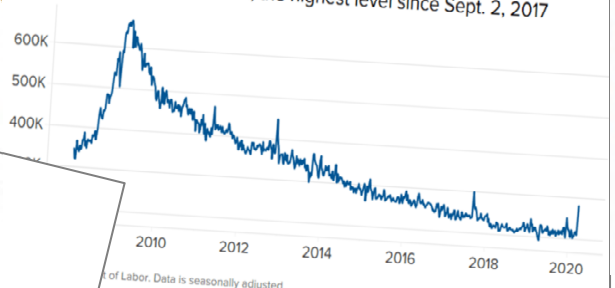
PUBLISHED THU, MAR 19 2020-8:31 AM EDT | UPDATED THU, MAR 19 2020-9:49 AM EDT

Jeff Cox
@JEFF.COX.7528
@JEFFCOXCNBCCOM

Jobless claims rose to 281,000 last week, reflecting only the first indicatio
of the impact the coronavirus will have on the U.S. employment picture.

Weekly unemployment insurance claims

Week ending March 14: 281K, the highest level since Sept. 2, 2017



of Labor. Data is seasonally adjusted.

CNBC

TIME

BUSINESS • COVID-19

As COVID-19 Crashes the Economy, Workers and Business Owners Wonder If Anything Can Save Them From Financial Ruin

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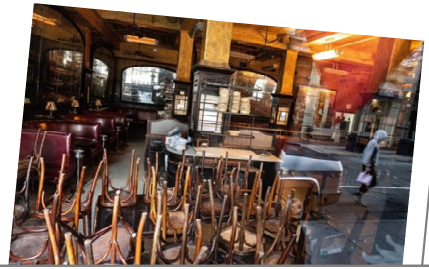


Forbes

576 views | Mar 21, 2020, 10:41am EDT

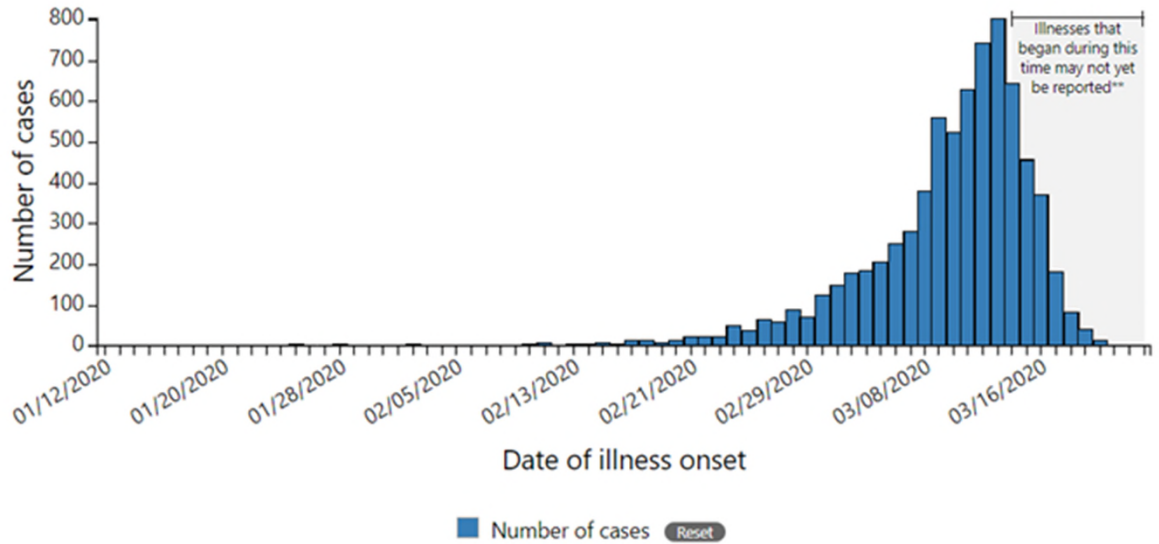
COVID-19's Worst Case? 10.6% Jobless Rate, $1.5 Trillion GDP Drop

Peter Cohan Contributor
Markets

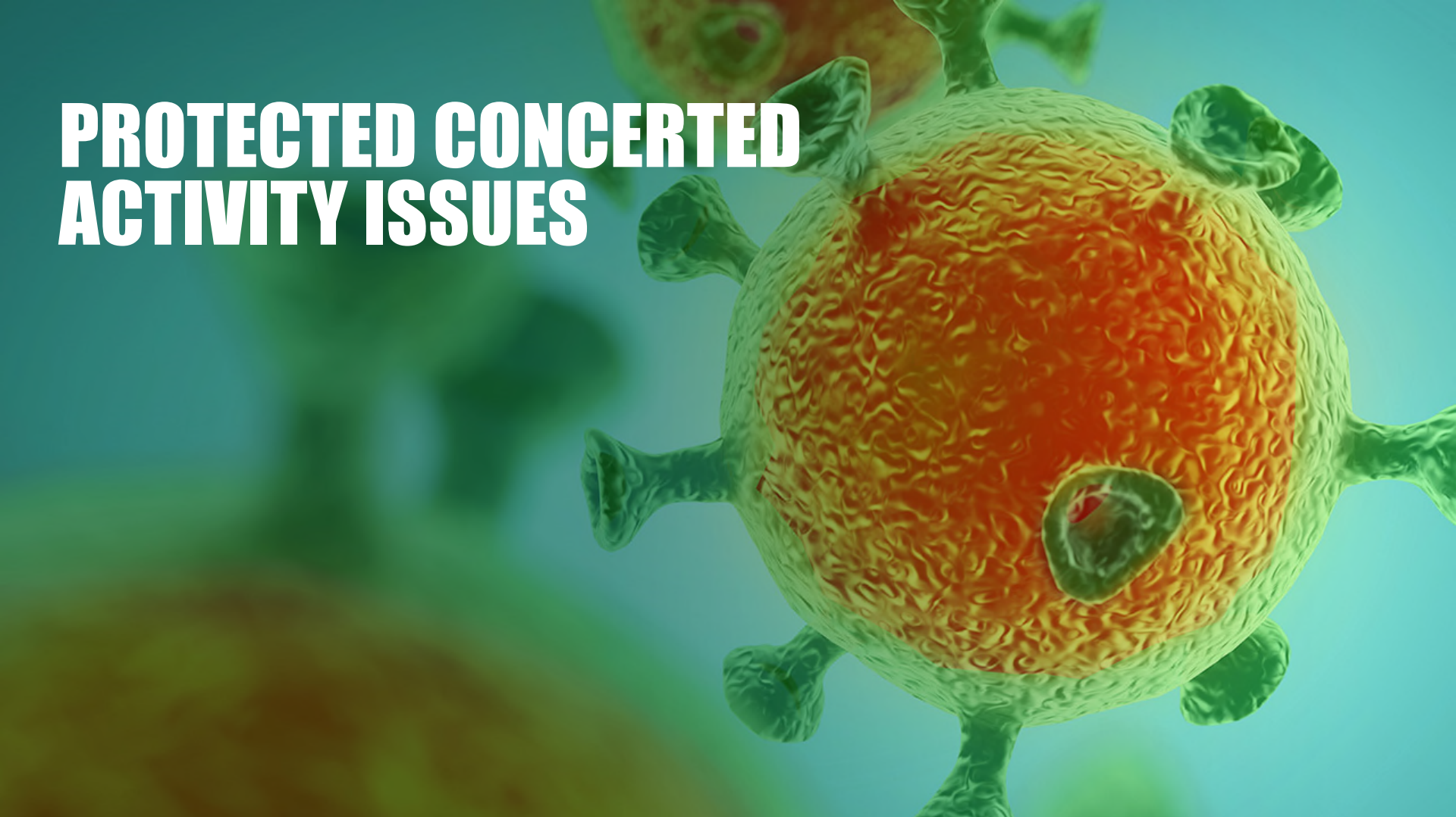
Economists have vastly under-estimated the economic damage from COVID-19. For example, on March 2, the OECD forecast that the Coronavirus would nick U.S.

COVID-19

COVID-19 cases in the United States by date of illness onset, January 12, 2020, to March 23, 2020, at 4pm ET (n=7,309)*



PROTECTED CONCERTED ACTIVITY ISSUES



The Core of the NLRA: Section 7 Protection

- Section 7 of the NLRA protects:

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

- Protected concerted activity under Section 7 usually must involve two or more employees
- Section 7 protection applies to non-union and union employees.
- Protected concerted activity ("PCA") under Section 7 includes many types of conduct that may be confrontational, annoying, offensive or disrespectful.
  - The potential limits on Section 7 protection of sexually or racially offensive speech is under NLRB review in *General Motors*, 368 NLRB No. 68 (briefs solicited 9/5/2019)

