

# WEBINAR

## Farm to Fork Post COVID-19

By Christine Tenley, Travis Koch and  
Emily Mack

# Presenters:



**Christine Tenley, Esq.**  
ctenley@burr.com  
404.281.3105 (cell) (feel free to call  
or text anytime)



**Travis Koch, Esq.**  
travis@kukerlaw.com  
307.274.4444



**Emily Mack, Esq.**  
emack@burr.com  
615.724.3204

# What are we going to discuss today?

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1. President Trump's Executive Order/ Secretary Perdue's directives
2. Summary of CDC/OSHA guidance for meat and poultry processors
3. Returning EEs to work/workers who refuse to return/handling "high risk" EEs
4. What to do if OSHA comes calling and how to deal with the union
5. What innovative practices are we seeing the plants doing today? (Smithfield, Milan, MO plant case study)
6. What to pay or not to pay-potential wage and hour pitfalls
7. What's the EEOC and the Plaintiff's bar up to

# April 28, 2020 Executive Order

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- March 13, 2020: Trump declares COVID-19 a national emergency;
- Beef, pork, and poultry processors must continue to fulfill orders to feed America;
- Recent plant closures due to outbreaks/state regulations threaten supply chain;
- References that such closures may differ from April 26th guidance issued by CDC/OSHA -“Meat and Poultry Processing Workers and Employers”

# Executive Order Key Points (cont.)

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- Must continue food processing operations;
- Delegates President's authority under DPA to Sec. of Agriculture-Sonny Perdue
- Tasks Perdue to ensure meat and poultry processors continue operations consistent with April 26<sup>th</sup> CDC/OSHA interim guidance
- Authorizes Perdue to issue orders and revise rules and regulations as necessary to implement this order

# May 5, 2020 Secretary Perdue's Directives

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- Messages that it is essential we work together to ensure the safety of those “who help keep food on the table” during this unprecedented time
- Effective immediately: processors must operate consistent with April 26<sup>th</sup> OSHA/CDC guidance;
- Implement practices and protocols for keeping employees safe and healthy
- