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# **REOPENING THE WORKPLACE**

**Strategies and Tips for Unionized Employers**

Joseph Ragaglia, David Broderdorf, Andriette Roberts | May 5, 2020

# General Reopening Plans – Last Week's Webinar

## Social Distancing

- **Physical workspace modifications** (e.g., separating desks, modifying open floor plans, closing common areas)
- **Limiting in-person interactions and physical contact** (e.g., no non-essential travel, no in-person meetings)
- **Training employees** on social distancing policies and protocols, including where to go with complaints
- **Update employee schedules** (e.g., staggered scheduling, telework for less essential personnel)

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## Safety Measures

- **Create infectious control procedures** (e.g., require frequent hand washing, limit sharing of equipment)
- **Regular screening protocols** for employees, customers/visitors (e.g., symptom, temp screening)
- **PPE procedures** (e.g., require workers and visitors to wear face coverings)
- **Workplace sanitization procedures** (e.g., provide hand sanitizer, require frequent sanitization of high-touch areas)
- **Follow current/updated guidelines** of local DOH, reopening orders, CDC, and OSHA for maintaining a clean and safe workplace

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## Enforcement/Accommodations

- **Develop/update accommodations policy** for vulnerable employees including alternative work arrangements
- **Develop policy for employees who fear returning to work or refuse to return to work**
- **Develop PPE enforcement policy** including discipline for those who refuse to wear face covering
- **Update/develop complaint procedures and training** on enforcement/discipline/accommodations

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## COVID Monitoring

- **Establish procedure to address workplace exposure** (e.g., separate and send home workers who appear to have symptoms consistent with COVID-19, clean and disinfect workplace)
- **Develop procedures for contact tracing/notification** of known exposure consistent with ADA or state law

# Today's Topics

1. Effectively invoking management rights to meet business and safety needs
2. Aligning staffing levels and work hours to promote social distancing
3. Dealing with union health and safety committees and representatives
4. Responding to union pay demands, requests for information, and work stoppage threats
5. Incentivizing sustained attendance levels
6. Negotiating special MOAs or MOUs to deal with COVID-19 issues

# 1. INVOKING MANAGEMENT RIGHTS EFFECTIVELY

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# 1. Invoking Management Rights Effectively

**Real World Scenario:** Chief Operating Officer contacts you on Wednesday:

“We’re reopening five plants on Monday. I need you to finalize and implement a social distancing plan for each plant by this Sunday. The plan must include the following items:

- Mandatory facial coverings
- Use of PPE (face masks, gloves, etc.)
- 6+ foot rule for working in confined spaces or rooms
- Entry screening and temperature checks
- Positive COVID-19 and anti-body testing protocols
- Moving more employees to second/third shifts”

- Two of the five plants are unionized, with existing labor contracts.



# 1. Invoking Management Rights Effectively

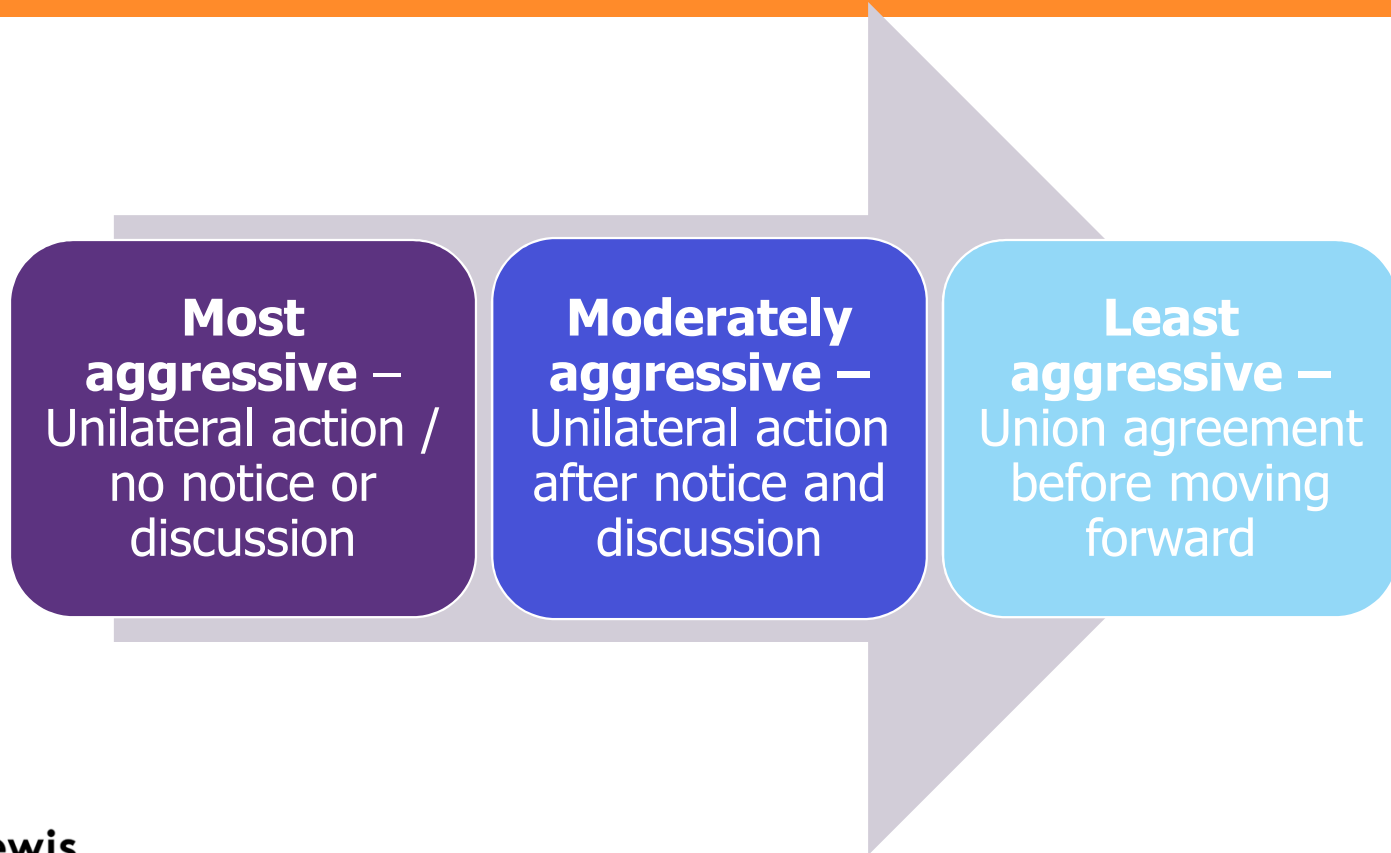
- Identify all labor contract language that could provide flexibility to implement necessary changes, such as:

Topics	Relevant language
Facilities and equipment	Right to control plant, equipment, tools
Supervision	Right to assign and direct employees
Rules and regulations	Right to establish or revise rules and regulations
Health & safety	Right to make medical decisions; health & safety decisions
Shift assignments	Right to assign employees to different shifts
Hours of work; breaks	Right to alter shift schedules and breaks temporarily or permanently

# 1. Invoking Management Rights Effectively

- Be careful about the following contract language, however:
  - Duty to notify union in advance of changes, even if right to implement? Past practice of doing so?
  - “New technology” provisions – are they implicated by new equipment or systems?
  - Restrictions on altering workplace rules and regulations, such as a reasonableness qualification?
  - Potential direct or indirect impact on disciplinary rules and standards?
  - Potential direct or indirect impact on fixed contractual rights, such as seniority, guaranteed work hours, etc.?

# 1. Invoking Management Rights Effectively



# 1. Invoking Management Rights Effectively

- **Key tips:**

- Even where management has an argument that it can act unilaterally, consider providing advance notice and opportunity to discuss the changes in advance of implementation.
  - Doing so also may fulfill any “effects” bargaining obligation that exists.
- Consider union alternatives in good faith, even if less desirable or not feasible. Doing so may result in agreement or reduce the likelihood of dispute.
- Advance notice and discussion also may be helpful should a dispute unfold at the NLRB or in arbitration.
- Disclaimers:
  - Statutory, regulatory, or executive mandates related to COVID-19
  - First contract bargaining and expired contracts – different and more complicated tests

# 2. ALIGNING STAFFING LEVELS AND WORK HOURS TO PROMOTE SOCIAL DISTANCING

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## 2. Aligning Staffing Levels and Hours to Promote Social Distancing

**Real World Scenario:** VP of HR calls you on Thursday about the employee recall/reopening process for Monday:

“For the reopening on Monday, our analysis shows we won’t need a full staff for the first four (4) weeks, and that we should move more employees to second or third shift to promote social distancing. Make sure this happens.”