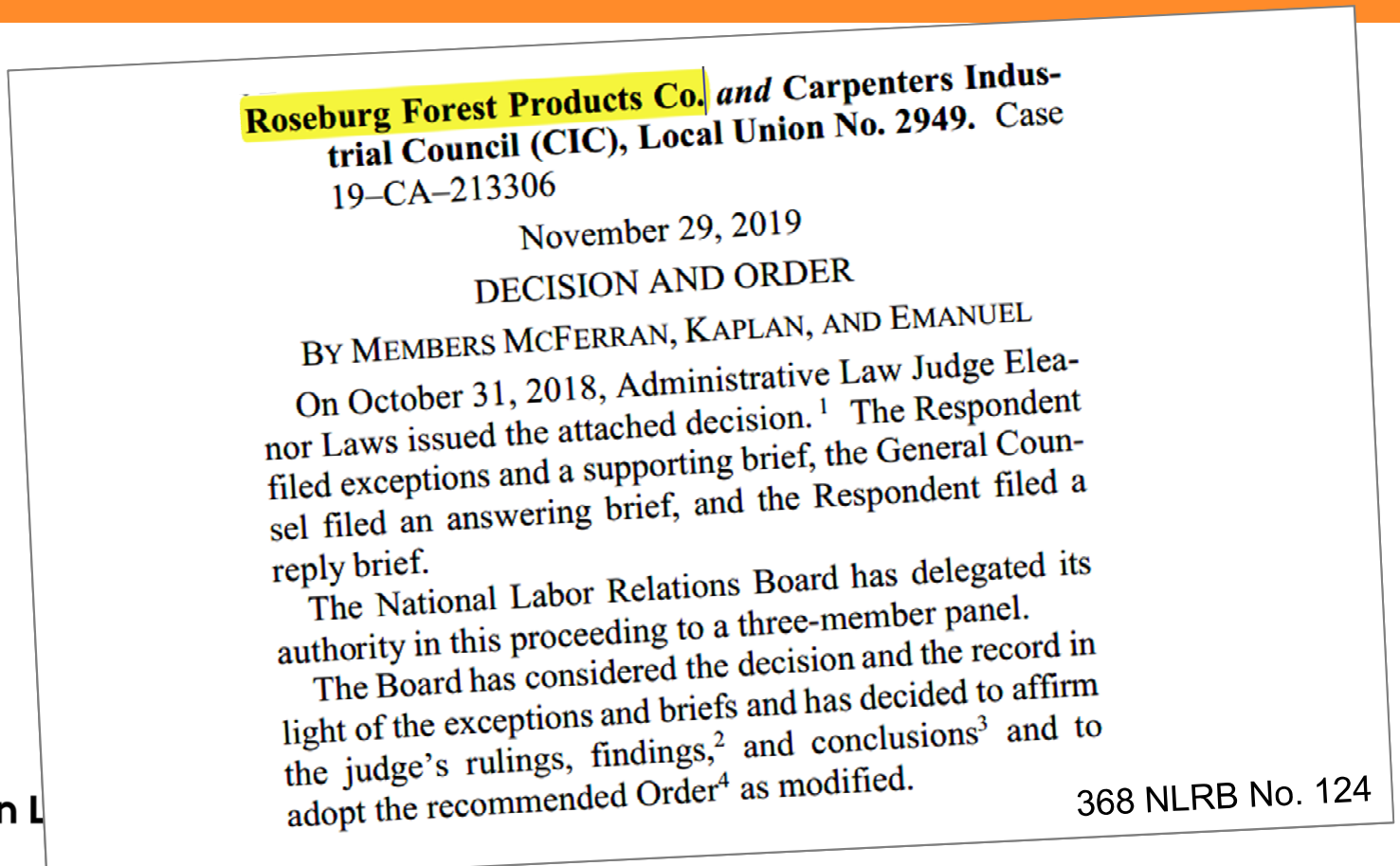
Protected Concerted Activity

- Two requirements:
    1. Is the activity "concerted" – i.e. does it involve two or more employees acting in "concert" (or an attempt by one employee to initiate "concerted" group activity)?
    2. Does the activity have the "purpose" of "mutual aid or protection" for the employee group?

- If both answers are "yes," the NLRA will protect the conduct in most circumstances.

- NOTE: in *Epic Systems* (138 S. Ct. 1612, 2018), the Supreme Court indicated that protected concerted activities in Section 7 should be **similar in nature** to the other protected conduct listed in Section 7 (i.e., employee self-organization, joining or assisting a union, or collective bargaining)

Health & Safety Specific PCA – Speech



Roseburg Forest Products Co. ***and*** **Carpenters Industrial Council (CIC), Local Union No. 2949.** Case 19–CA–213306

November 29, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On October 31, 2018, Administrative Law Judge Eleanor Laws issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

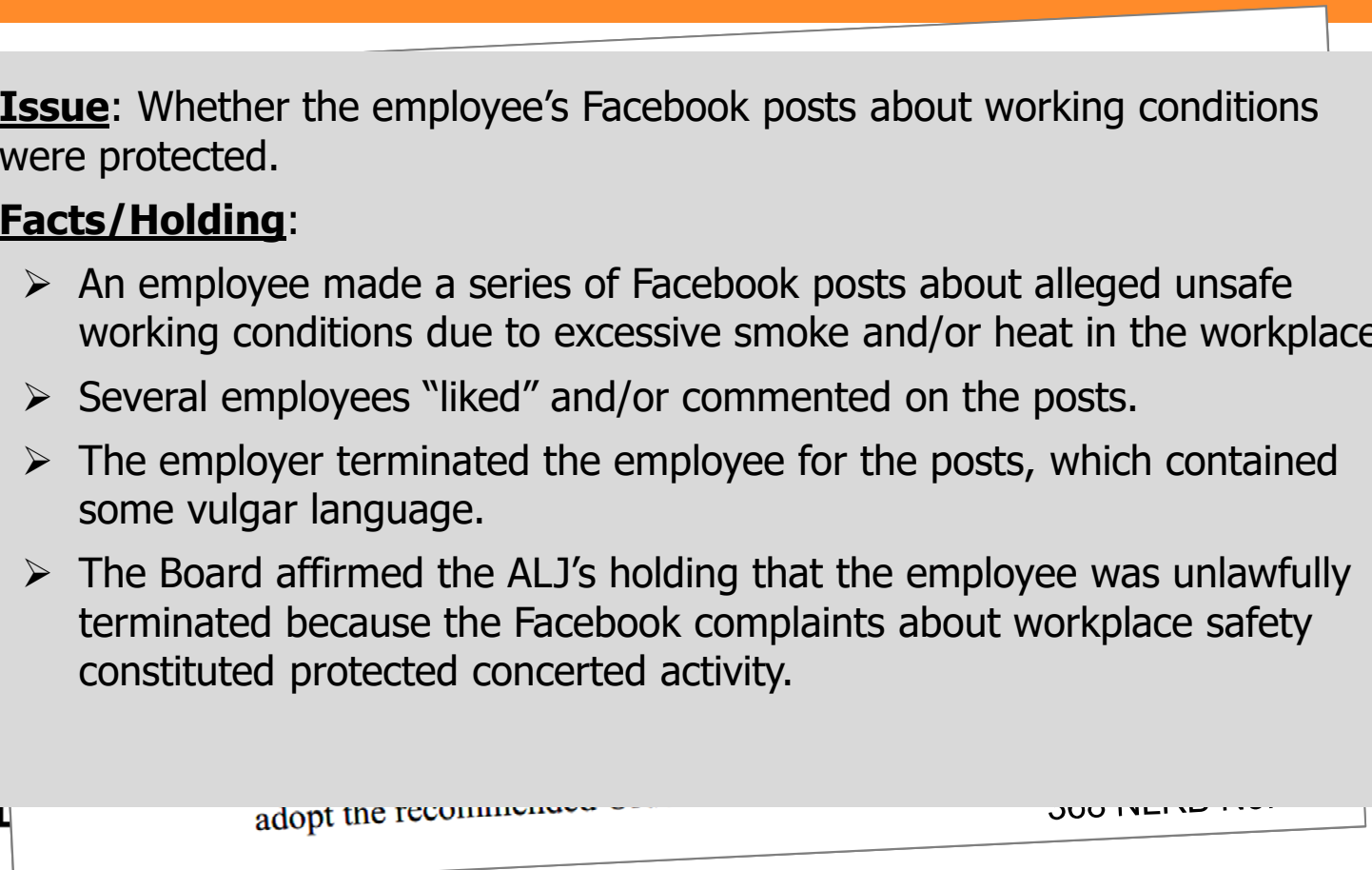
The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order[4] as modified.

368 NLRB No. 124

Health & Safety Specific PCA – Speech

1. **Issue**: Whether the employee's Facebook posts about working conditions were protected.
2. **Facts/Holding**:
   - An employee made a series of Facebook posts about alleged unsafe working conditions due to excessive smoke and/or heat in the workplace.
   - Several employees "liked" and/or commented on the posts.
   - The employer terminated the employee for the posts, which contained some vulgar language.
   - The Board affirmed the ALJ's holding that the employee was unlawfully terminated because the Facebook complaints about workplace safety constituted protected concerted activity.



