



COVID-19 WEBINAR SERIES

Returning to Work: Practical Guidance for Advanced Preparations

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SIDLEY

Today's Sidley Speakers



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Agenda

- Workplace Health and Safety Considerations
- LMRA/Collective Bargaining Agreements
- ADA and Employee Privacy Matters
 - ADA and Reasonable Accommodation
 - ADA and Privacy
- I-9 Compliance Issues
- Travel Bans and Special Considerations for Employers with Foreign National Employees



Workplace Health and Safety Considerations

- Every U.S. employer has a legal obligation under the federal **Occupational Safety and Health Act** to:
 - “furnish each of its 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 its employees.” 29 U.S.C. § 654(a)(1)
- In California, healthcare employers and other employers that operate internal healthcare departments on their premises also must comply with the **CalOSHA Aerosol Transmissible Diseases Standard** (California Code of Regulations, Title 8, §5199)
- This means that each employer must protect its employees from COVID-19 infection in the workplace
 - Essential businesses must continue to do so
 - Non-essential businesses must do so when shelter-at-home orders are lifted

Workplace Health and Safety Considerations

- **No employee safety precaution will be perfect**
 - Until an effective vaccine is developed
- **Three types of safety precautions that employers must consider when determining how to protect employees from COVID-19**
 - Engineering controls
 - Administrative controls
 - Personal Protective Equipment (PPE)



Workplace Health and Safety Considerations

- **Engineering controls**

- Controls that isolate employees from, or eliminate, the hazard
- Example:
 - Installation of plexiglass barriers or sneeze guards between employee work stations and/or customers
 - Construction of drive through or pass through windows
 - Physical rearrangement of work stations to maintain adequate employee working distance
 - Construction of negative pressure ventilation rooms
 - especially in healthcare settings where aerosol generating procedures are performed on patients



Workplace Health and Safety Considerations

- **Administrative controls**

- Controls that require action by the employer and/or employee to reduce employees' potential exposure to the hazard
- Two Goals
 - Minimize contact between employees and between employees and visitors/public
 - Clean, clean, clean
- Examples:
 - Modify work schedules/shifts, including continue remote work where feasible
 - Modify work practices
 - Promote personal hygiene (employees, visitors and the public)
 - Direct employees not feeling well to stay home
 - Contact trace if potential for COVID-19 exposure
 - Testing(?)



Workplace Health and Safety Considerations

- **Personal Protective Equipment (PPE)**

- Equipment worn by employees to protect them from exposure to the hazard
 - Protective measure of last resort
- Examples:
 - Cloth masks
 - Not the same as respirators (N95)
 - Visitors/public(?)
 - Gloves
 - Disposable (nitrile, plastic)
 - Gowns, smocks
 - Especially where adequate employee working distance cannot be maintained
- Must be provided by employer
 - Employees can bring own PPE



Workplace Health and Safety Considerations

- **Be creative**
 - One size does not fit all
 - Protections need to be customized to the workplace
 - Develop and implement a COVID-19 employee protection plan
- **Thoroughly communicate precautions to employees**
 - Orally and in writing
 - Lots of misinformation
 - Thousands of employee complaints already have been filed with Federal OSHA and its State counterparts



LMRA/Collective Bargaining Agreements

- **For unionized employers**
 - Employment actions and procedures that affect the terms and conditions of unionized employees' employment are “mandatory subjects of bargaining” that normally must be negotiated
 - In cases of an unforeseen emergency, bargaining prior to shutdowns or layoffs may not be required
 - Fact specific
 - Employer has obligation to bargain about effects of the action once emergency passes, including recall and reopening procedures

LMRA/Collective Bargaining Agreements

- **CBA may provide...**

- Management rights
- Workplace safety
- PTO/Vacation
- Scheduling
- “Zipper” clause



- Section 502 provides: if employees refuse in good faith to work because of “**abnormally dangerous conditions for work at the place of employment,**” their work stoppage will not be considered a strike
 - Unclear if COVID-19 qualifies

