

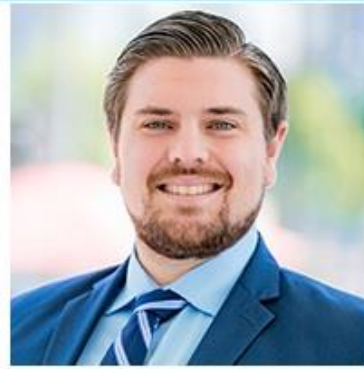
Complying with the COVID-19 Response and Reopening Liability Assurance Act



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**BOMA/METRO DETROIT
MEGA EDUCATION WEBINAR
MARCH 25, 2021**

Presentation Outline

- MDHHS Epidemic Orders and Executive Orders
- MIOSHA Emergency Orders and CDC Guidelines
- COVID-19 Response and Reopening Liability Assurance Act and Safe Harbors
- Future State and Hypotheticals

Michigan Department of Health and Human Services – Epidemic Orders



The revolving door that will continue to spin as we navigate the Covid-19 Pandemic

General Overview

- To date, the MDHHS has issued a total of 44 different Epidemic Orders
- Of these 44 Orders, 22 have since been rescinded
- Many of the rescinded Orders still impact potential Covid-19 claims since the claims relate back to the date of the “exposure”
- Making sure you complied with the Orders in place on the date of the exposure is key to optimizing protection

Epidemic Orders

March 23 – Reporting Covid-19 Test Data	June 29 – Visitation at Juvenile Justice Facilities	October 6 – Reporting COVID – 19 Cases at Schools	December 8 – Requirement for Residential Care
April 2 – Reinforcing Executive Orders	June 30 – Nursing Home Visitation	October 9 – Gathering/Face Covering Order	December 18 - Gathering/Face Mask Order
April 4 – Funeral Director Reporting	June 30 – Reinforcing Executive Orders	October 20 – Schedule of Fines for Violation	January 4 - Gathering/Face Mask Order
April 28 – Safe Housing for Michigan Homeless	August 14 – Mandatory Testing, Prevention and Safe Housing for Agricultural Workers	October 21 – Residential Care Requirements	January 11 – Testing of MI Nursing Home Inspection Staff
May 4 – Handling Bodily Remains	August 19 – Prison Testing	October 26 – Rescission of Emergency Orders	January 13 – Hospital, Labs and Health Professionals
May 18 – Reinforcing Executive Orders	September 10 – Exceptions to Restrictions on Entry into residential Care Facilities	October 28 – Testing in Skilled Nursing Facilities	January 13 – Gathering/Face Mask Order
May 22 – Emergency Order Safe Housing for Unstable Individuals	September 14 – Mandatory Testing for MDHHS Hospitals/ Centers Staff	October 29 – Restriction on Entry to Juvenile Justice Facilities	January 22 – Gathering/Face Mask Order
May 27 – Reinforcing Executive Orders	September 21 – Mandatory Testing for MDHHS Juvenile Justice Staff	October 29 – Gathering/Face Mask Order	February 2 – Administration of COVID-19 Tests
June 3 – Hospital Visitation	October 5 – Gathering/Mask Order	November 18 – Gathering/Face Mask Order	February 2 – Standing Order for COVID-19 Testing
June 10 – Reinforcing Executive Orders	October 6 – Requirements Residential Care	December 1 – Testing of MI Nursing Home Inspection Staff	February 4 – Gathering/Face Mask Order
June 15 – Nursing Home Testing	October 6 – Restriction on Entry to Juvenile Justice Facilities	December 7 – Gathering/Face Mask Order	February 10 – Mandatory Testing for Prison Staff

Epidemic Orders

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MDHHS Orders Applicable to BOMA

- April 2, 2020 – Reinforcing Executive Orders 2020-11, 2020-20 and 2020-21 (Rescinded October 26, 2020)
- May 18, 2020 – Reinforcing Executive Orders 2020-69, 2020-71, 2020-91 and 2020-92 (Rescinded October 26, 2020)
- May 27, 2020 – Reinforcing Executive Orders 2020-69, 2020-71, 2020-96 and 2020-97 (Rescinded October 26, 2020)
- June 10, 2020 – Reinforcing Executive Orders 2020-110, 2020-114 and 2020-115 (Rescinded October 26, 2020)
- July 30, 2020 – Reinforcing Executive Orders 2020-153, 2020-160 and 2020-161 (Rescinded October 26, 2020)
- October 5, 2020 – Emergency Order Under MCL 333.2253 – Gathering Prohibition and Mask Order (Rescinded October 9, 2020)
- October 9, 2020 - Emergency Order Under MCL 333.2253 – Gathering Prohibition and Mask Order (Rescinded October 29, 2020)
- October 20, 2020 – Emergency Order Under MCL 333.2253 – Schedule of Fines for Violation of Emergency Orders (Remains in effect for 6 months)
- October 26, 2020 – Rescission of Emergency Orders Reinforcing Executive Orders
- October 29, 2020 - Emergency Order Under MCL 333.2253 – Gathering Prohibition and Mask Order (Rescinded November 18, 2020)
- November 18, 2020 - Emergency Order Under MCL 333.2253 – Gathering Prohibition and Mask Order (Remains in effect until December)

MDHHS Orders Applicable to BOMA Since Last Session

- December 7, 2020 – Gatherings and Face Mask Order (Rescinded December 18, 2020).
- December 18, 2020 – Gatherings and Face Mask Order (Rescinded January 13, 2021).
- January 13, 2021 – Gatherings and Face Mask Order (Rescinded February 1, 2021).
- January 22, 2021 – Gathering and Face Mask Order (Rescinded February 8, 2021).
- February 4, 2021 – Gathering and Face Mask Order

December 7 Order Regarding Re-Opening

- Order allowed for the re-opening of many services and businesses previously closed by MDHHS Orders
 - Hair salons, 25 people outdoor gatherings, gyms, ice rinks, pool, retail, outdoor dining/delivery, childcare, outdoor recreation, funerals, manufacturing and construction.
 - All require face mask. Person responsible for business must make sure it is complied with.
- However, as I'm sure we've all grown accustomed to by now, masks and social distancing remained at the forefront, along with restrictions.
 - Retail – 30% occupancy
 - Gyms – 25% occupancy and 12 feet between stations
 - Outpatient facilities/veterinarians – persons not in same household remain 6 feet apart.
 - Ice Rinks – 20 people per 1,000 square feet.
 - Care Services (tattoos, hair, piercing, etc.) – gatherings allowed so long as does not involve removing face mask.

December 18 Gathering Order

- Allowed for re-opening of additional services/businesses.
 - Theaters, stadiums, arenas, bowling centers, bingo halls, arcades, outdoor group fitness
- Entertainment facilities have restrictions that must be complied with.
 - No more than 6 people from same household in shared area, 6 feet apart.
 - No food/beverage sold or consumed.
 - Operate at 20% capacity.
- Since the December 18, 2020 Order supersedes the previous Order, it sets out the same limitations previously provided by MDHHS related to:
 - Retail
 - Gyms
 - Outpatient facilities
 - Care Services (tattoos, piercings, hair, etc.).

January 13 Gathering Order

- Indoor fitness classes allowed to reopen.
 - Yoga studios, cycling bars, jazzercise classes, boot camp classes, etc.
 - Gatherings for group fitness classes are permitted, provided that all persons maintain 6 feet social distance and are masked for duration of the workout.
- Non-contact sports allowed to resume
 - Allow for gatherings at non-contact sports so long as it does not exceed 25% total occupancy
 - Participants must maintain 6 feet from one another at all times

January 22 Gathering Order

- Allowed for the reopening of Restaurants and Bars!
 - Designated dining areas
 - Groups no more than 6 seated together
 - Groups are seated 6 feet apart
 - Limited to 25% or 100 persons, whichever is less
 - Closed between 10:00 p.m. and 4:00 a.m.
- If an employee tests positive for COVID-19, or shows symptoms while working, gathering at the establishment will be **prohibited** until deep clean performed consistent with CDC Guidance.

February 4 Order on Additional Gatherings

- Allow for Michigan to resume Contact Sports
 - Participants within your facilities remain masked. If unable to, all participant must be tested and confirmed negative.
 - Gatherings of participants prohibited unless social distancing can be maintained when not engaged in play.
 - Sport organizers, venues and teams must make sure strict compliance.
 - Sport Organizers encouraged to administer a testing program.

Meaning of Rescission

- Although the December 7th, December 18th, January 13th and January 22nd orders have been “rescinded,” the guidance and rules behind them have been reaffirmed in each subsequent Order issued by MDHHS.
- You must still follow the guidance laid out in each order for re-opening your business/service

Contact Tracing Requirements

- Gatherings are prohibited unless the facility maintains accurate records of date, time of entry, names of patrons and contact information, gatherings are prohibited.
 - Goes for business providing hair, nail, tanning, massage, spa, tattoo, body art, piercing services and exercise facilities.

In-Home Services and Contact Tracing

- Must not permit employees to gather with clients unless the business maintains appointment records including date/time of service, name of client and contact information.
 - Cleaners, repair persons, painters.

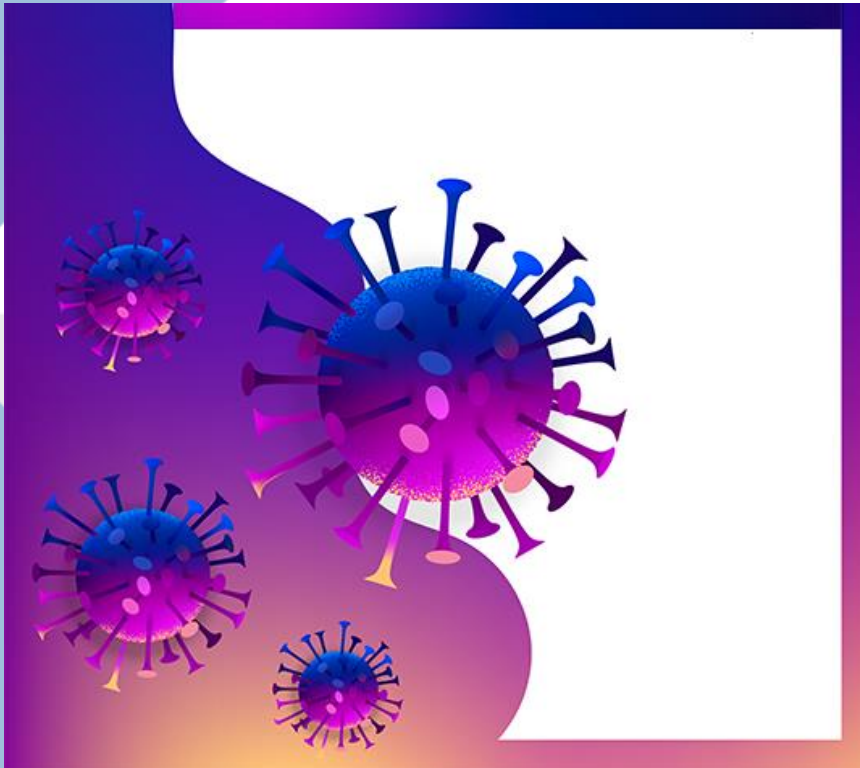
Dine-In Food Services

- **MUST** maintain accurate records of the names and phone numbers of persons who purchase food for consumption on the premises, including date and time of entry.

Compliance

- Upon request, businesses and other facilities **MUST** provide names/phone numbers of individuals with possible COVID-19 exposure to MDHHS to aid in contact tracing.
- Make sure tenants are keeping accurate records to avoid “potential” liability down the road.

Michigan Occupational Safety and Health Administration – COVID 19 Emergency Rules



- Issued October 14, 2020
- In place for six (6) months
- Applies to all employers who fall within the Michigan occupational safety and health act
- Requires employers to categorize each job into risk categories
- Requires employers to develop a COVID-19 preparedness and response plan consistent with CDC and OSHA

Risk Categories

- **Low Risk Work:**
 - Requires minimal contact with the public and other coworkers.
- **Medium Risk Work:**
 - Requires frequent or close contact with the public, including people who may be infected with COVID-19, but who are not known or suspected COVID-19 patients.
 - Examples: schools, high-population-density work environments, high-volume retail settings.
- **High/Very High Risk Work:**
 - High potential for exposure to known or suspected sources of COVID-19.
 - Examples: health care professional, first responders, nursing home employees, law enforcement, correctional officers, mortuary workers.

Workplace Controls



- Designate COVID-19 safety coordinator
- Provide training to employees on COVID-19
- Daily self-screening protocol
 - Questionnaire covering symptoms and suspected or confirmed exposure to people with COVID-19 and, if possible, temperature screening
- Maintain 6 feet between employees
- Face Coverings:
 - The employer shall provide non-medical grade face coverings to their employees at no cost to the employee.
 - The employer shall require face coverings to be worn when employees cannot consistently maintain 6 feet of separation from other individuals in the workplace and **consider face shields** when employees cannot consistently maintain 3 feet of separation from other individuals in the workplace.
 - The employer shall require face coverings in **shared spaces**, including during in-person meetings and in restrooms and hallways.

