



Curtains Up! Legal Issues for Reopening Venues:

Employment Law Developments

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Seyfarth Shaw LLP

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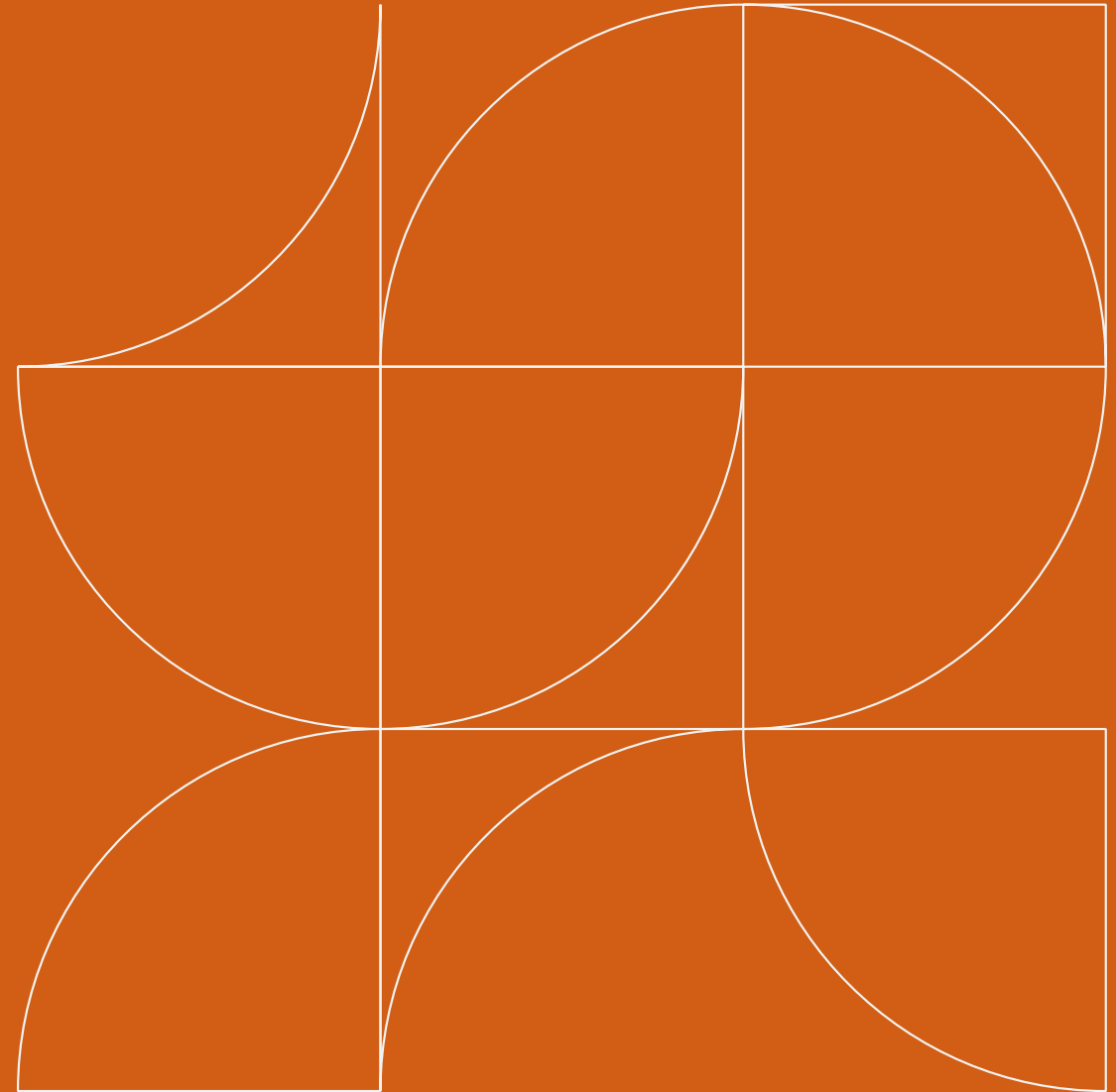
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Agenda

- 1 Considering the need for new or revised policies
- 2 Making spaces safe for work
- 3 Inquiring about health or vaccination status
- 4 Knowing what to do in the event of infection
- 5 Handling leave

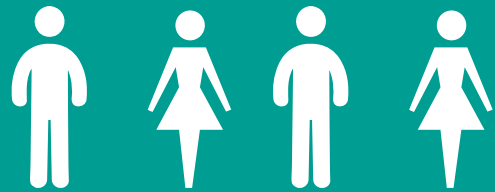
Preparing to Bring People Back Together





Background

- In March 2020, shelter in place orders were issued
 - Advice was based on mitigating risks based on the facts known at the time
 - Much about virus and transmission was unknown
 - Focus on handwashing, sanitizing surfaces
 - Masks discouraged
 - Patchwork of states and local orders
- “Critical infrastructure” continued, but under close scrutiny
- Subsequent broader reopening was at sharply reduced capacity limits
 - Detailed written plans to outline safety efforts, communication in the event of outbreak, etc.
 - All work that could be performed remotely was ordered to be done in that manner
 - Many employees fearful to return



Background

- Over time, our understanding, but mostly the COVID conditions have evolved
 - Public health guidance has changed in response to greater understanding how the virus spreads
 - Reduced cases, mask wearing, and now vaccine has resulted in easing of gathering restrictions
 - Broader adoption of mitigation tools, like masks
 - Current vaccine rollout has introduced a new variable into the mix
- Throughout, there have been few black and white rules about workplaces, and best practices can be expected to continue to evolve

THEATERS & PERFORMING ARTS GUIDELINES



Illinois Department of Commerce & Economic Opportunity
JB Pritzker, Governor

RESTORE ILLINOIS
A Public Health Approach To Safely Reopen Our State

PART OF PHASE 4 OF RESTORE ILLINOIS PLAN

APPLICABLE TO EACH REGION UPON TRANSITION TO PHASE IV | UPDATED MARCH 18, 2021

Revitalization Phase of the Restore Illinois public health approach to reopening the Illinois economy includes larger gathering sizes, additional businesses reopening and increased capacities. We must all continue to social distance, frequently wash our hands and cover faces to maintain progress in overcoming COVID-19.

This document is applicable to businesses that meet the following criteria:

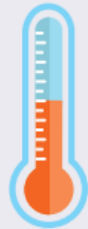
- Seated theaters, cinemas, and performing arts centers primarily engaged in showing live or pre-recorded performances
 - Examples of productions shown by theaters and cinema businesses include (non-exhaustive): plays, musicals, orchestras, operas, comedy/ improvisational shows, movies, pre-recorded events
- These guidelines apply to ticketed events with seating available for all customers; general admission shows and/or events without seating (e.g., standing room only) are not permitted at this time
- **Note:** Organizations that operate across multiple workplace environments should refer to applicable Phase IV guidelines for guidance on those workplaces
- **Note:** As of March 18, 2021, theaters and performing arts venues should operate with the following capacity restrictions:
 - Indoor venues with capacity of less than 200 people may have the lesser of 50 people or 50% capacity
 - Indoor venues with capacity of more than 200 people may operate at no more than 25% capacity
 - Outdoor theaters and performing arts venues should operate at 25% of overall theater or performance space capacity
- Capacity restrictions and group sizes will be reassessed on an ongoing basis throughout Phase IV

Uniform guidelines across businesses, industries and nonprofits within the State of Illinois:

GENERAL HEALTH

i. Minimum guidelines

1. All employees who can work from home should continue to do so
2. Employees should wear face coverings over their nose and mouth when within 6-ft. of others (cloth masks preferred). Exceptions may be made where accommodations are appropriate - see [IDHR's guidance](#)
3. Social distance of at least 6-ft. should be maintained between non-household individuals unless participating in activities permitted under Phase IV guidelines
4. Employers should provide hand washing capability or sanitizer to employees and if applicable, customers
5. Frequent hand washing by employees, and an adequate supply of soap/ paper towels and/or disinfectant/ hand sanitizer should be available



Illinois Guidelines for Theaters and Performing Arts

- Minimum guidelines and encouraged best practices for:
 - General Health
 - HR and Travel Policies
 - Health Monitoring
 - Physical Workspaces
 - Disinfecting/Cleaning Procedures
 - Staffing and Attendance
 - External Interactions
 - Customer Behaviors

BE SAFE ★
CHICAGO ★



Be Safe.
Performance Venues

Chicago Guidelines for Performance Venues

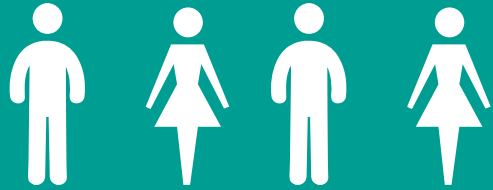
- Recommended Guidance for Re-opening
 - Ensure >6 ft. between individuals
 - Limit seating capacity and gathering sizes
 - Require face coverings for all; face coverings not required for cast / performers
 - Where possible, provide hand sanitizer at ingress/egress points
 - Require health checks upon entry
 - Monitor ingress/egress and ensure social distancing
 - Frequently clean seating and high-traffic areas
 - Provide signage at any entry/exit points and any other high-traffic common areas
 - Optimize seating arrangement to ensure social distancing
 - Develop flexible work models for staff
 - Consider ways to control ingress, egress, and seating
 - Limit travel by staff
 - Follow CDPH and CDC guidance for testing and tracing protocols