LMRA Protections Relevant to All Employers

- **For all employers**
 - Employees have the right to “*engage in concerted activities for the purpose of . . . mutual aid or protection*”
 - Employees who discuss or complain about wages, workplace policies, management personnel, are exercising their protected rights
 - One individual is enough if he or she is acting on behalf of others
- **Employers may not discipline or discharge employees in response to their protected activities**
- **Concerted refusal of a work assignment due to COVID-19 likely protected**
 - Must be reasonable based on good-faith belief that working conditions are unsafe
 - Protections lost only when employee actions involve threats of violence, sabotage of workplace, disclosure of trade secrets, spreading malicious falsehoods or similar reckless conduct

ADA Considerations

- **Reasonable accommodations**
 - How should employers approach accommodations during the pandemic?
 - What constitutes an undue hardship?
- **Is remote work an accommodation?**
 - **Workers' compensation issues**
 - **Business expenses**



Obstacles to Return to Work

- **Childcare issues**

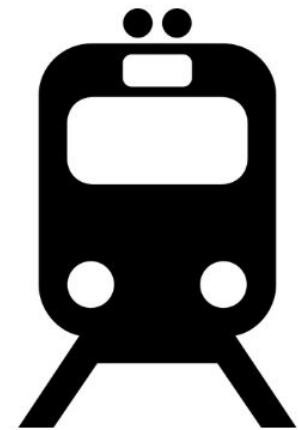
- Legal vs Practical
- State leave laws to cover childcare
- Family status discrimination claims in return to work

- **Transportation**

- Reduced public transportation
- Employer-subsidized transportation; what are the issues?
 - Wage and hour
 - Cost

- **Employee fear**

- What to consider when an employee refuses to come to work
- Vulnerable employees
- Is every vulnerable employee protected by the ADA in the context of COVID-19?



Employee Privacy Matters

- **What information employers request**
 - Fitness for duty, certifications, temperature testing, contact-related information
 - Americans with Disabilities Act
 - Medical inquiries and examinations
 - Asking about symptoms of the pandemic
 - Genetic Information Non-Discrimination Act
 - State law
 - Importance of jurisdictional considerations generally



Employee Privacy Matters (cont'd)

- **How you collect it**

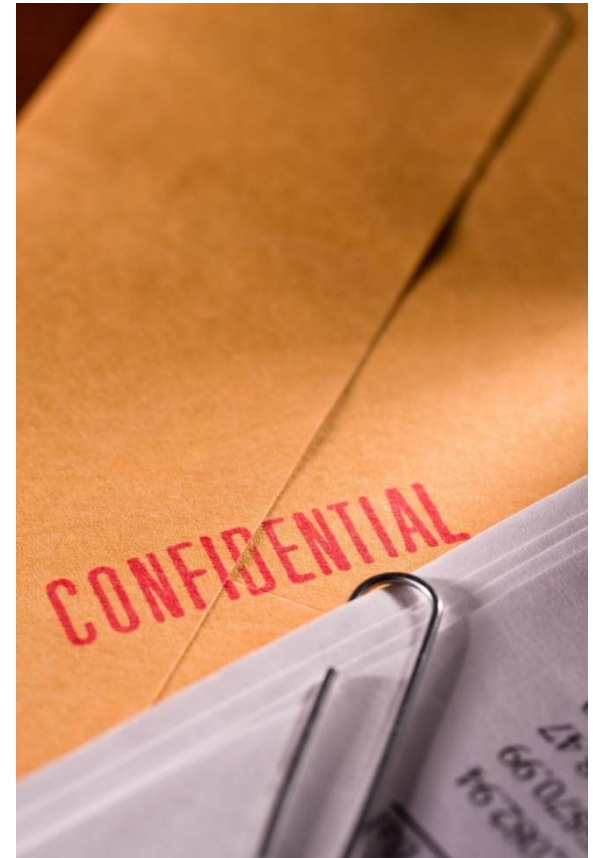
- Notice considerations
- Communications with employees more generally

- **How you maintain it**

- Notes and documentation
- Confidential medical record
- Stored separately
- Knowing what you know