- Again, two of the five plants are unionized, with existing labor contracts.

## 2. Aligning Staffing Levels and Hours to Promote Social Distancing

- How were employees let go? (furlough, layoff, separation, etc.)
- How do these distinctions impact the recall process or rights?
- What if some employees decline recall based on personal fears, obligations, or limitations?
- Can someone be recalled to a different shift, and if so, what is the process for doing so?

## 2. Aligning Staffing Levels and Hours to Promote Social Distancing

- **Key tips:**

- Look for “win/win” opportunities to avoid disputes over recall procedures.
- Incorporate employee scheduling flexibility where feasible (timing, shifts, hours, etc.).
- Consider unilateral rights versus “thinking outside the box” on shifts/hours that might require union agreement (4x10s, 3x12s, etc.).
- Consider potential telework possibilities based on practice to date, or creative thinking for the future.



# 3. DEALING WITH UNION HEALTH & SAFETY COMMITTEES AND REPRESENTATIVES

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### 3. Dealing with H&S Committees and Reps

**Real World Scenario:** Union President emails you in advance of the plant reopening on Monday:

“The Union is extremely disturbed by reports that you will reopen the plant on Monday without adequate health and safety precautions. The Union insists that all reopening plans be sent to the health & safety committee for review and approval before our employees are required to report to work.”

- How do you respond?

# 3. Dealing with H&S Committees and Reps

## Key tips:

- Master the contract language on health & safety committees, representatives, and union role on such issues
  - Confirm (ideally) that union does not have approval or veto power over necessary steps to ensure health & safety
  - Confirm (ideally) that union role is limited to notice and input/oversight of such initiatives
- Understand the historical role (or lack thereof) of committee and representatives on various initiatives
- Be prepared for push back on aggressive union communications to employees and the public on employer not complying with health & safety obligations

# 4. RESPONDING TO UNION PAY DEMANDS, RFIS, AND WORK STOPPAGE THREATS

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## 4. Responding to Union Pay Demands, RFIs, and Work Stoppage Threats

**Real World Scenario:** After one week back-to-work, the Union President sends you a letter with the following demands and threats:

“I understand the Company is complaining about poor attendance levels. I’m not surprised. Our employees have been forced to work in abnormally dangerous and unsafe conditions.”

“We demand the Company immediately implement a hazard pay program for all bargaining unit employees with \$5 extra per hour for at least the next six (6) months.”

“We also demand that the Company send us all names of employees who test positive for COVID-19 and that these employees and all employees who worked in the same department or general area be entitled to at least two weeks paid leave.”

“If the Company does not satisfy these demands, you may experience entire departments failing to show up for work or walking off the job due to these abnormally dangerous conditions.”

# 4. Responding to Union Pay Demands, RFIs, and Work Stoppage Threats

## Pay Demands

- What are competitors doing with pay?
- Can the business afford a temporary bonus or increase?
- Could financial incentives improve attendance or performance?
- How would the incentives impact overtime costs?

## RFIs

- Consider relevancy of union's requests
- Consider ADA and/or HIPAA restrictions on disclosure of personal information
- Don't assume the request(s) will go away

## Work Stoppage Threats

- Invoke "no strike" contract restrictions where feasible, including potential discipline
- Section 502 exception for "abnormally dangerous conditions"
- Don't acknowledge that term applies
- Sustained communication to union and employees about all health & safety measures to rebut fear and threats

# 5. INCENTIVIZING SUSTAINED ATTENDANCE LEVELS

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## 5. Incentivizing Sustained Attendance Levels

**Real World Scenario:** Plant manager of one of the unionized plants calls you after the reopening with the following problem:

“Attendance levels have been terrible since we reopened. We’re only getting about 60% of scheduled employees to work. What can you do to increase these numbers, and fast?”