Remote Work

- Remote work Rule: **The employer shall create a policy prohibiting in-person work for employees to the extent that their work activities can feasibly be completed remotely.**
- MIOSHA will accept a written policy which indicates that employees are not to perform in-person work activities where the work activity can be feasibly completed remotely.
- Employers are obligated to demonstrate infeasibility of remote work.
- Employers should include in the remote work determination information which covers at least:
 - Which positions/classifications report for in-person work and why they must be physically present in the workplace.
 - Reasons that this work cannot be performed remotely, this must include enough specificity to show this analysis has been performed.
- This written policy may be part of the employer's COVID-19 preparedness and response plan. It does not have to be a stand-alone document.

Quarantine & Isolation



- **Rule: The employer shall physically isolate any employees known or suspected to have COVID-19 from the remainder of the workforce, using measures such as, but not limited to:**
 - (a) Not allowing known or suspected cases to report to work.
 - (b) Sending known or suspected cases away from the workplace.
 - (c) Assigning known or suspected cases to work alone at a remote location (for example, their home), as their health allows.
- **When an employer learns an employee has COVID-19, the employer shall:**
 - Immediately notify the local public health department, and
 - Within 24 hours, notify any co-workers, contractors or suppliers who may have come into contact with the person with
- **Employees with known or suspected COVID-19 may return to the workplace in accordance with CDC guidelines:**
 - Quarantine (non-confirmed, no symptoms) 14 days from the date of the last close contact.
 - Isolation (symptoms or confirmed with or without symptoms):
 - At least 10 days since symptoms first appeared and
 - At least 24 hours with no fever without fever-reducing medication and
 - Other symptoms of COVID-19 are improving
 - Loss of taste and smell may persist for weeks or months after recovery and need not delay the end of isolation

Recordkeeping Requirements

- **Employers must maintain a record of the following:**
 - COVID-19 employee training.
 - Daily screenings for each employee or visitor entering the workplace.
 - Notifications to the local public health department of known COVID-19 cases.
 - Notifications to co-workers, contractors, and suppliers of known COVID-19 cases.
- **Employers must maintain records for 1 year from time of generation.**

Construction Industry Specific Requirements

- Create dedicated entry point(s) at every worksite, if possible, for daily screening or in the alternative issue stickers or other indicators to employees to show they received screening before entering the worksite that day
- Identify choke points and high-risk areas where employees must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.
- Create protocols for minimizing personal contact upon delivery of materials to the worksite.

Manufacturing Industry Specific Requirements

- Create dedicated entry point(s) at every facility for daily screening and ensure physical barriers are in place to prevent anyone from bypassing the screening.
- Create protocols for minimizing personal contact upon delivery of materials to the facility.

Retail Industry Specific Requirements

- Require patrons to wear a face covering
- Post signs at entrances instructing patrons to wear a face covering and not to enter if they are or have recently been sick.
- Design spaces and store activities that encourage employees and patrons to maintain 6 feet of distance from one another.
- Install physical barriers at checkout, including plexiglass barriers, tape markers, or tables.
- Establish an enhanced cleaning and sanitizing protocol for high-touch areas like restrooms, credit-card machines, keypads, counters, shopping carts and other surfaces.

Restaurants and Bars Industry Specific Requirements

- Require 6 feet of separation between parties or groups at different tables.
- Require patrons to wear a face covering except when seated at their table or bar top.
- Prohibit access to common areas in which people can congregate.
- Post signs at entrances informing patrons not to enter if they are or have recently been sick.
- Post signs instructing patrons to wear face coverings until they are seated at their table.
- Require hosts, servers and staff to wear face coverings in the dining area in addition to areas where social distancing cannot be maintained.

Health Care Industry Specific Requirements

- Post signs at entrances instructing patients to wear face coverings when inside the facility, except as necessary for identification or to facilitate an examination or procedure.
- Limit waiting-area occupancy to the number of individuals who can be present while staying 6 feet away from one another and ask patrons to wait in their cars if possible.
- Mark or arrange 6 feet of social distancing in waiting rooms.
- Conduct a common screening protocol for all patients, including a temperature check and questions about COVID-19 symptoms.
- Place hand sanitizer and face coverings at patient entrances.
- Install physical barriers at sign-in, temperature screening, or other service points that normally require personal interaction.