- **With whom you share it**

- Confidentiality
- Public health authorities



Short-Term and Longer-Term Return to Work

- **Short-Term**

- Return to work guidance or requirements relating to essential businesses
 - Test-based strategy
 - Non-test based strategy (e.g., April 13 healthcare personnel guidance re: 72 hours since recovery + improvement + seven days since symptoms)
 - State guidance on non-test based strategies
- Addressing employee concerns

- **Longer-Term**

- Testing
- Vaccinations



I-9 and E-Verify Considerations for Return to Work

- **I-9 process**

- Government accommodations during COVID-19 emergency
- Employees coming back from remote work
- Employees coming back after furloughs or RIFs

- **E-Verify process**

- Government accommodations during COVID-19 emergency
- Best practices for E-Verify clean-up during return to work

Travel Bans and Immigration Issues

- **Issues for foreign national employees returning to work**
 - Audit of job duties, immigration status expirations, due dates
 - Considerations for return to work after furloughs and remote work arrangements
 - F-1 students in practical training
 - H-1B workers
 - PERM process
- **Travel restrictions for U.S. workers and foreign national employees**
 - Consular closures
 - Travel bans
 - Newest Executive Order with expanded immigration restrictions

Q&A



THANK YOU FOR JOINING US

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PRACTICES

- Investment Funds
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ADMISSIONS & CERTIFICATIONS

- U.S. Supreme Court
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- U.S. Court of Appeals, 8th Circuit
- U.S. District Court, N.D. of Illinois – General
- U.S. District Court, N.D. of Illinois – Trial Bar
- Illinois

EDUCATION

- Northwestern School of Law (J.D., 1984, *cum laude*)
- Northwestern University (B.A., 1981)

PATRICK S. CASEY is senior counsel in Sidley's Chicago office. For more than 30 years, he has practiced in all aspects of labor and employment law. He has tried breach of contract and age, race and sex employment discrimination cases (including those involving denial of tenure) before judges and juries, presented oral argument before the United States Courts of Appeal for the Seventh and Eighth Circuits and appeared before the United States Supreme Court.

Pat has conducted several highly sensitive internal investigations involving allegations of fraud of high level executives. He has guided two large public utilities through a 500 person reduction-in-force without incurring one discrimination charge, and has successfully prosecuted and defended restrictive covenant cases for accounting firms, telecommunications companies and physician groups. Industry sectors in which Pat has substantial employment experience include hedge funds, healthcare and nonprofits.

Pat's traditional labor practice includes counseling employers about union relations, defending employers against unfair labor practices and representing employers during collective bargaining negotiations and in arbitration proceedings. He helped transform a chemical company's very traditional collective bargaining relationship into one that contained skill blocks and incentive pay without any strikes or other work disruptions. He also successfully negotiated a project labor agreement on behalf of a large airline with respect to its construction of a new terminal at a major metropolitan airport.

A significant portion of Pat's practice involves representing clients nationwide in occupational and mine safety and health investigations and litigation with the federal Occupational Safety and Health Administration (OSHA), its state counterparts, the U.S. Chemical Safety and Hazard Investigation Board, the U.S. Department of Transportation (DOT), the Environmental Protection Agency (EPA) with respect to its Risk Management Plan enforcement, and the Mine Safety and Health Administration (MSHA). Pat has investigated, litigated and favorably settled several OSHA, MSHA, EPA and DOT citations involving five and six-figure penalties. He also has represented clients nationwide in industrial accidents (including falls, electrocutions and asphyxiations), explosions and chemical releases involving multiple employee fatalities and serious injuries. He has conducted one- to three-week occupational safety and health reviews of clients' facilities, including large petroleum refineries, asphalt refineries, chemical facilities and a packaging plant. Pat defends employers against employee whistleblower claims investigated by OSHA under numerous federal laws, including under the Sarbanes-Oxley Act (one such claim involved an employee of a U.S. company's foreign subsidiary).

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EDUCATION

- Yale Law School (J.D., 2009); Book Reviews & Features Editor, *Yale Law Journal*, Co-Editor-in-Chief, *Yale Journal of International Law*
- Yale University (B.A., 2004, *summa cum laude*)

CLERKSHIPS

- John G. Roberts Jr., United States Supreme Court (2010-2011)
- Merrick B. Garland, U.S. Court of Appeals, D.C. Circuit (2009-2010)

KATE HEINZELMAN is a member of Sidley's Privacy and Cybersecurity, Healthcare and Commercial Litigation groups. Her practice focuses on investigations, counseling, and litigation on technology, privacy, and regulatory matters, particularly in the healthcare and life sciences sectors.