Health & Safety Specific PCA – Refusal to Work

- Non-union employees who collectively refuse to work based on safety concerns may be protected under Section 7
  - Must be a concerted action to protest "intolerable working conditions"
- For unionized employees, concerted refusals-to-work may be prohibited by labor contract's no-strike clause *(to be discussed later)*
- WATCH: when the Board determines whether the employees' actions are protected:
  - The reasonableness of the refusal to work is irrelevant
  - The manner in which the employees choose to protest is irrelevant (as long as it is peaceful and they do not occupy the premises and refuse to leave)

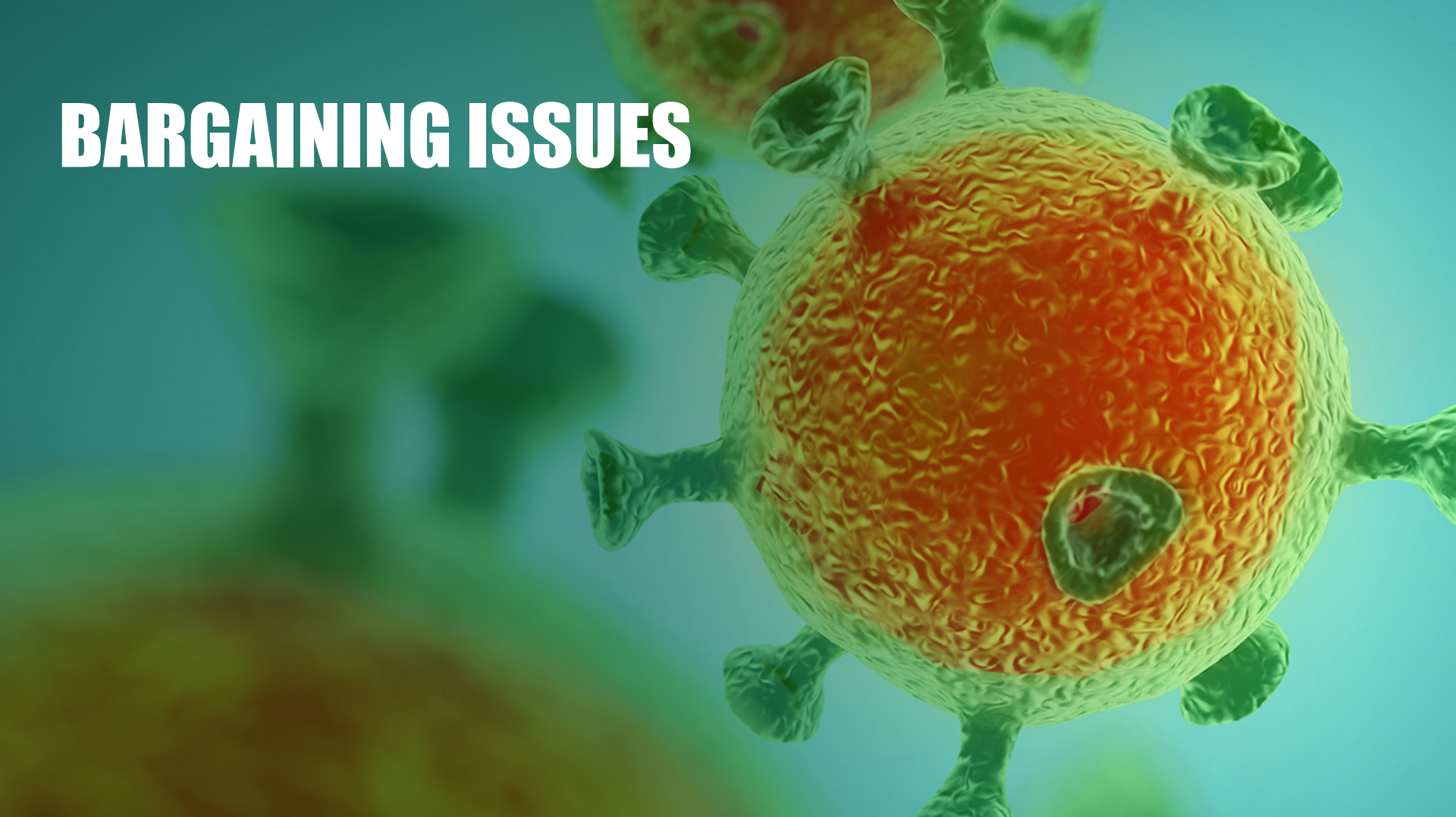
Protected Conduct and COVID-19

- During the COVID-19 pandemic, many employees who are working – or returning to work – will raise COVID-19-related questions, concerns or complaints
- Much of this conduct may arise on an individual basis (likely not protected under the NLRA) but it may involve multiple employees (which might have NLRA protection)
- This conduct may occur in the workplace or away from the workplace
  - NLRA protection is not limited to conduct occurring inside the workplace
  - Example: employees using social media to discuss workplace safety concerns do not lose protection under the NLRA
- **Dual focus challenge**:
  - Employers **continuing "essential" businesses** may have employees or unions who oppose working or who demand more extensive workplace safety procedures
  - **Employers who shut down** may face demands about resuming work, or regarding who will be recalled in what order, and what workplace safety procedures will exist

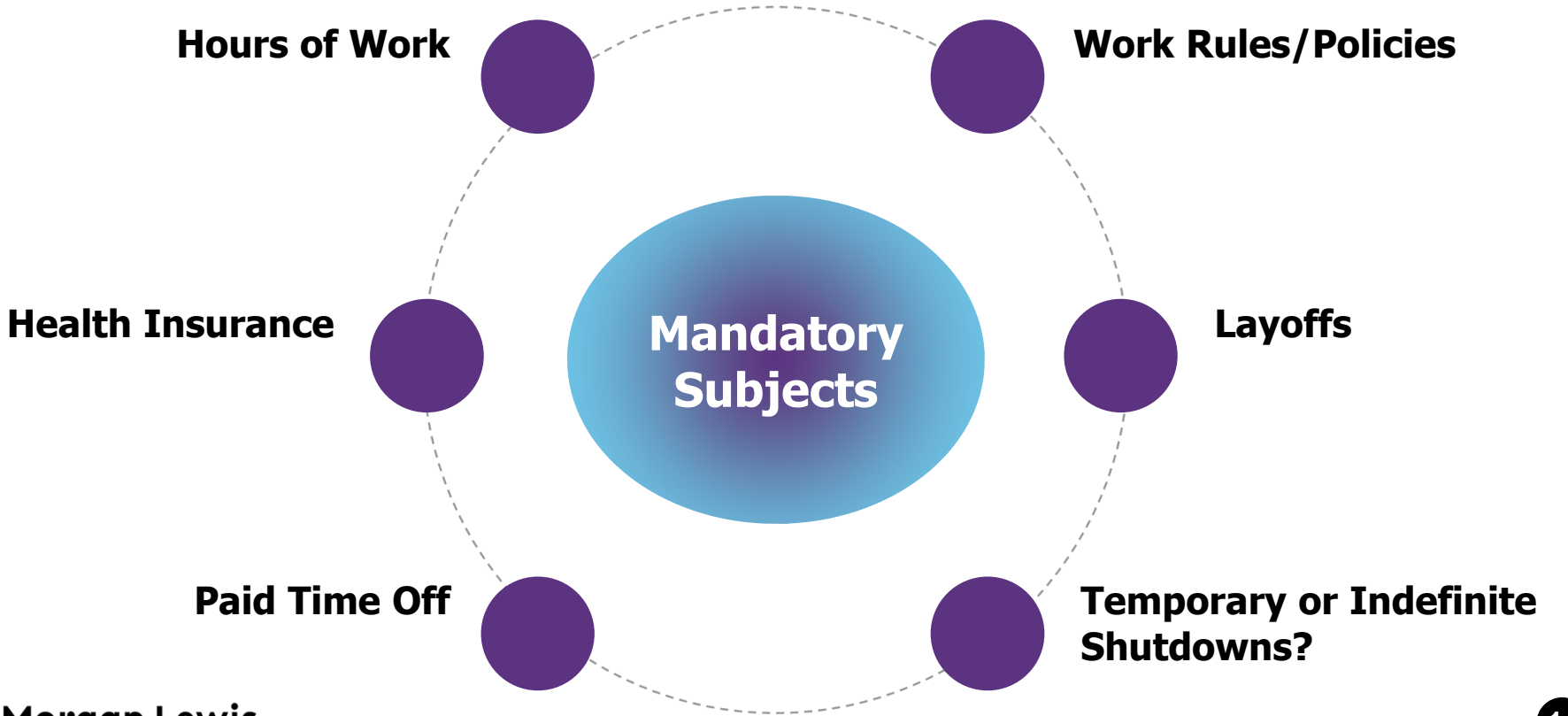
Protected Conduct and COVID-19 *(cont.)*

- **Many employer responses** to the majority of COVID-19 employee complaints and actions will be the same **regardless** of whether the conduct has NLRA protection:
  - The Company is actively monitoring the COVID-19 pandemic, coordinating with government officials, and taking seriously employee health and safety
  - The Company has implemented enhanced safety procedures (list them) and adopted new protocols (list them) to answer questions and to give assistance to employees
  - The Company is receptive to employee suggestions and wants to hear any complaints from employees (give details about suggestion/complaint procedures)
- If employees engage in "concerted" conduct **that may have NLRA protection** (e.g., group refusals-to-work as a form of protest, or group safety demands), then:
  - Discipline or retaliation is unlawful
  - In cases involving protected refusals-to-work (when work is continuing), you can operate using managers or replacement employees (but good luck finding and hiring replacements right now)
  - WATCH: **unsafe** employee conduct (e.g., failure to follow necessary safety and health procedures) is almost certainly **unprotected** by the Act and **can** result in discipline/discharge

BARGAINING ISSUES



Mandatory Subjects of Bargaining



Mid-Contract Bargaining Issues

- First consideration – defining "management rights" and flexibility under the current CBA that does not require bargaining or union agreement…
- Alternatively, need to bargain to agreement with union over temporary modifications to deal with the crisis.
- Legal requirements imposed by federal government, state government, or localities likely take precedence over conflicting CBA, although employers may still have to bargain over "effects" of those mandates.

Unilateral Change Based on Contract – *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019)

MV Transportation, Inc. ***and*** **Amalgamated Transit Union Local #1637, AFL–CIO, CLC.** Case 28–CA–173726

September 10, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN AND EMANUEL

In this case, we once again visit an issue that has repeatedly sown division among the members of the National Labor Relations Board and between the Board and reviewing courts of appeals. That issue is whether a "clear and unmistakable waiver" standard or a "contract coverage" standard should apply when considering whether an employer's unilateral action is permitted by a collective-bargaining agreement. When the full Board last visited this issue in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), a majority reaffirmed adherence to the "clear and unmistakable waiver" standard. Today, for reasons that follow, we overrule *Provena St. Joseph* and adopt the "contract coverage" standard.

