



## Managing the COVID-Era Workplace

Part 2: OSHA and State Safety & Health Law –  
New Requirements, Risks and Rewards

*Webinar Attendees:*

*Our phone lines are muted until the presentation begins at approximately 11:00 a.m. Pacific. If you are experiencing any technical or sound issues, please contact Stoel Rives Events at [events@stoel.com](mailto:events@stoel.com).*

1



## Managing the COVID-Era Workplace

Part 2: OSHA and State Safety & Health Law –  
New Requirements, Risks and Rewards

Presented by:

Karin Jones and Tim O'Connell  
Labor and Employment Practice Group

Willa Perlmutter  
Environmental, Land Use, and Natural Resources Practice Group

June 25, 2020

2

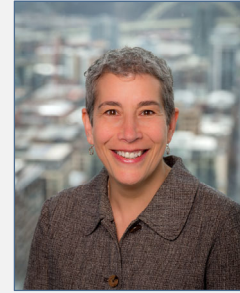
## Today's Presenters:



**Karin Jones**  
206.386.7598  
karin.jones@stoel.com



**Tim O'Connell**  
206.386.7562  
tim.oconnell@stoel.com



**Willa Perlmutter**  
503.294.9462  
willa.perlmutter@stoel.com

## Specific OSHA/State Statute or Regulation on COVID-19

- Crickets
- DC Circuit: Double Crickets
- But:
  - Jesus: Golden Rule
  - Kant: Categorical Imperative
  - OSHA: General Duty Clause

## General Duty Clause

- OSHA Sec. 5(a)(1):  
Each employer -- shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees
- Similar:  
RCW 49.17.060(1)  
ORS 654.010

5

5

## Electronic Showing of Hands

- Anyone doubt COVID-19 is a recognized hazard?
- So, how to furnish a workplace free from the recognized hazard?

6

6

## State Re-Opening Plans – Workplace Safety Components

- State Specific  
We'll focus on Washington and Oregon
- Industry Specific  
We won't attempt to cover every industry-specific set of requirements
- CDC Guidance

7

7

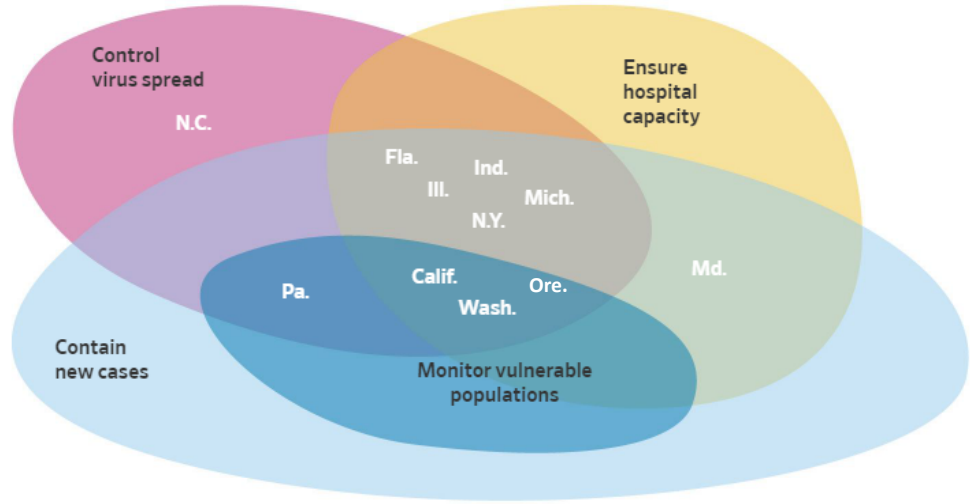
## Are Re-Opening Plans Enforceable Standards?

- Washington:  
Yes, Emergency Rule
- Elsewhere:  
Maybe  
General Duty Clause
- Requirement for a workplace standard:  
Based on “best available evidence”  
OSHA Sec. 6(b)(5)  
WISHA, RCW 49.17.050(4)
- Which is “best available” when there is such variation?

8

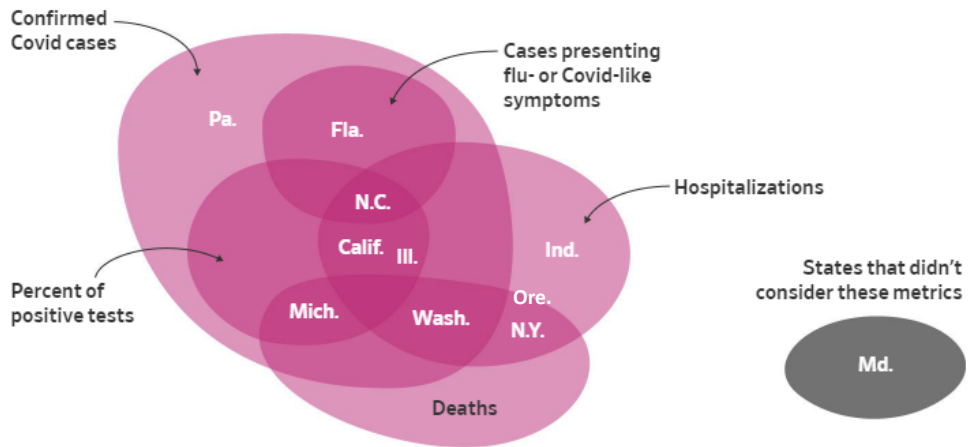
8

### Criteria Considered for New Phases of Reopening



Graphic originally published in the Wall Street Journal.

### Metrics Used to Control Virus Spread

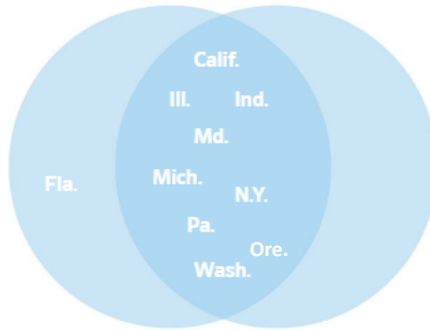


Graphic originally published in the Wall Street Journal.

### Metrics Used to Contain New Cases

Testing capacity

Contact-tracing capacity



States that didn't consider these metrics

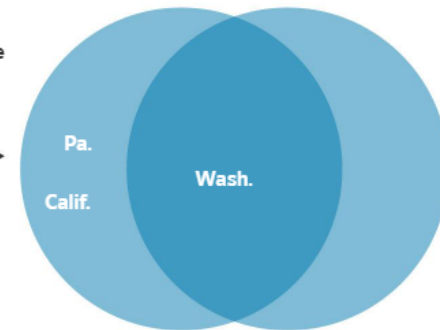


Graphic originally published in the Wall Street Journal.

### Metrics Used to Monitor Vulnerable Populations

Outbreaks in long-term-care facilities

Racial and other demographic disparities



States that didn't consider these metrics



Graphic originally published in the Wall Street Journal.

# The Hierarchy of Controls

13

## Engineering Controls

- Air filters or ventilation
- Reconfigure workspaces for social distancing
- Physical barriers/shielding

14

14

## Administrative Controls

- Require sick/exposed employees to stay home
- Entry screening
- Social distancing
- Staggered schedules, breaks, etc.
- One-way foot traffic
- Enhanced cleaning/disinfecting
- Provide hand-washing & sanitizing stations (see WAC 296-800-23025)
- Education & training
- Encourage customers/visitors to wear masks

15

15

## Personal Protective Equipment

- Masking  
Type depends on work  
E.g., L&I: “Which Mask for Which Task?”
- Gloves, other PPE  
Depends on work

16

16





Stoel Rives<sup>LLP</sup>

# Reporting and Record Keeping

17



Stoel Rives<sup>LLP</sup>

## Work Related?

- Employee COVID-19 cases must be recorded & reported on OSHA 300 log if work related
- What must employer do to determine work-relatedness?
- OSHA Guidance clarifies that it will consider:
  - Reasonableness of investigation
  - Evidence available to the employer
  - Evidence that COVID-19 was contracted at work vs. contracted somewhere else
- Some states may presume work-relatedness of COVID-19 (e.g., CA for workers' comp purposes)

18

18

## Reporting & Record Keeping

- Reporting COVID-19 to local or state health authorities:
  - No federal requirement
  - Usually left to medical providers/labs, not employers (but check local & state law)
- Maintaining COVID-19 records:
  - OSHA 300 logs
  - Contact tracing information
  - Leave records

## Circumventing the Agencies: Workplace Safety Claims in the Courts

## Workplace Safety Violations and Employer Liability

- Generally: no direct suit over alleged violation of workplace safety standard
- Workers' comp is exclusive remedy, with very limited exceptions
  - Oregon: if the employer's "willful and unprovoked aggression" was a substantial factor in causing the injury (ORS 656.018(3))
  - Washington: if the employer deliberately intended to produce the injury (RCW 51.24.020)

21

21

## "Novel" Approaches to Navigating Around the Comp Bar

- Issues
  - Workers' comp bar
  - Claim for damages vs. claim for equitable relief
  - Preemptive oversight by OSHA
- "Nuisance" claims
  - Amazon (S.D.N.Y.)
  - McDonald's (Illinois and California)
  - Smithfield Foods Inc. (W.D. Mo.)

22

22

## Concerted Activity

- Fear: potent union organizing tool
- If employees act together:
  - No union need be involved
  - Still protected by federal law
  - If employees strike, may be protected
  - Even if in violation of CBA – Sec. 502

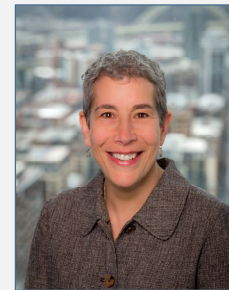
## Questions?



**Karin Jones**  
206.386.7598  
karin.jones@stoel.com



**Tim O'Connell**  
206.386.7562  
tim.oconnell@stoel.com



**Willa Perlmutter**  
503.294.9462  
willa.perlmutter@stoel.com

## Disclaimer

The content presented in these webinar materials is not privileged and does not create an attorney-client relationship. Please contact us directly if you need specific legal advice.