In-Home Services Industry Specific Requirements

- Maintain accurate appointment record, including date and time of service, name of client, and contact information to aid with contact tracing.
- Prior to entering the home, inquire with the customer whether anyone in the household has been diagnosed with COVID-19, is experiencing symptoms of COVID-19, or has had close contact with someone who has been diagnosed with COVID-19. If so, the business or operation must reschedule for a different time.

Personal-Care Services Industry Specific Requirements

- Post signs at entrances instructing patrons to wear face coverings when inside the facility.
- Post signs at entrances informing patrons not to enter if they are or have recently been sick.
- Restrict entry to patrons, to a caregiver of those patrons, or to the minor dependents of those patrons.
- Limit waiting-area occupancy to the number of individuals who can be present while staying 6 feet away from one another and ask patrons to wait in their cars if possible.
- Discard magazines in waiting areas and other non-essential, shared items that cannot be disinfected.
- Mark or arrange 6 feet of social distancing in waiting rooms.
- Require employees and patrons to wear a face covering at all times.

Public Accommodations Industry Specific Requirements

- Post signs at entrances instructing patrons to wear face coverings when inside the facility.
- Post signs outside of entrances instructing patrons not to enter if they are or have recently been sick.
- Require patrons to wear a face covering.
- Establish crowd-limiting measures to meter the flow of patrons.
- For entertainment facilities, establish safe exit procedures for patrons.

Sports and Exercise Facilities Industry Specific Requirements

- Post signs at entrances instructing patrons to wear face coverings when inside the facility.
- Post signs outside of entrances instructing patrons not to enter if they are or have recently been sick.
- Mandate wearing of facial coverings at all times except when swimming.
- Provide equipment-cleaning products throughout the facility for use on equipment.
- Ensure that ventilation systems operate properly.

Enforcement of MIOSHA Rules

- Deficiencies in an employer's Preparedness and Response Plan, or failure to comply with the remote work requirements, can result in citations from MIOSHA and a fine of up to **\$7,000** for serious violations.
- On November 5, 2020, MIOSHA issued a statement it will be **conducting inspections at workplaces** with traditional office settings to review how rules are being followed and enhance compliance.
- Sample posters, Preparedness and Response Plans, Reopening Checklists, industry guidelines and videos are available at Michigan.gov/COVIDWorkplaceSafety
- MIOSHA Ambassador Program offers one-on-one guidance to help employers understand MIOSHA regulations. Ambassadors visit businesses statewide to offer education and support (do not issue citations or penalties).
- **MIOSHA Hotline: 855-SAFE-C19 (855-723-3219)**

Michigan Saves

- Nonprofit, public-private partnership green bank
- Assists with financing energy-efficiency and renewable-energy improvements (HVAC upgrades)
- Equipment financing agreements, loans, leases
- \$5,000 to \$2,000,000 (larger projects are considered on a case-by-case basis)
- Available to all types of businesses, nonprofits, public sector, and multifamily housing
- 0% APR rates available in certain areas and for specific energy improvements
- Utility Collaboration with Consumers Energy, DTE Energy, SEMCO Energy
- Phone: 517-484-6474; Email: infor@MichiganSaves.org

“COVID-19 Response and Reopening Liability Assurance Act”

- Enacted MCL 691.1451 et. seq. on October 22, 2020, twenty (20) days after the Michigan Supreme Court invalidated Governor Whitmer’s ability to enact Executive Orders under the “Emergency Powers of Government Act” in a 4-3 decision.
- The Act is the product of three (3) bills approved by the House of Representatives before the Supreme Court’s decision: HB 6030, HB 6031, and HB 6032.

HB 6030 [Now known as Public Act 236 of 2020]

- Section 2 provides definitions which apply throughout the Act including a “COVID-19 claim” as well as “conduct intended to reduce transmission of COVID-19.”
- Section 5 is the meat of the statute for property owners and managers: ***“A person [includes businesses, government and non-profit] who acts in compliance with all federal, state and local statutes, rules, regulations, executive orders and agency orders related to COVID-19 that had not been denied legal effect at the time of the conduct or risk that allegedly caused harm is immune from liability for a COVID-19 claim.”***

HB 6030, cont.