368 NLRB No. 66

Unilateral Change Based on Contract – *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019)

Prior Precedent: "Clear and unmistakable waiver"

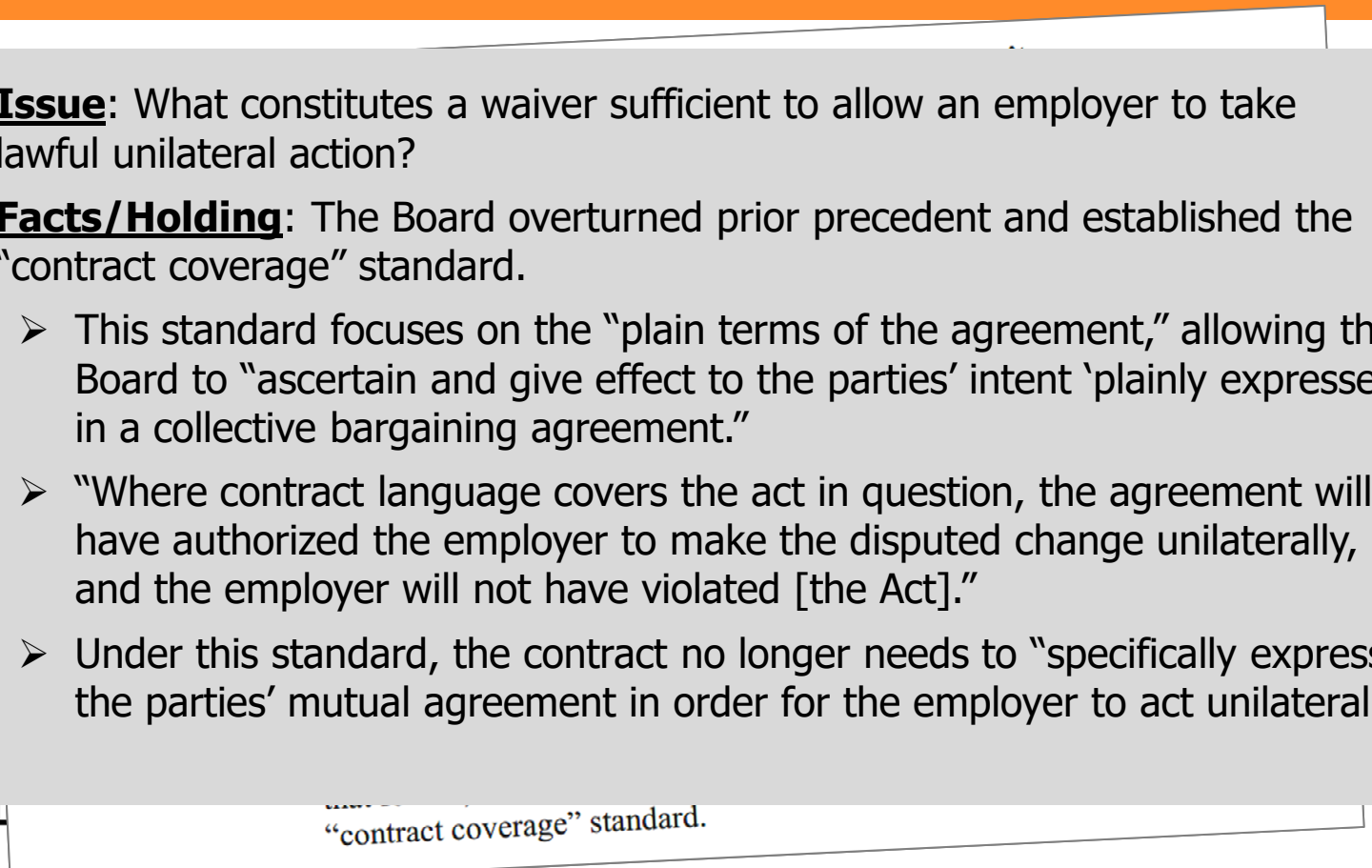
Under the "clear and unmistakable waiver" standard:

- Required contract terms to "specifically express [the parties'] mutual intention to permit unilateral employer action with respect to a particular employment term."
- In other words, management rights clauses – even broad ones – were not sufficient to allow employers to take unilateral action.
- This strict standard offered little flexibility for employers.

"contract coverage" standard.

Unilateral Change Based on Contract – *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019)

1. **Issue**: What constitutes a waiver sufficient to allow an employer to take lawful unilateral action?
2. **Facts/Holding**: The Board overturned prior precedent and established the "contract coverage" standard.
   - This standard focuses on the "plain terms of the agreement," allowing the Board to "ascertain and give effect to the parties' intent 'plainly expressed' in a collective bargaining agreement."
   - "Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated [the Act]."
   - Under this standard, the contract no longer needs to "specifically express" the parties' mutual agreement in order for the employer to act unilaterally.


"contract coverage" standard.

First Contract and Post-Expiration Issues

- During the first contract bargaining or after the expiration of the existing CBA, an employer must maintain the status quo on mandatory subjects of bargaining.
  - E.g., wages, benefits, hours of work.
- The status quo obligations remain until the parties reach an overall agreement or bargaining impasse.
- Potential exceptions:
  - "Past practice" defense under expired contracts
  - *RBE Electronics* – "exigent circumstances" exception to make specific changes, with or without bargaining over that change

Unilateral Change Based on Past Practice – *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145 (Dec. 16, 2019)

Mike-Sell's Potato Chip Company and Teamsters Local Union No. 957. Case 09–CA–184215

December 16, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

The main issue presented in this case is whether the Respondent violated Section 8(a)(5) of the Act by unilaterally selling four sales routes that were assigned to bargaining-unit drivers to nonemployee independent distributors in 2016. [W]e … find that the Respondent's sales of the four routes constituted a continuation of the status quo because the sales were consistent with a longstanding past practice. Therefore, we … find that the Respondent was not obligated to bargain with the Union about its decision to sell those routes. Consequently, we also reverse the judge's related finding that the Respondent violated Section 8(a)(5) by failing to provide information related to the sale of the routes that the Union requested in order to bargain about the sales decisions.

368 NLRB No. 145

Mike-Sell's Potato Chip Co., 368 NLRB No. 145 (Dec. 16, 2019)

1. **Issue**: What constitutes a "change" under the Act requiring bargaining
2. **Facts/Holding**: The company used both employee drivers and independent distributors to move product from distribution centers to customers.
   - Over many years, the company unilaterally sold routes performed by employees to independent distributors. Eventually, the union filed an NLRB charge alleging recent sales decisions required bargaining.
   - The NLRB found no bargaining duty because the recent sales decisions were not a "change" to but rather a continuation of operational past practice.
   - The company met the burden of proving that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis.
   - Note that the union could request bargaining about changing the practice itself just not the specific unilateral decision as part of the practice.

What Does This All Mean For Employers Looking to Respond to COVID-19?

- Provide union with advance notice of operational changes, layoffs, temporary shutdowns, or policy changes in response to COVID-19
- Respond to union requests for information as promptly as possible
- Engage in effects bargaining, if union requests, and possibly decision bargaining
  - Circumstances may require bargaining in a compressed time period
- No duty of either party to agree to modify terms of existing CBA
  - But there may be a mutual interest in bargaining temporary, mid-term modifications
- Absent a specific agreement to modify the CBA, rely on existing terms of CBA and past practice to take unilateral action

Virtual Bargaining Best Practices

- Use video platform
- Ground rule on all participants joining by video and not just phone
- Ground rule on no recording
- Logistics for passing proposals
- Separate caucus "rooms"

CONTRACT INTERPRETATION ISSUES – NO STRIKE CLAUSES AND FORCE MAJEURE EXCEPTIONS

"No Strike" Clauses

- Commonly included in most CBAs → often coupled with a corresponding "no lockout" clause.

- What does this mean?
  - The union promises not to strike during the life of the contract.

- What are the limitations?
  - Only applies during the life of the contract.
    - In other words, the union is free to strike after expiration.

Section 502

- Rarely cited LMRA Section 502 permits workers otherwise subject to a "no strike" clause to refuse to work because of an "abnormally dangerous condition."
- What is required?
  - "[A]scertainable, *objective evidence* supporting its conclusion that an abnormally dangerous condition for work exists."
  - "[S]ome identifiable, *presently existing* threat to the employees' safety."
    - *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 387 (1974).

Section 502

- Courts have found that the following types of evidence will not meet the high bar for Section 502 protection:
  - Subjective beliefs
  - Speculation of possible harm
  - Generalized doubts about an employer's ability to respond to a threat

- Procedure for preventing/stopping an unlawful strike that involves contract dispute → *Boys Markets* injunction.
- Practical concerns with pursuing injunctive relief during this crisis period, which may counsel in favor of joint problem-solving rather than disciplining employees or seeking injunction.