Representative matters include:

- Coordinating a multidisciplinary, global rapid data breach response effort for a multinational company;
- Conducting data-driven healthcare fraud and abuse investigation;
- Designing cybersecurity and data privacy compliance programs and procedures;
- Working with clients across industries on data security incident and crisis response; and
- Counseling healthcare, life sciences, and technology companies on complex regulatory and enforcement matters.

Kate also maintains an active pro bono practice. Among other matters, she has:

- Briefed, argued, and won *In Re Estate of Rosa North Ford* (No. 17-PR-463) (D.C. Jan. 31, 2019), which established an individual's right in the District of Columbia to inherit as an heir from an intestate's estate under equitable principles; and
- Briefed, as *amici curiae*, challenge to constituent Facebook blocking on First Amendment grounds in *Davison v. Randall* (No. 17-2003) (4th Cir. Jan. 7, 2019), the first decision by a federal appellate court to address the First Amendment's application to officials' social media accounts.

Kate brings to her practice substantial experience working with a broad range of government agencies and federal programs across the national security, healthcare, and energy and environmental fields. Before joining Sidley, Kate was Deputy General Counsel at the Department of Health & Human Services. While there, she oversaw a variety of projects and agencies, including components of the Centers for Medicare & Medicaid Services, the Public Health Division, the Office for Civil Rights and the Office of the National Coordinator. Before joining the Department of Health & Human Services, Kate worked in the White House Counsel's Office as Special Assistant and Associate Counsel to President Barack Obama. In this role, she advised the President and his Administration on crisis response, national security, privacy and technology, energy, and environmental matters. Kate also served as Counsel to the Assistant Attorney General for National Security at the Department of Justice, where she provided counsel to departmental leadership on national security operational and litigation matters as part of the division's front office.

Kate served as a law clerk to Chief Justice John G. Roberts, Jr. on the U.S. Supreme Court.

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- U.S. District Court, N.D. of California
- U.S. District Court, S.D. of California
- U.S. District Court, W.D. of New York
- U.S. District Court, N.D. of New York
- U.S. District Court, S.D. of New York
- California
- New York

EDUCATION

- Albany Law School of Union University (J.D., *cum laude*, Trustee Prize)
- Binghamton University (with honors)

WENDY LAZERSON is the co-chair of Sidley's Labor and Employment international practice group and a partner in Sidley's San Francisco and Palo Alto offices. She also serves on the firm's COVID-19 Task Force. Wendy is a recipient of the BTI Client Service Award for excellence in service to clients. Clients turn to Wendy to handle their most challenging matters regardless of venue, due to her reputation as a thoughtful, pragmatic and strategic thinker. Wendy represents employers in litigation matters involving employment disputes such as discrimination and retaliation class actions and individual claims, sexual harassment, whistleblowing, wage and hour, trade secret theft, and PAGA. Wendy represents clients based in China and other foreign countries with U.S. subsidiaries and employees. Wendy regularly leads workplace investigations involving allegations of improprieties in the C Suite, including sexual harassment, violation of workplace policies and financial improprieties. Wendy's role counseling clients complements her litigation practice. She also trains workforces with regard to legal compliance and best practices to proactively avoid employee claims. Wendy has a long record of success obtaining arbitration awards, defense verdicts, summary judgement, and defeating class certification. Wendy is comfortable in front of a jury, a judge or an arbitrator.

In addition to practicing law, Wendy is the local chair on the Committee for the Retention and Promotion of Women. Wendy regularly speaks on topics of interest and has published many articles with thought leadership. Wendy has received many honors and awards reflecting her recognition by peers and clients, including *Chambers USA* (2019), BTI Client Service All-Star award (2017), *The Best Lawyers in California* (2015 – 2020), *The Best Lawyers In America* for Litigation — Labor and Employment (2016 – 2020), *Best Lawyers in Northern California* (2016 – 2020), *Super Lawyers* for Northern California — Employment and Labor (2008 – 2020), *San Francisco Magazine* as a Top Lawyer in Northern California (2013 – 2019) and a "Labor and Employment Star" (2020) by *Benchmark Litigation*.