Where We Are Now

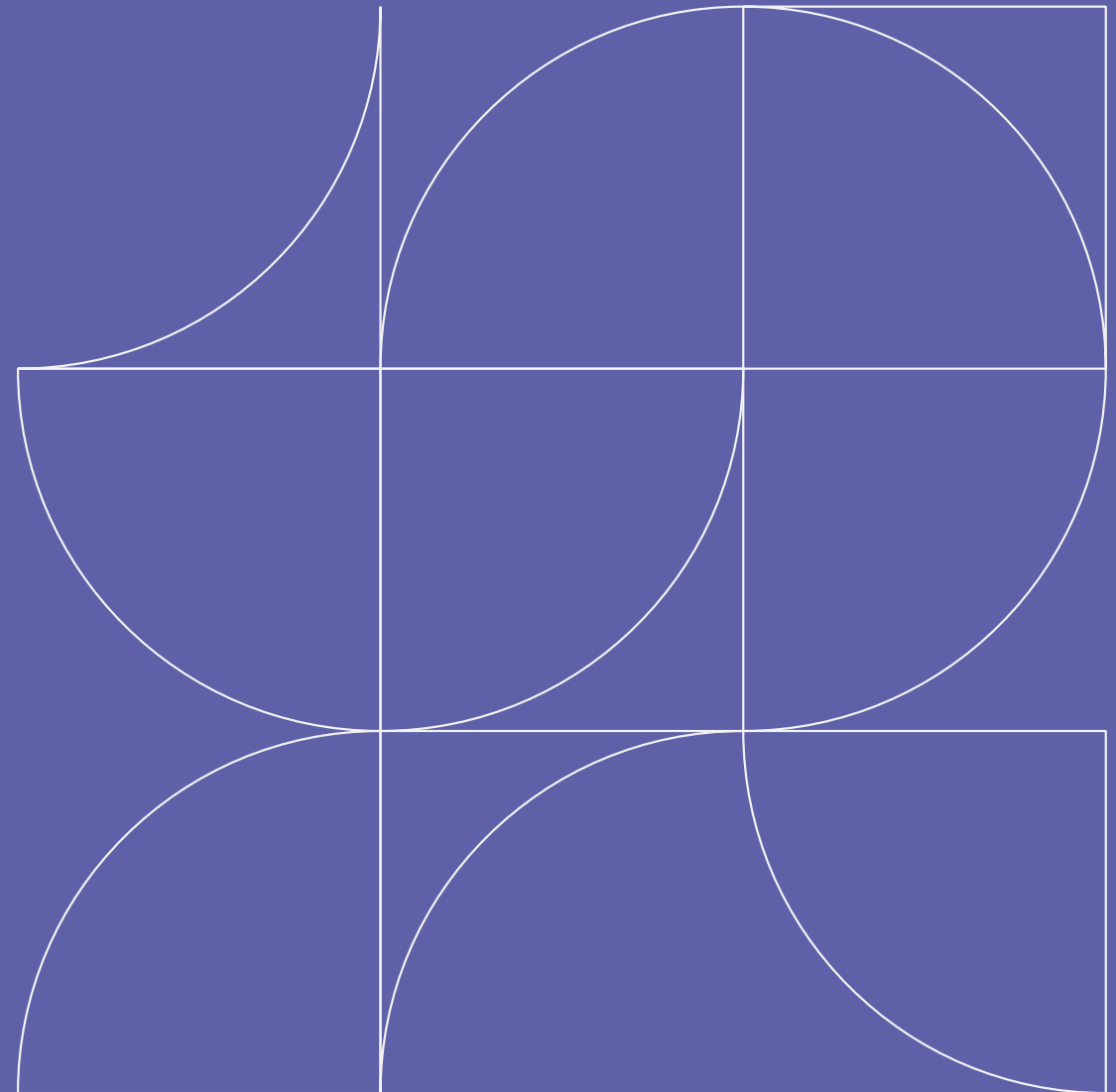
- Current conditions are trending to a return to operation later in 2021
- Assess your space and who will be in it in various phases of reopening. Likely not the same as before
- Decide who will return and when
- Implement steps to help those who return to be safe and feel safe
- Prepare how to respond to those who may be unable or unwilling to return
- Know how to respond in the event of illness

Background Of The Advice Discussed Today



- Existing guidelines are born out of experiences with certain industries and types of work
 - Essential business, like manufacturing, grocery
 - Remote work
 - Restaurants and bars
 - Non-essential retail
 - Museums and exhibition spaces
- Guidelines for theaters are likely to incorporate approaches from these other contexts and evolve over time
- Be thoughtful and flexible

Considering The Need For New Or Revised Policies





Potential New or Revised Policies

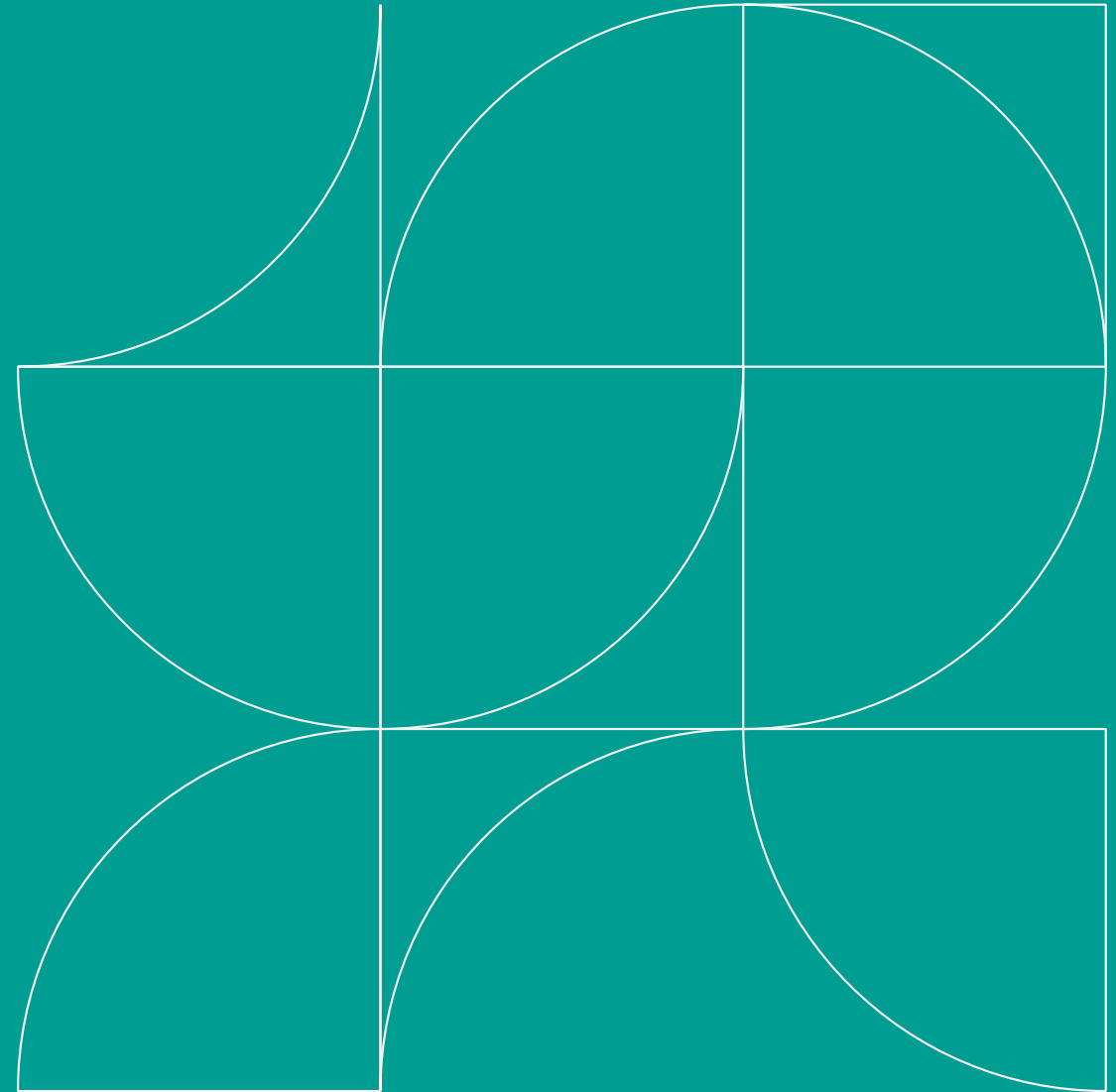
- Remote work for employees
- Wellness questionnaire, self-certification, or check before entry
 - Symptoms identified by CDC
 - Contact with suspected or confirmed COVID case
 - Travel
- Waivers from those who enter the space
 - Personal assumption of risk of entry
 - Communication tool
 - Enforceability issues as it relates to employees
 - More to come from LCA



Potential New or Revised Policies

- Communicating via mask
 - Limit messages on masks, e.g., political messages
- Training upon return to the space
 - Review safety measures
 - Distribute detailed instructions on returning protocols, linked to timing (i.e., stage of prep for live performances)

Making Spaces Safe For Work



Social Distancing Protocols

- Considerations for employees and other workers
 - Ability to maintain at least six foot distance
 - Pathways (e.g., one-way travel, floor markers)
 - Use of physical barriers (e.g., plexiglass, etc.)
 - Limit gatherings
 - Posters, training
 - Reconfigure schedules and type of work to limit the number of people present in a space at any one time
 - Repurpose spaces to allow for more distance, including space for breaks and lunches
 - Stagger breaks so people can maintain distance
 - Consider whether some work can be done via remote link, such as Zoom

Health and Safety Protocols

- Best Practices
 - Point person to set standards, periodically review safety steps with those using the space
 - Health screens/testing
 - Self-checks vs. checks administered on-site
 - Frequency
 - Consider requiring health and safety steps:
 - Wear masks when in common spaces or in close proximity to others
 - Handwashing protocols
 - Work area cleaning protocols
 - Eliminate shared items where possible (microphones, costume pieces)
 - For shared tools, develop a protocol for cleaning between use

Health and Safety Protocols

- Consider requiring health and safety steps (cont.):
 - Provide hand sanitizer, facial tissue, cleaning supplies
 - Reminders about proper hygiene, handwashing, coughing and sneezing etiquette
 - Ensure adequate ventilation
 - Consider increased cleaning of high traffic areas, common areas
 - Coordinate with landlords and building management regarding common areas - adequate cleaning, social distancing protocols, notification protocols in event of COVID-19 positive test in building

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Webinars



Curtains Up! Legal Issues for Re-Opening Venues

Safety Measures and Costs

April 15 @ 3PM



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CHICAGO DEPARTMENT OF
DCASE
CULTURAL AFFAIRS & SPECIAL EVENTS

This workshop will be presented as a Zoom Webinar.