Objecting to "Abnormally Dangerous Conditions" in Non-Union Setting

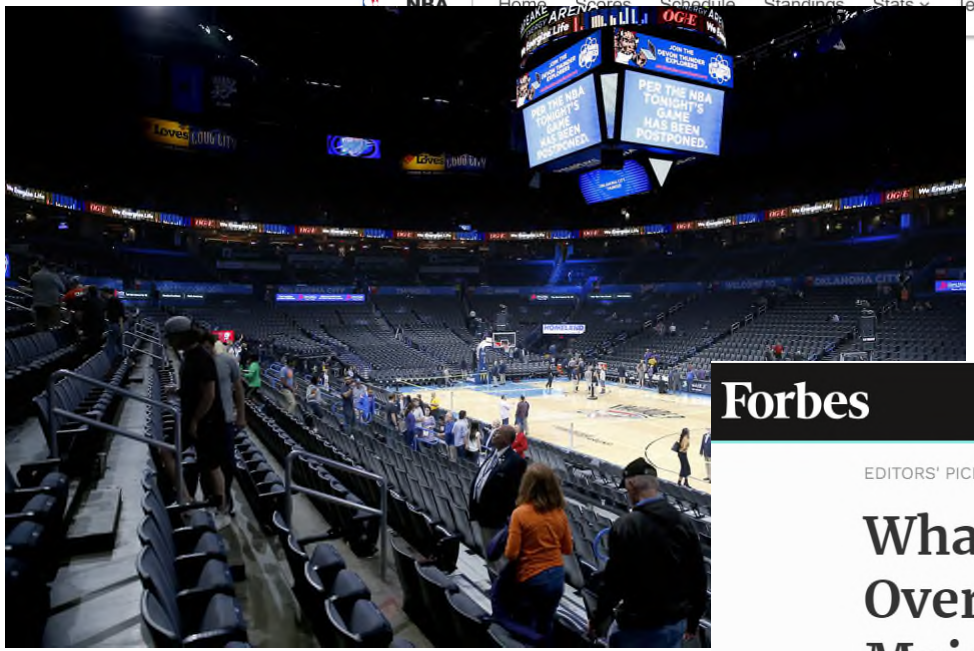
- The Board has refused to apply the Section 502 requirements to non-union employees.

> It is well-settled that unrepresented employees may concertedly decline to perform certain work they deem unsafe without being punished or discharged. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). And although represented employees with a collective-bargaining agreement containing a no-strike clause must have "ascertainable, objective evidence supporting [their] conclusion that an abnormally dangerous condition for work exists," *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 387 (1974), the Board has never applied an objective reasonableness test in the nonunionized workplace. *TNS, Inc.*, 329 NLRB 602 (1999); *Palco*, 325 NLRB 305 (1998), reversed on other grounds *NLRB v. Portland Airport Limousine Co.*, 163 F.3d 662 (1st Cir. 1998).

Odyssey Capital Group, L.P., 337 NLRB 1110 (2002)

- Instead, non-union employees are held to the lower PCA standard discussed previously.

Force Majeure Provisions



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Forbes Billionaires Innovation Leadership Money Business Small Business Lifestyle Lists

EDITORS' PICK | 4,117 views | Mar 13, 2020, 05:59pm EDT

What If The 2019-20 NBA Season Is Over? Explaining The 'Force Majeure' Clause

Force Majeure Provisions

- Under contract law principles: the unforeseeable circumstances that prevent completion of a contract.
  - Also can be referred to as "Act of God" provisions.
- Could COVID-19 trigger a force majeure provision?
  - The proper focus is not whether the catastrophe or disaster is controllable by one degree or the other by human beings; but, whether the circumstances are so out of control that the facilities are required to be closed. In the circumstances present here, the contagiousness of the virus or bacteria was unable to be controlled without requiring the closing of the facilities.
    - *Erie County Board of MR and DD,* 111 BNA LA 1121 (Goldberg, 1999) (influenza breakout that "hit almost everyone" was considered an "act of God").
- Invoke sparingly and based on temporary business conditions that make compliance impossible or infeasible, relying on objective evidence of the impact.

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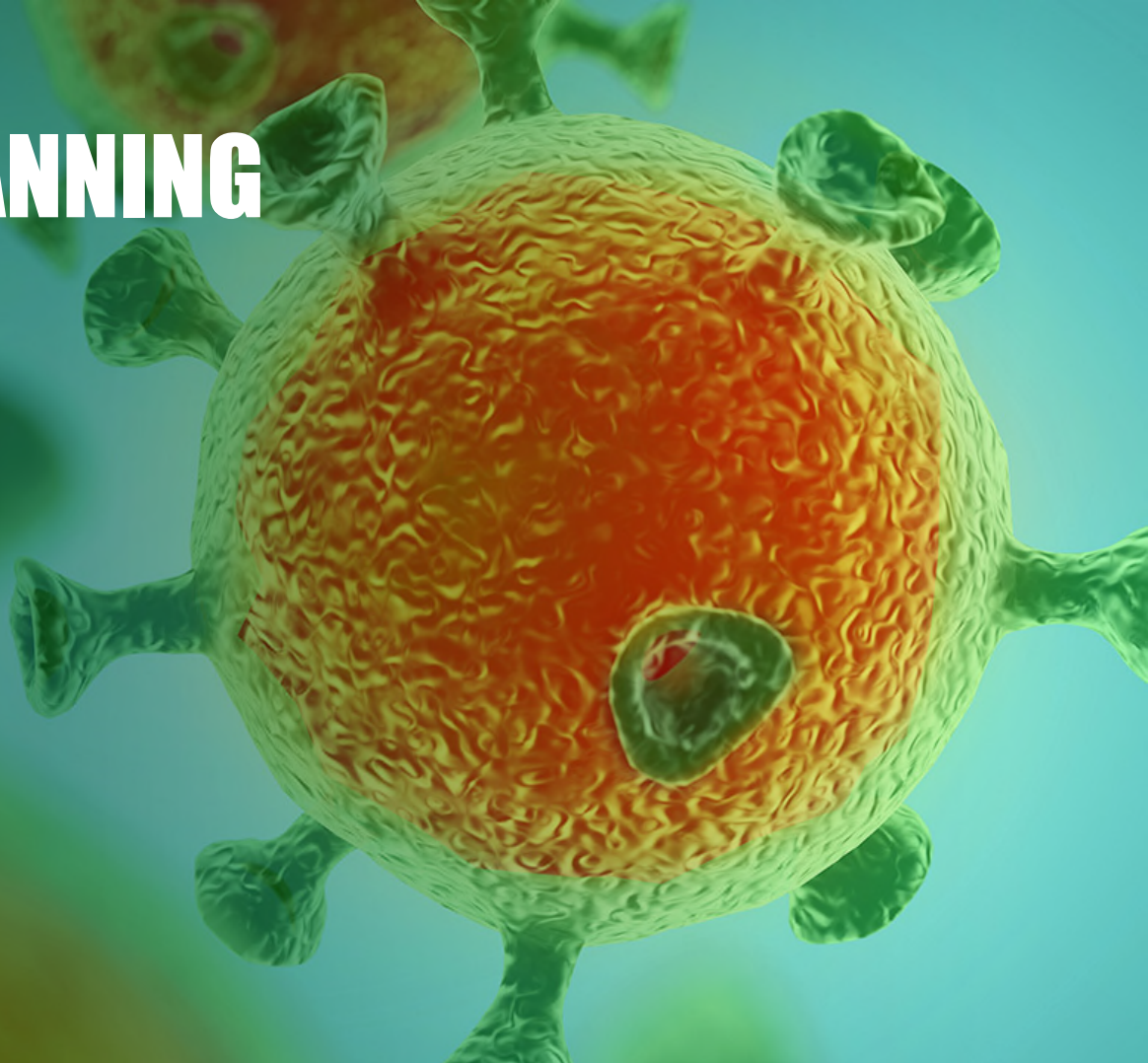
WORKPLACE PLANNING AND COVID-19

What to Do?



Workplace Planning and COVID-19: What to Do?

Concerted Activity

Bargaining Obligations

Labor Contracts

Union Demands

1. Continuing Operations

- **Labor contracts**. Most labor contracts have extensive provisions addressing **sick leave**, **vacation**, **attendance**, **hours**, **layoffs**, temporary or indefinite **shutdowns**, and more
  - Many changes caused by COVID-19 will involve **"management rights" clauses**
  - Carefully review your contract's **no-strike clause** to the extent that you continue operations over the objection of the union and/or without agreeing to extraordinary union demands
- **Operating Changes that NORMALLY Require Bargaining**. Typically, the NLRA requires employers to give the union **reasonable advance notice** and the opportunity for **decision-bargaining** or **effects-bargaining** before making the changes.
  - **Government-ordered changes** involving no employer decision: no decision-bargaining required (but watch for possible duty to engage in effects-bargaining)
  - Also, **"exigent circumstances"** that can **sometimes excuse** the duty to bargain or permit unilateral action before reaching an overall impasse or agreement. *See RBE Electronics*, 320 NLRB 80, 81-82 (1995).
  - **Work-at-home arrangements** or **workplace restructuring** may both involve a variety of issues that may warrant bargaining

1. Continuing Operations *(cont.)*

- **<u>COVID-19 Union Demands</u>**. Unions have given a wide array of demands to employers throughout the country
  - Some demands focus on **curtailing** operations while giving employees **paid leave**
  - Other demands focus on **increased wages/benefits** for **continued** work
  - **Healthcare employers** have specialized challenges, burdens, and risks given rise to union proposals relating to healthcare employees;
  - **Potential examples** of widely varied union demands have included:
    - Enhanced workplace sanitation
    - Other health and safety changes
    - Staffing adjustments (up and down)
    - Schedule and shift changes
    - Enhanced sick leave/other PTO
    - Demands regarding protective equipment
    - Hazard pay and increased overtime
    - Changes regarding where employees work
    - Demands addressing work-at-home issues
    - Improvements in medical benefits
- **<u>Protected "Concerted" Employee Conduct</u>**. Watch out for employee actions in "concert" regarding COVID-19 concerns, which may be NLRA-protected (e.g., coordinated group protests and refusals to work over workplace risks or demand for changes)

2. Shutdowns ("non-essential" businesses)

- **<u>Labor contracts</u>.** Here as well, the labor contract is the starting point for the handling of shutdowns, layoffs, supplemental unemployment benefits, seniority, etc.
  - Some contracts may have "force majeure" or "act of God" provisions that may encompass the COVID-19 pandemic, and afford relief for certain contractual requirements
  - Some difficult issues may be posed by **contractual notice** requirements or **severance pay** requirements that are potentially triggered by government-order shutdowns, even though this may have been unintended by the parties

2. Shutdowns ("non-essential" businesses) *(cont.)*

- **Bargaining.** For shutdowns associated with the COVID-19 pandemic, the evaluation of bargaining obligations depends on the cause and type of shutdown:
  - A **government-ordered shutdown** does not require decision-bargaining but effects-bargaining is normally required (even after-the-fact), but bargaining may not be required if covered by the contract
  - The law governing bargaining obligation in "**shutdown**" situations is similar: shutdown decisions are not a mandatory subject of decision-bargaining, but effects-bargaining is required at a "meaningful" time
  - **WATCH**: if a shutdown is discretionary and expected to be temporary (e.g., based on insufficient business), the shutdown-related separations will normally be considered "**layoffs**" which – absent coverage by existing labor contract provisions – may warrant decision- or effects-bargaining under NLRB case law
  - Again, the COVID-19 pandemic in many cases is likely to constitute the type of "**exigent circumstances**" that may excuse a failure-to-bargain, or at least permit bargaining with little or no notice (or even after-the-fact bargaining)

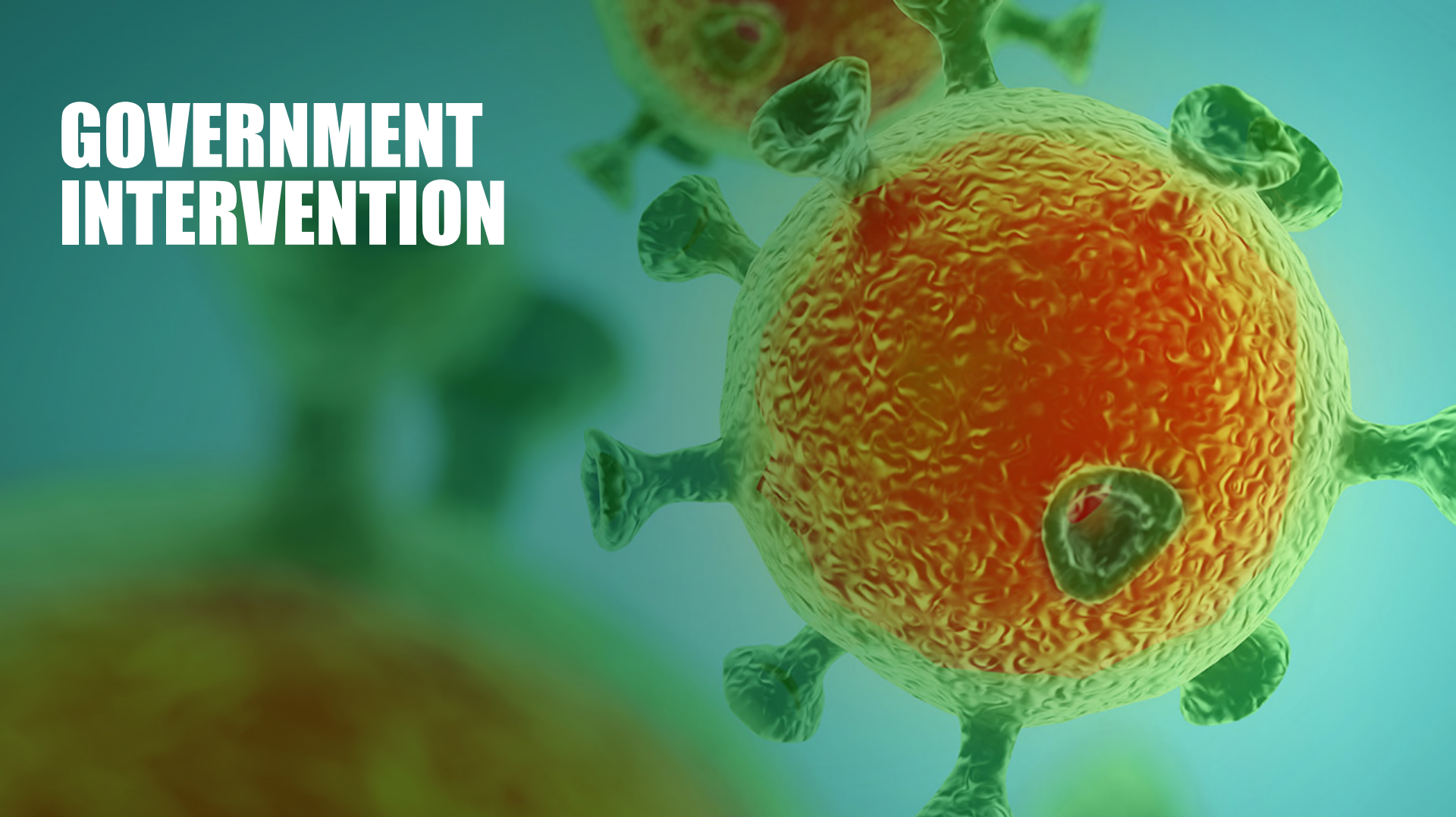
3. Outsourcing, Work Transfers, Relocations

- COVID-19 issues currently vary widely depending on the state, and many employers have been required to **move work between facilities, engage in subcontracting, or make other arrangements** for business continuation
- Absent labor contract provisions that address these situations, NLRB case law can be complicated, which – during the COVID-19 crisis – comes down to four main principles:
  1. **True emergency situations** may constitute "exigent circumstances" that excuse bargaining (or permit late or after-the-fact bargaining), but this defense rarely succeeds
  2. **Relocation** and **work transfers** may require decision-bargaining if these changes are caused by labor costs or matters that the union can control (Dubuque Packing)
  3. **Outsourcing or subcontracting** usually has required decision-bargaining, unless it involves matters that go to "entrepreneurial" control of the business (Fibreboard)
  4. **WATCH**: these are situations that can involve "runaway shop" claims (alleged antiunion discrimination to avoid or penalize unionized operations). Standard NLRB remedy: buy-it-back and put-it-back (and reinstate employees with backpay and benefits).

4. Other Business Changes

- **Independent contractor/joint employer risks**. The COVID-19 pandemic does not change the standards governing "independent contractor" relationships (NLRB SuperShuttle case) and "joint employer" relationships (recent NLRB joint employer final rule).
  - But **COVID-19 may test these relationships** because (i) more situations may arise that require (or tempt) you to directly control "employment-related" aspects of these relationships, and (ii) the COVID-19 crisis may cause especially dire problems for independent contractors and/or vendors or franchisees that may necessitate various types of "employment-related" assistance
- **The dual focus challenge**: workplace health and safety (for employees who keep working vs. separation-related benefits (for non-working employees)
- **The dual timeframe challenge:** addressing short-term emergency needs while trying to predict the future and plan for the longer term.

GOVERNMENT INTERVENTION



State Government-Mandated Restrictions

Coronavirus latest: New York follows California, orders residents to stay home

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The latest information on the coronavirus pandemic from around the world.

New York follows California, residents ordered to stay home

NEW YORK — New York Gov. Andrew Cuomo is ordering all workers in non-essential businesses to stay home and banning gatherings statewide.

Baker Orders All Non-Essential Mass. Businesses To Close Starting Tuesday

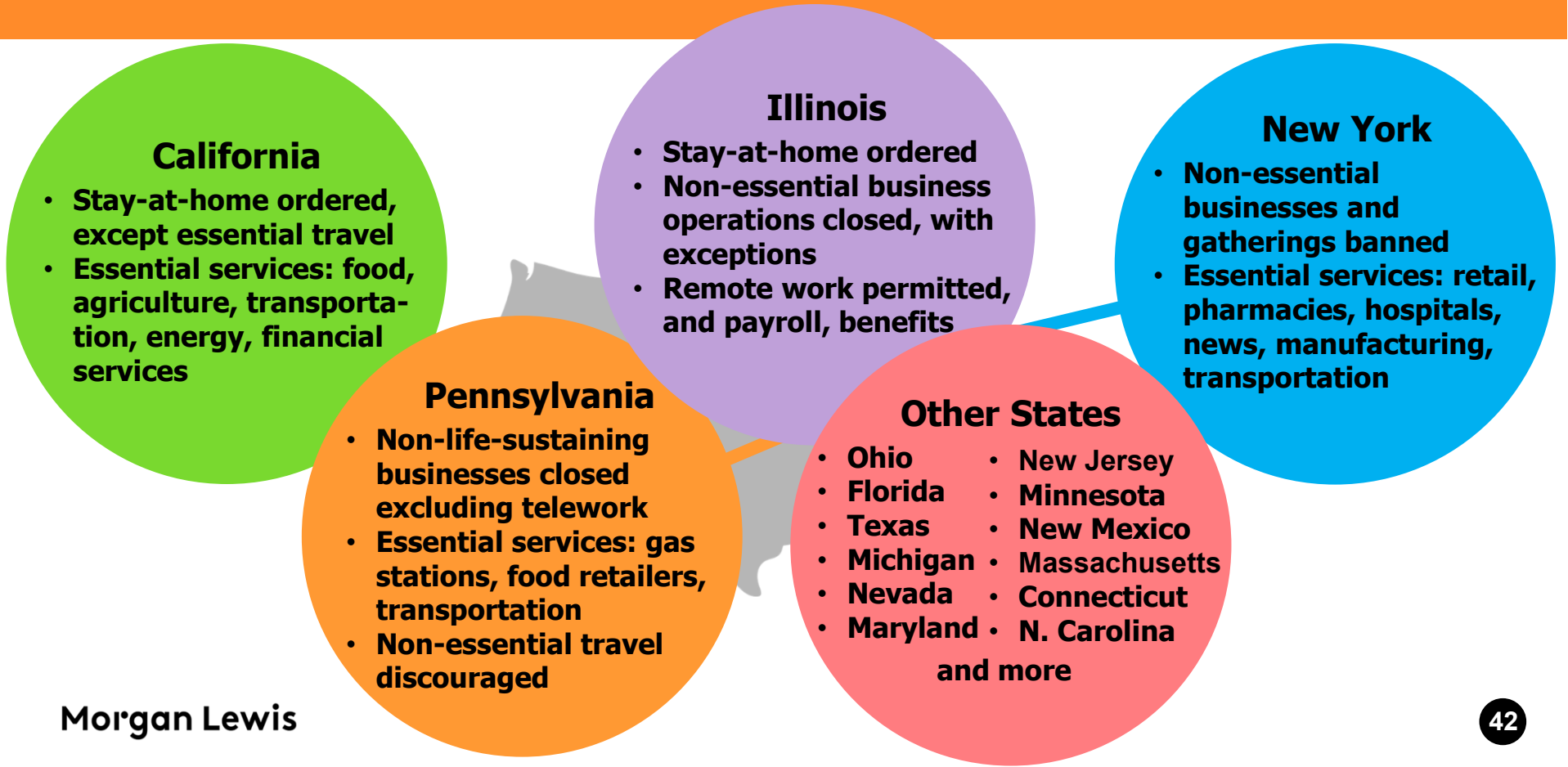
March 23, 2020 *Updated Mar 23, 2020 6:11 PM* By Ally Jarmanning

Gov. Charlie Baker on Monday ordered all non-essential businesses and organizations to close for at least two weeks, but said he would not issue a stay-at-home order.

Gov. Tom Wolf orders all Pennsylvania businesses that aren't 'life-sustaining' to close, will enforce order

by Angela Couloumbis of Spotlight PA, Updated: March 19, 2020- 9:13 PM

State Government-Mandated Restrictions



Local Government Orders – Impact on Bargaining

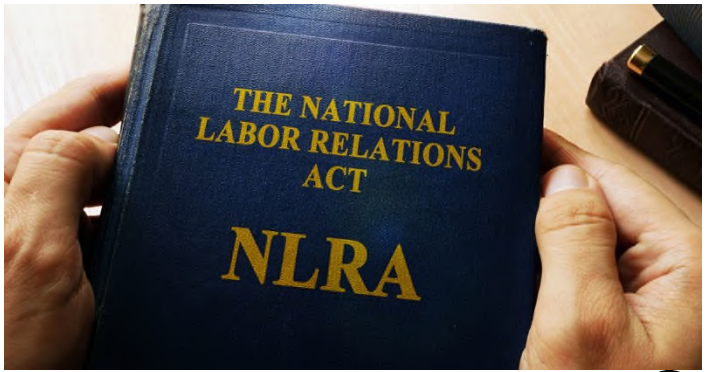
- Complying with state or federal orders may excuse an employer's obligation to bargain – at least over the decision.
  - If the employer has no discretion on how it complies → no obligation to give the union notice and bargain.
    - *Long Island Day Care Services*, 303 NLRB 112, 117 (1991) (no obligation to bargain over mandatory 2 percent raises because "[Department of Health and Human Services'] ultimate offer of additional moneys was accompanied by a directive . . . [a]nd, the Respondent had no say over how much money would be awarded or how the funds would be allocated.").
  - If the employer has some discretion on it complies → standard bargaining obligations.
    - *Long Island Day Care*, 303 NLRB at 116 (obligation to bargain over mandatory COLA because "there were decisions within the Respondent's discretion on which bargaining could focus").
- Even if an employer does not need to bargain over the decision to comply with a state order, it may still be required to bargain over the effects.

Responding to COVID-Related Orders

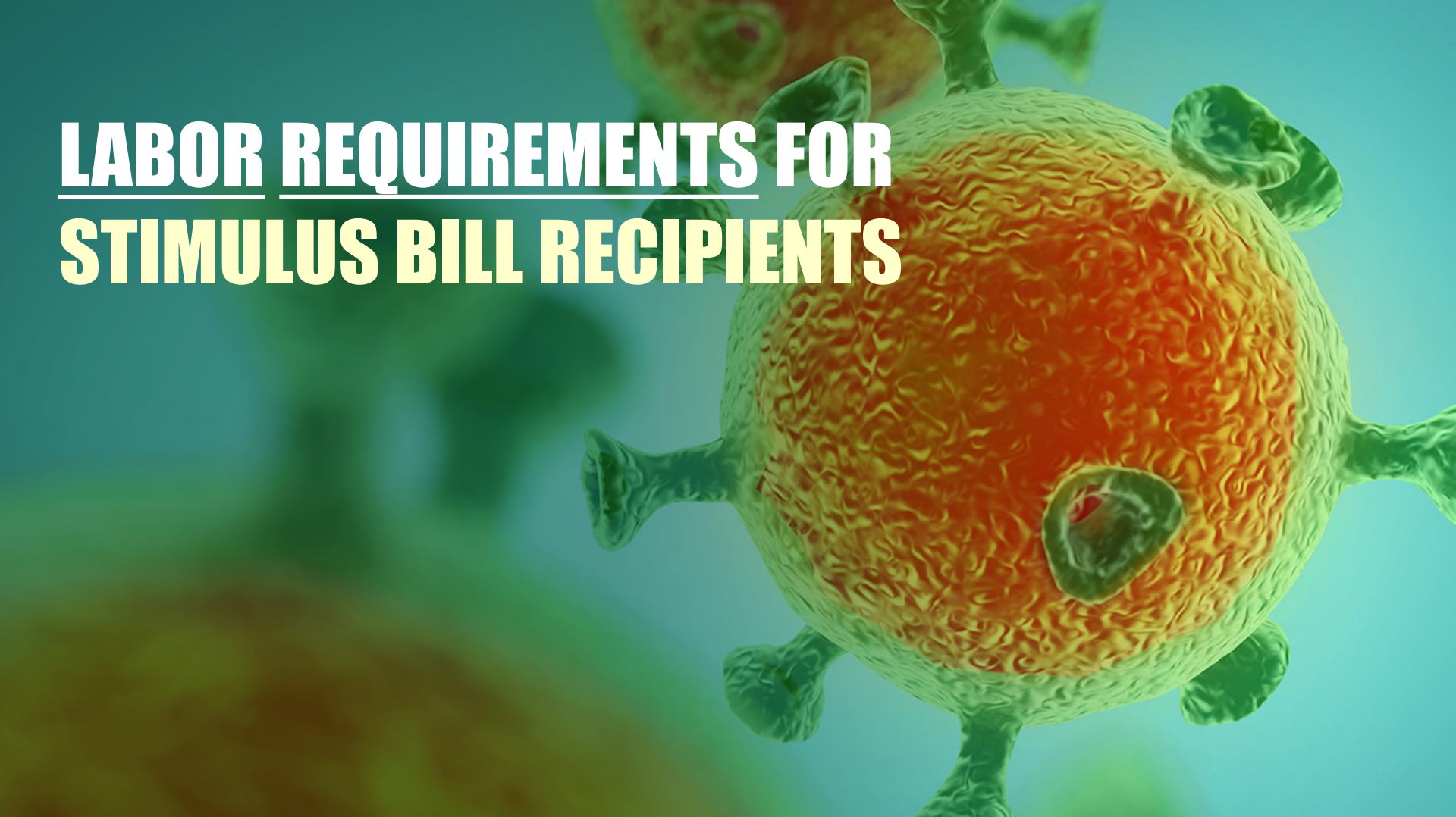
- These principles impact how an employer may lawfully respond to a state order closing or restricting business operations.
  - If an order gives the employer discretion, it should give the union notice and bargain over the decision, if requested.
  - If an order gives the employer no discretion, it may respond without bargaining first.
    - Employers may need to bargain over the effects (e.g., furloughs, continued health insurance coverage, severance)
- State orders often leave employers little-to-no time to comply.
  - On March 23, MD governor held press conference at 11:00 am to announce order closing all "non-essential" businesses – which took effect at 5:00 pm the same day.
  - "Exigent circumstances" rule would be in play, but consider post-implementation bargaining.

Local Government Orders – Labor Implications

- The Supreme Court has routinely held that states cannot pass laws that infringe upon rights and obligations under the NLRA.
- Recent state/local orders classify some sectors as essential, implicitly or expressly indicating they must stay open.
- Such orders differ on whether unions are considered "essential businesses" and, therefore, can continue to operate as normal.
- Open questions of federal pre-emption, police power, and state/local intent.