Wendy earned her J.D. with distinction and honors, graduating *cum laude* from Union University, there winning the Trustee Prize awarded to the person ranked second in the graduating class. She attended Boston University and received her B.A. with honors from Binghamton University. She was invited to Law Review and to clerk for the Appellate Division of the New York State, Second Department.

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PRACTICES

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EDUCATION

- University of Pittsburgh School of Law (J.D., 1994)
- University of Pittsburgh (M.A., 1994)
- University of Pittsburgh (B.A., 1990)

MARKETA LINDT works with U.S. and multinational corporations to implement efficient business immigration visa programs to best attract and retain foreign national talent. Marketa also leads Sidley's I-9 compliance practice, where she counsels and defends companies regarding their hiring practices of foreign national employees and compliance with the government's I-9 verification requirements. Her I-9 compliance practice includes providing proactive counseling on I-9 hiring practices and the E-Verify process, defending employers in civil and criminal workplace enforcement actions, conducting immigration-related internal investigations, and conducting due diligence and analysis of I-9 issues in mergers, acquisitions and other corporate transactions. She also serves on the firm's COVID-19 Task Force.

In addition to representing U.S. companies with their business immigration and I-9 compliance needs, Marketa is actively engaged in national and regional advocacy efforts to change our laws and regulations so that they better serve U.S. employers, foster economic growth and promote fairness and justice in the immigration system. In June 2019, she was installed for a one-year term as elected national President of the American Immigration Lawyers Association. As such, Marketa testified at a hearing before the House Judiciary Immigration Subcommittee regarding business immigration processing delays at USCIS. Marketa also serves as a member of the U.S. Chamber of Commerce immigration policy committee.

Marketa is recognized as a leading corporate immigration attorney in the Chambers & Partners Global and National Immigration ranking, International *Who's Who of Business Lawyers*, *Who's Who Legal: Illinois*, *Who's Who Legal Thought Leaders – Corporate Immigration* and *The Best Lawyers in America*. She is also recognized as an Immigration Trailblazer by the *National Law Journal*.

Marketa regularly speaks at national and regional conferences regarding business immigration law and I-9 compliance. She is a primary author of the immigration law and practice treatise *Business Immigration Law*. Marketa has also authored articles for a number of leading immigration texts, including AILA's *Guide to Worksite Enforcement and Compliance*, the *Guide to PERM Labor Certification*, and numerous annual editions of the *Immigration & Nationality Law Handbook*. She serves as an editor of Kurzban's *Immigration Law Sourcebook*. She has appeared a number of times on television, radio and print regarding developments in immigration law.

In addition to her business practice, Marketa is committed to providing access to counsel for underserved immigrants. She serves in an advisory capacity to several Chicago-area cultural institutions and organizations that provide assistance to underserved immigrant communities. For a number of years, Marketa has served as a member of the Leadership Board of the National Immigrant Justice Center in Chicago.

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EDUCATION

- University of Minnesota Law School (J.D., 1993, *magna cum laude* Order of the Coif); *Phi Beta Phi*, Articles Editor, 1992-1993, Staff Member, 1991-1992, *Minnesota Law Review*
- Princeton University (M.A., 1988, NSF Graduate Fellowship)
- Kenyon College (B.A., 1986, *summa cum laude*, *Phi Beta Kappa*)

JAMES D. WEISS is counsel in the Employment and Labor group in Chicago. Mr. Weiss practices in all areas of employment and labor law, with a particular emphasis on labor-management relations and wage and hour issues. He regularly provides training and strategic and day-to-day advice to clients regarding such matters as collective bargaining, labor issues in domestic and international corporate transactions, responding to union organizational campaigns, drafting and enforceability of restrictive covenants, exemptions under the Fair Labor Standards Act, entitlements to leave and overtime, reductions in force, individual and group exit incentives and separation packages, and compliance with the full range of other statutory and regulatory requirements facing employers today.