Rules for Those Working In And Visiting The Space

- Determine how and in what respects the Return to Work Plan will apply to staff, contractors, and others when they are in the space
- Consider limiting visitors to the workplace
- Require any visitors to complete a questionnaire before entering an office, facility, or other work location



ACTORS' EQUITY ASSOCIATION

COVID-19 SAFETY GUIDANCE

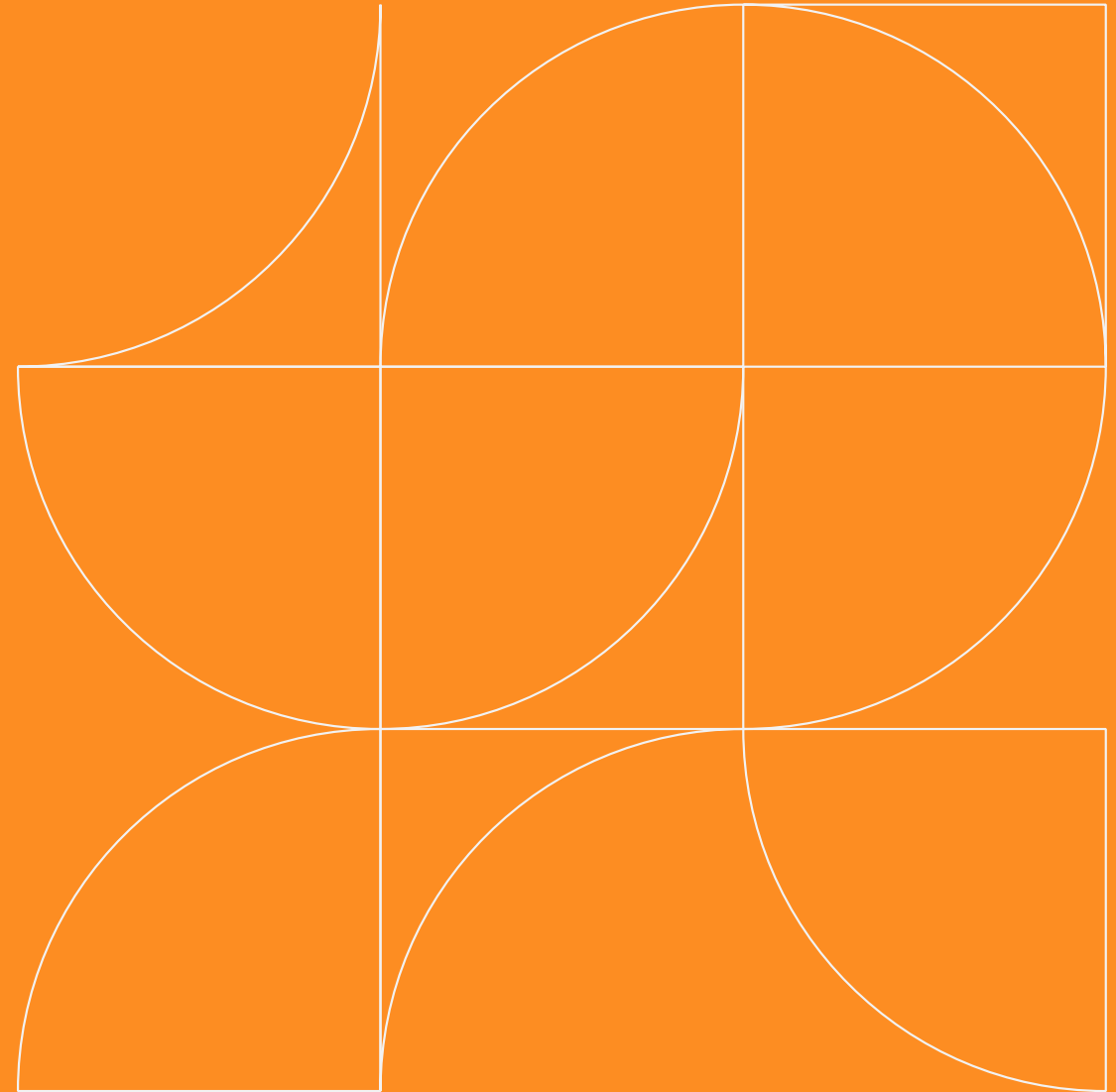
REVISED, MARCH 2021

Guidance for a safe and sanitary work environment for stage managers and actors working in live theatre.

Be aware of Union Guidance/Requirements

- AEA Safety Guide
 - Four Core Principles Needed to Support Safe and Healthy Theatre Productions
 - Infection Rate Guidelines
 - Vaccinations
 - Testing Guidelines
 - Use of Masks & Personal Protective Equipment (PPE)
 - Social Distancing
 - Air Flow/Ventilation Guidance
 - Bubbles
 - Indoor vs. Outdoor
 - Producer COVID-19 Intake Worksheets

Inquiring About Health Or Vaccination Status





Non-Healthcare Settings

- **Can:**

- Visit other fully vaccinated people indoors without social distancing or wearing masks
- Visit unvaccinated people from a single household who are low risk for severe COVID without wearing a mask or socially distancing
- Refrain from quarantining and testing if exposed but asymptomatic
- Note that local governments may set different rules

- **Should**

- Wear masks and socially distance in public
- Avoid medium and large size in-person gatherings
- Wear masks and socially distance when with multiple households

The Vaccine: Mandatory or Voluntary?

Pros

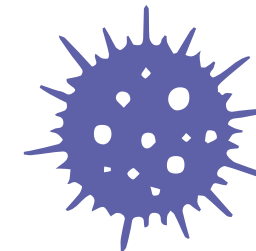
- In theory, leads to more people being vaccinated
- Reduced risk of spread of the virus in the space
- Increased morale for those pro-vaccine
- Pro-vaccine message for third-parties
- Demonstrates reasonable care

Cons

- Unlikely you will have 100% vaccinated in your space
- Decreased morale for those anti-vaccine
- Increased risk of litigation
- Standing up and administering accommodation process
- Potential workers compensation liability for adverse effects
- Employees may need to be paid for time spent being vaccinated, any attendant costs
- Clear authority for mandate comes from EEOC in light of federal employment law – not states in light of state law.
- Response to employees who decline vaccination.

The Vaccine: Mandatory or Voluntary?

- One of the biggest questions that employers are struggling with right now
- There are **employment law** considerations to take into account, and there may also be **labor law** considerations
- On the employment law front, consider the **ADA** and **Title VII**, and similar state and local laws
 - Not applicable as a matter of law for those with fewer than 15 employees



What The EEOC Has to Say

- December 16, 2020: EEOC updated COVID-19 technical assistance guide to address vaccines
- Employers are always **free to encourage voluntary vaccination**
- Employers may ask whether someone has been vaccinated
 - Vaccines are **not** medical examinations for purposes of the ADA, and the question is **not** a disability-related inquiry
- Employers may **not** ask why an employee is not vaccinated, unless the standard for job-related and consistent with business necessity is met (see next slide)

What The EEOC Has to Say

- Employers can **require** employees to be vaccinated **IF**:
 - The employees receive the vaccine from a pharmacy or health care provider that is not under a contract with the employer
 - The employer handles requests for accommodations consistent with applicable law
- If an employer wants to administer the vaccine or contract with a pharmacy or health care provider to administer the vaccine (and therefore ask medical pre-screening questions), **THEN**:
 - The employer must show that the questions are job-related and consistent with business necessity, and that refusal to answer the questions and get the vaccine poses a direct threat to health and safety
- Responses to pre-screening questions must be kept **confidential**

Reasonable Accommodations Under the ADA

- Mandatory Vaccine Program
- If employee cannot get vaccine **because of qualifying disability** may be entitled to reasonable accommodation under the ADA
- EEOC Guidance, *December 2020*
 - **Direct Threat Assessment** – must determine that unvaccinated person exposes others to the virus at the worksite
 - Nature of work
 - Amount of contact with others
 - How many others in workplace are vaccinated
 - Cannot automatically exclude from worksite or take any action even if direct threat, unless no reasonable accommodation is available that would eliminate or reduce the risk of unvaccinated employee no longer poses a direct threat.

Reasonable Accommodations Under the ADA

- **Examples of Disabilities**
 - Anxiety
 - Allergy
 - Certain Autoimmune Disorders
 - Other
- **Must Follow Standard ADA Process**
 - Interactive process / Individualized Assessment
 - Supporting medical documentation
 - Cannot automatically terminate
 - Train managers responsible for communicating/facilitating vaccine program

Reasonable Accommodations Under the ADA

- **Possible Reasonable Accommodations**
 - Masks / Face Coverings or Other PPE
 - Testing
 - Social Distancing
 - Remote Work
 - Reduced exposure (e.g., alternative hours)
 - Leave of Absence
 - Combination of the Above

Reasonable Accommodation Due to Religion

- Employee must request accommodation or otherwise provide notice to employer.
- Employee must have “sincerely held” religious beliefs that preclude vaccination.
- EEOC says employers generally should not question employees’ religious beliefs.
 - Courts generally agree, both within and outside vaccination contexts.
 - But being an “anti-vaxxer” is not a religious belief.
 - Working remotely is an obvious (though not necessarily feasible) accommodation.
 - But employers should assess feasibility today, not as things were pre-pandemic.

Reasonable Accommodation Due to Religion

- Employer still has an undue hardship defense.
 - Much easier to prove under Title VII than ADA.
 - Still requires provide that hardship can't be averted through reasonable accommodation (e.g., social distancing, masks, and frequent hand-washing)
- Accommodations that “burden others” generally are not required, but what does “burden others” mean?
- If accommodation isn't possible, termination doesn't necessarily follow.

Addressing Vaccine Hesitancy

Promote Vaccine Literacy

Key Facts:

- Vaccines are safe and effective.
- Although approved for emergency use authorization to speed delivery, the vaccines were subjected to the same safety standards as other vaccines.
- Vaccines were subjected to rigorous trials involving thousands of adults of diverse racial, ethnic, age and health status classifications.
- More than 100,000,000 adults in the U.S. have received at least one dose; approximately 50,000,000 have been fully vaccinated.

Addressing Vaccine Hesitancy

Promote Vaccine Literacy

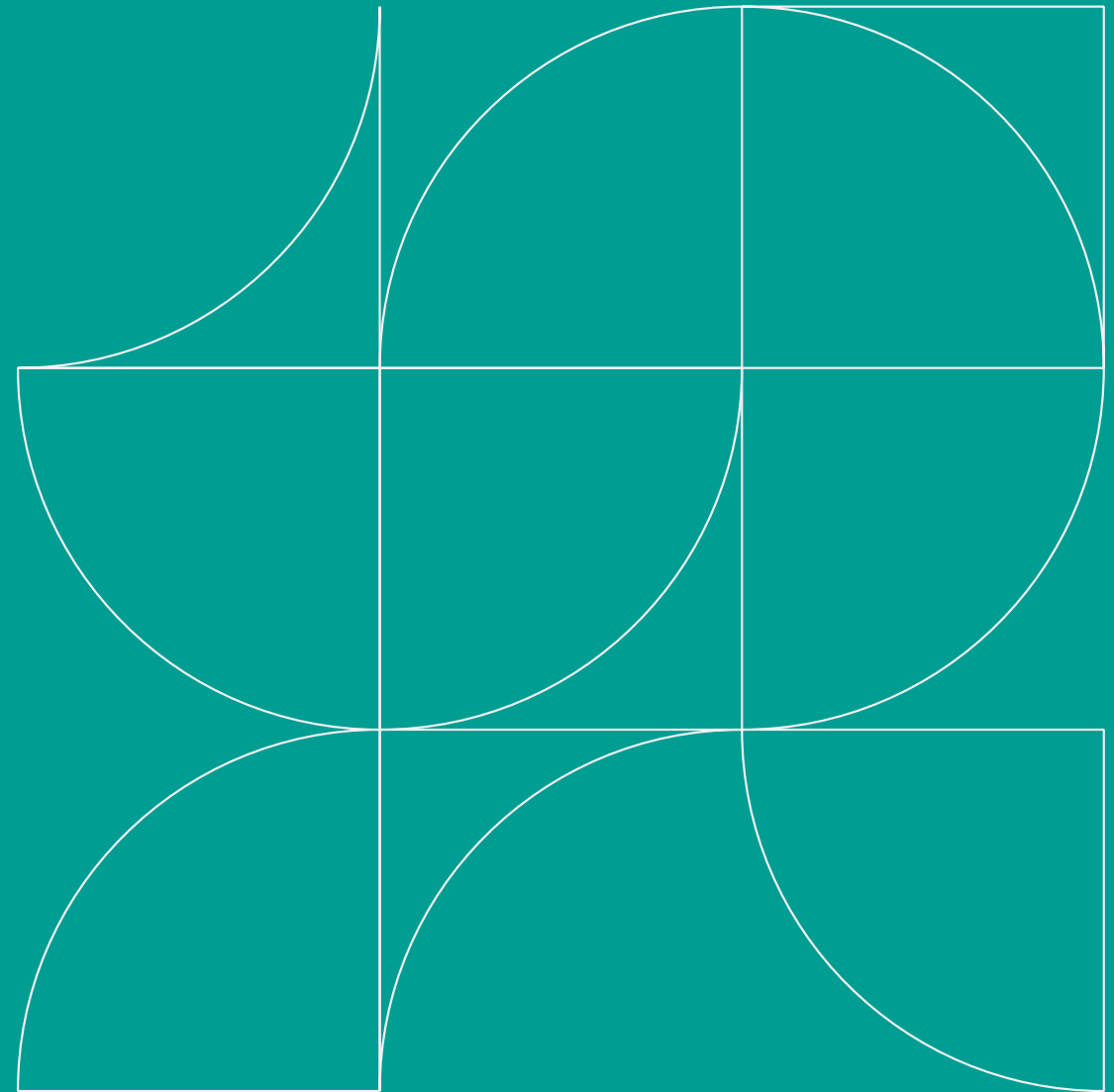
- To date, not one person who has received a vaccine has died from COVID-19.
- Vaccines are 100% effective at preventing hospitalizations and death from COVID-19.
- Vaccines and herd immunity provide the path back to activities important to us (family, friends, work, events, travel).
- Vaccines not only protect you, they protect others around you.

Addressing Vaccine Hesitancy

Vaccine Incentive Plans

- Employers can provide incentives to employees get vaccinated.
- ADA risk is less if employer does not provide the vaccine or contract with third party to provide.
- The EEOC has withdrawn its prior proposed rule for employer-sponsored wellness plans stating the incentive must be *de minimis*.
- Still need to accommodate those who decline vaccination for disability or religion-related reasons.

Knowing What To Do In The Event Of Infection





Develop Plan to Quickly Respond to any COVID-19 Diagnosis, Symptom Reports, or Exposure

- Make sure those in the space know who to notify in the event of COVID-19 diagnosis, symptoms, exposure (and how)
- Develop a protocol in the event of a report of confirmed or possible COVID-19
 - Send home if symptoms or positive test result
 - CDC guidance currently permits essential workers with potential exposure to remain in the workplace if certain steps are taken
- Identify a point person to oversee the response



Develop Plan to Quickly Respond to any COVID-19 Diagnosis, Symptom Reports, or Exposure