LABOR REQUIREMENTS FOR STIMULUS BILL RECIPIENTS



New Labor Requirements for Stimulus Bill Recipients

The **$2 trillion stimulus bill** adopted by the Senate on March 25, 2020 – the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") – includes important **labor law "good-faith certifications"** applicable to employers who accept certain loans and loan guarantees:

1. **Neutrality**. The employer must certify that it "will remain neutral in any union organizing effort for the term of the loan"
2. **CBA Compliance**. The employer must certify that it "will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing repayment of the loan"
3. **No Outsourcing/Off-Shoring**. The employer must certify that it "will not outsource or offshore jobs for the term of the loan and 2 years after completing repayment of the loan"
4. **Workforce Guarantees.** The employer must certify that the funds will be used "to retain at least 90 percent of the . . . workforce, at full compensation and benefits, until September 30, 2020" and the employer "intends to restore no less than 90 percent of the workforce . . . that existed as of February 1, 2020, and to restore all compensation and benefits . . . no later than 4 months after the termination date of the public health emergency. . . ."

Taft-Hartley Intervention Authority

- "Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof . . . will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute."
  - 29 U.S.C.A. § 176

Taft-Hartley Intervention Authority

- Taft-Hartley Act also gives the President the authority to seek an injunction in federal court to stop a strike.
- In order to obtain an injunction, the strike must "(i) affect[] an entire industry or a substantial part thereof . . . and (ii) if permitted to occur or to continue, will imperil the *national health or safety*."
  - 29 U.S.C.A. § 178 (emphasis supplied).
- This is a difficult evidentiary threshold to satisfy.

Presidential Intervention Authority – Notable Examples

ons

The Washington Post
Democracy Dies in Darkness

President Invokes Taft-Hartley Act

By **Helen Dewar** and **Edward Walsh**
March 7, 1978

President Carter invoked the Taft-Hartley Act yesterday in an attempt to force the rebllious United Mine Workers back to work and end the nation's record 91-day-old coal strike.

The New York Times

Nixon Gets a Court Order Halting Coast Dock Strike

By Robert B. Semple Jr. Special to The New York Times

Oct. 7, 1971

The New York Times

PRESIDENT INVOKES TAFT-HARTLEY ACT TO OPEN 29 PORTS

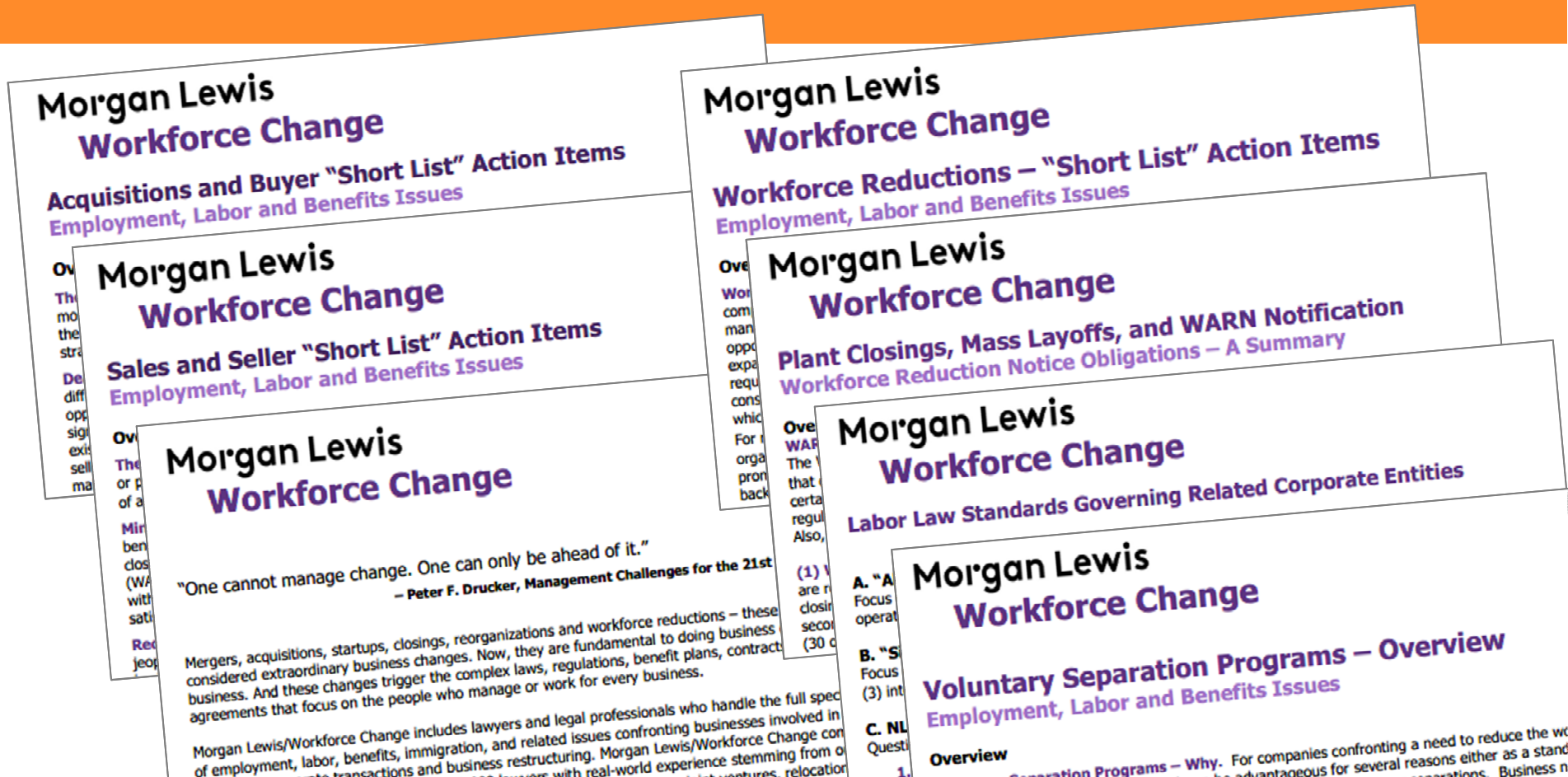
By David E. Sanger With Steven Greenhouse

Oct. 9, 2002

Government Intervention Best Practices

- Government orders modify, but rarely totally nullify, bargaining obligations.
- Offers to bargain post-implementation can be useful.
- Classification as "essential business" can be important in discussion with union or local authorities.
- Major employers with a large presence in essential sectors should keep the Taft-Hartley option in mind as a last resort.

Morgan Lewis Workforce Change – Resources



MORGAN LEWIS CORONAVIRUS COVID-19 RESOURCE PAGE >

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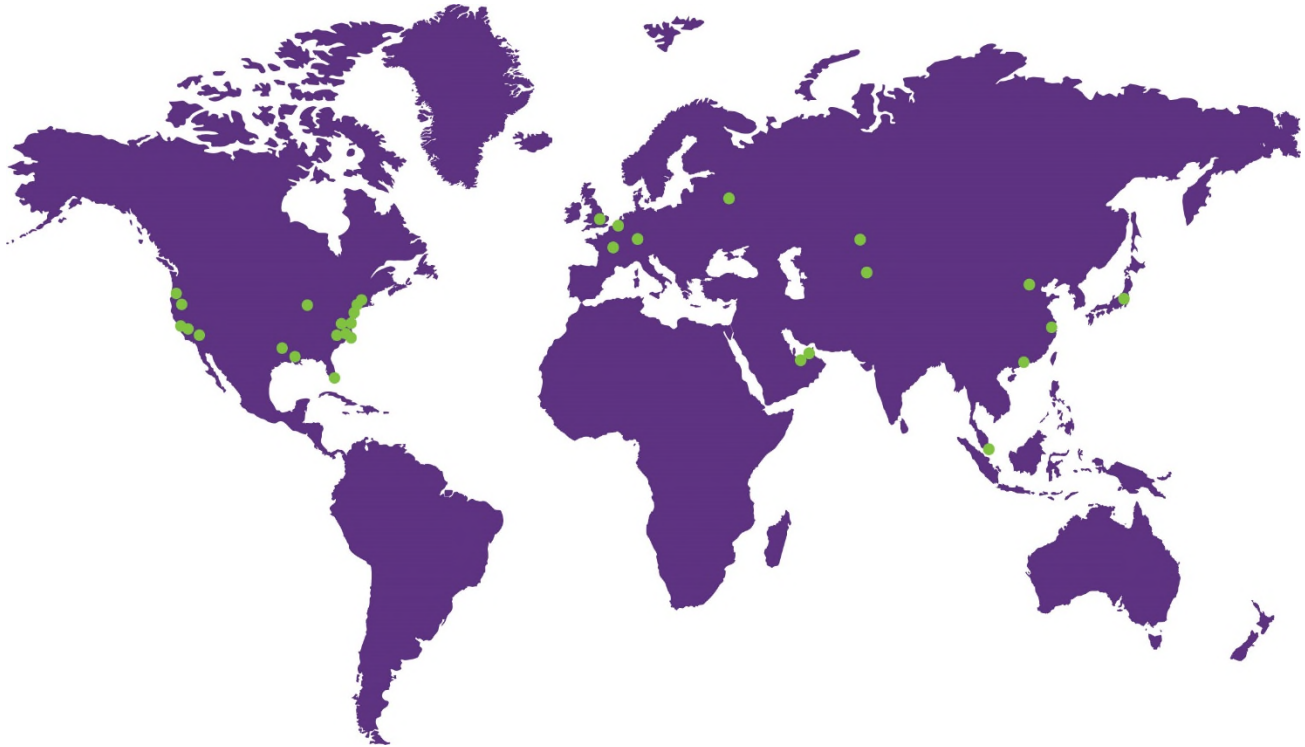

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