- Section 5 provides additional protection: “*An isolated, de minimis deviation from strict compliance with such statutes, rules, regulations, executive orders, and agency orders **unrelated to the plaintiff’s injuries** does not deny a person immunity...*” Must be both de minimis and unrelated.
- Section 8 makes it clear that the liability protection does not constitute a defense to liability in “*an administrative proceeding or civil action brought by a state or local government prosecutor or agency to enforce state statutes and regulations, executive orders, or state agency orders, applicable to COVID-19.*”

HB 6031 [Now known as Public Act 237 of 2020]

- HB 6031 provides similar liability protections to what exists in HB 6030.
- Section 85 reads:
...an employer is not liable under this act for an employer's exposure to COVID-19 if the employer was operating in compliance with all federal, state and local statutes, rules and regulations, executive orders, and agency orders related to COVID-19...
- The same de minimis exception which applies in HB 6030 applies to HB 6031.

HB 6032 [Now known as Public Act 238 of 2020]

- The first two (2) bills, HB 6030 and HB 6032, were more about employer liability protection. HB 6032 is more about employee protection from COVID-19 related employer action.
- Section 3 precludes an employer from taking adverse action against an employee under any of the following circumstances:
 - An employee either (a) tests positive or (b) displays principal symptoms (defined earlier in the bill) and adheres to all the following guidelines before returning to work (i) 24 hours pass since a fever (ii) 10 days pass since the later of first symptoms or a negative test and (iii) employee's principal symptoms improved.
 - An employee objects to an employer's violation of the Act.
 - An employee reports health violations related to COVID-19.
 - Exception, this protection does not apply to an employee displaying symptoms who refuses to receive test within three (3) days after an employer requests a test.

HB 6032, cont.

- An employee who tests positive or who displays the principal symptoms cannot return to work until all of the following criteria can be satisfied until:
 - 24 hours have passed since a fever (ii) 10 days have passed since the later of first symptoms or a negative test and (iii) employee's principal symptoms improved.

HB 6032, cont.

- An employee with “close contact” [being within six (6) feet for fifteen (15) minutes or longer] with someone who tests positive cannot report to work until (a) fourteen (14) days passed since the close contact or the employee who tests positive receives a medical determination that the positive person was not contagious at the time of the close contact with the employee.
- There are exceptions to this rule for health care and other workers.

HB 6032, cont.

- An employee may bring a cause of action for a violation of HB 6032 and, if he/she prevails, she's entitled to at least \$5,000 in damages from the employer.

Most Important Parts of the Act

- Employers must comply with federal, state and local law as it pertains to COVID-19 to obtain immunity. It's important to stay abreast of the law (perhaps implement a daily review of Michigan Department of Health and Human Services and County Health Department websites).
 - <https://www.michigan.gov/coronavirus>;
<https://www.oakgov.com/health/Pages/default.aspx>;
<https://health.macombgov.org/Health-Home>; <https://www.waynecounty.com/covid19/>
- De minimis violations do not compromise liability protection.
- Retroactive to any claim or cause of action that accrues after March 1, 2020
- Employers cannot take adverse action against employees taking proper precautions after testing positive or having “close contact” with a person who tested positive.

Impact of Legislative Process

- Several other states with Covid immunity for businesses other than health care in some form: AL [EO], AR [EO], GA, ID, IA, KS, KY, LA, MA, MS, NJ, NV, NC, NY, OH, OK, TN, UT, WI and WY
- Cannot compare actions between states
 - Some states require reasonable or substantial compliance
 - Some states impose liability only for willful or intentional misconduct
 - Some create rebuttable presumption of acceptance of the risk by posting signs at the location
- Currently, no federal act or bill providing immunity – only administrative rules for PPE manufacturers

Compromise Safe Harbor

- Compliance with applicable federal, state and local rules
- Not overcome by isolated, de minimis deviation unrelated to claim
- De minimis - too trivial or minor to merit consideration
- Compliance is key – tracking various rules is important

What is Immunity?

- Immunity from liability does not mean immunity from litigation.
- Compliance with “federal, state, and local statutes, rules, regulations, executive orders, and agency orders that had not been denied legal effect at the time of the conduct or risk that allegedly caused harm” could be difficult to establish when the guidance is unclear or contradictory.

Vigilance and Documentation

- Establish Plan
- Document Plan
- Publish Plan
- Enforce Plan
- Update Plan

Questions



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