Mr. Weiss is also an experienced litigator, having successfully represented employers before state and federal courts and administrative bodies including the United States District Court for the Northern District of Illinois, the United States District Court for the Central District of Illinois, the National Labor Relations Board, the Illinois Circuit Court, the EEOC, the United States and Illinois Departments of Labor, the Illinois Department of Human Rights, and the Illinois Human Rights Commission, as well as in numerous labor arbitrations. He recently obtained summary judgment in federal court on behalf of a nationally known food processor in a multi-plaintiff action for claimed severance benefits, with potential liability in excess of one million dollars.

Mr. Weiss' clients include major public utilities (with over 10,000 employees), international accounting and consulting firms, banks, international hotel chains, building management associations, and a wide range of manufacturers and machine shops, both large and small, in several different industries.

Prior to joining the firm in 1994, Mr. Weiss served as a law clerk to the Hon. Donald P. Lay, Senior Judge, U.S. Court of Appeals for the Eighth Circuit. He has published on behalf of the firm several articles regarding the Fair Labor Standards Act and "Nominal Damages, Nominal Victory: *Estate of Farrar v. Cain's* Improper Limit on Awards of Attorneys' Fees under § 1988," 76 *Minnesota Law Review* 1251 (1992).

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- U.S. District Court, C.D. of California
- U.S. District Court, S.D. of California
- California

EDUCATION

- Cornell Law School (J.D., 2007, *cum laude*)
- University of California, Berkeley (B.A., 2001, with honors)

GALIT KNOTZ focuses her practice on labor and employment matters including class and representative actions, wage and hour issues, discrimination, harassment and wrongful termination. She has experience representing clients in the retail, food service, financial services, communications and entertainment industries, and has provided counsel on compliance issues.

Galit served as an extern to the Honorable R. Gary Klausner of the United States District Court, Central District of California. She earned her J.D., *cum laude* from Cornell Law School, where she was Note Editor of the *Cornell International Law Journal*. Galit received her B.A. in English, with honors, from the University of California, Berkeley.

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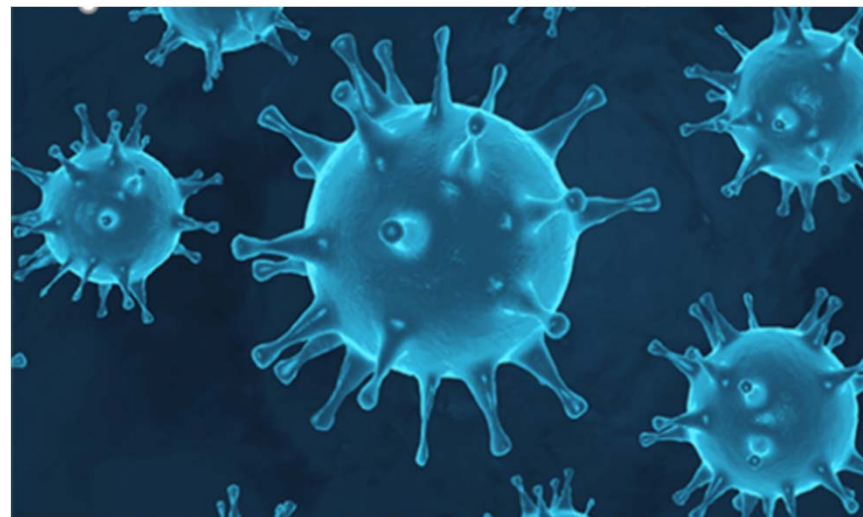
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Sidley COVID-19 Resource Center

The outbreak and rapid spread of the coronavirus disease (COVID-19) has roiled markets and disrupted supply chains, threatening the global economy. It is forcing companies to confront a host of hard questions about how they can and should conduct business during a global public health crisis.



The Sidley COVID-19 Resource Center offers insights from across Sidley's many practice disciplines to provide timely perspective on what companies can do now and how they can prepare for the future.

To access the resource center simply visit www.sidley.com and type COVID-19 Resource Center into the search bar.

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