# 5. Incentivizing Sustained Attendance Levels

## Carrots

Temporary wage rate incentives

Special attendance bonuses

Other perks for working

## Sticks

Limiting unpaid leave alternative(s)

Enforcement of attendance rules

Replacement with supervisors, contractors, or other employees

# 6. NEGOTIATING SPECIAL MOA/MOUS FOR COVID-19 ISSUES

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## 6. Negotiating Special MOAs/MOUs for COVID-19

**Real World Scenario:** The Union President calls you after a month of skirmishes, letter exchanges, and grievances with the following message:

“The past few weeks have been tough on us all. I get that. But the Company has blatantly violated the CBA numerous times under the guise of health and safety. This has to stop. Let’s get together to negotiate an MOA to resolve our major disagreements and settle pending grievances.”

## 6. Negotiating Special MOA/MOUs for COVID-19



### Step 1

- \* Assess Union leverage and priorities

### Step 2

- \* Assess Company leverage and priorities

### Step 3

- \* Consider the contractual "hook" for MOA/MOU
- \* Consider future bargaining impact, especially if scheduled for 2020

### Step 4

- \* Ensure any deal does not waive management rights
- \* Ensure deal has expiration date or cancellation clause

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**[SHOW ME THE MASKS: SUPPLYING FACE COVERINGS AND RESPIRATORS TO ESSENTIAL EMPLOYEES>](#)**

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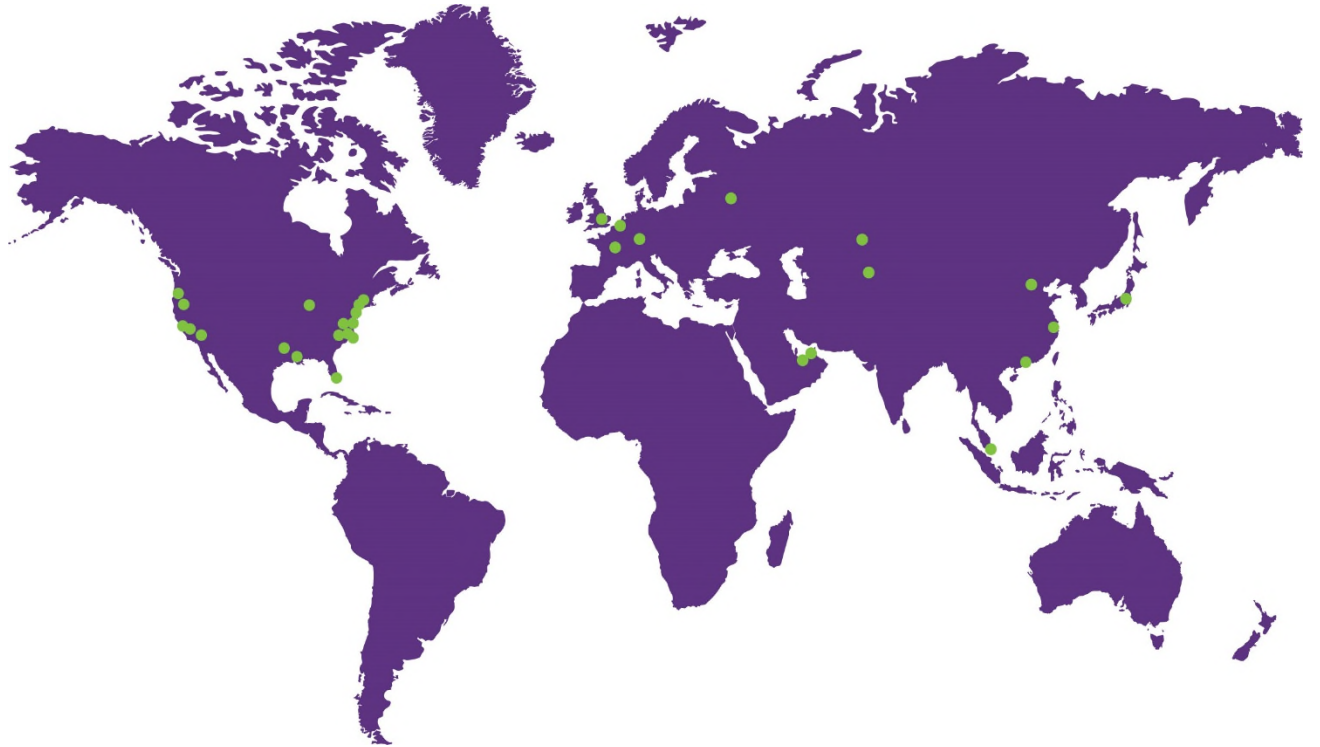
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