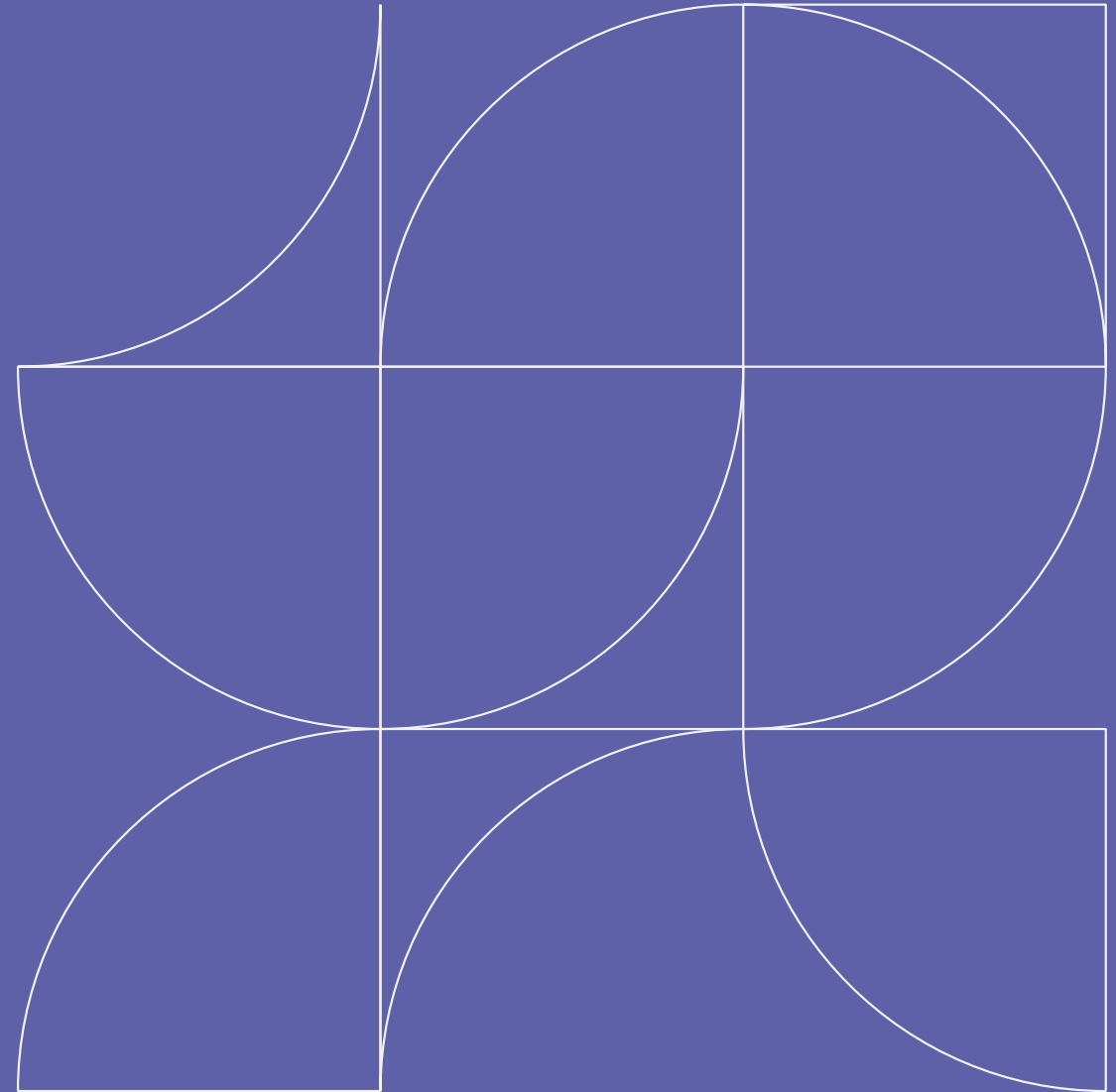
- Contact tracing
 - Compliance with privacy and disability discrimination law requirements
 - Determine whether anyone needs to be sent home
- Protocol for a temporary shutdown or deep cleaning
 - May come with little to no advance notice
 - The entire building or select areas?
 - Outside vendor for cleaning?
 - Additional measures when reopen?



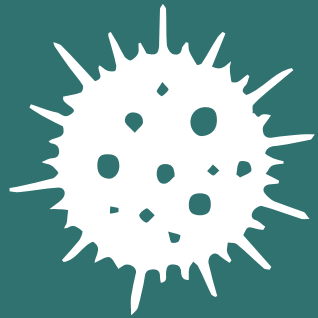
Develop Plan to Quickly Respond to any COVID-19 Diagnosis, Symptom Reports, or Exposure

- Determine if there is any requirement to notify any government or other public authorities and, if so, develop protocol to provide such notice
 - IDPH and CDPH require notification if 2 or more employees report COVID-19 related symptoms or positive tests
- Determine whether to notify the workers' compensation insurance carrier
- Develop protocol for responding to questions and concerns raised by employees, temporary workers, independent contractors

Handling Leave



COVID-19 Leave Overview



Paid Time Off and Leave Laws

- Cook County
 - Not changed by COVID-19
 - Check whether your municipality has opted out.
 - Employer is covered if it gainfully employs at least one Covered Employee with a place of business within Cook County.
- Chicago
 - Not changed by COVID-19, but the City has released guidance regarding the applicability of the Ordinance in response to the COVID-19 pandemic.
 - May 20, 2020 ordinance protects covered employees who remain at home for complying with public health orders or for other COVID-19 related reasons.
 - Ordinance prohibits employers from taking adverse actions against employees who cannot work due to various COVID-19 related reasons, even if the employee has exhausted legally-protected or employer-provided leave.

**thank
you**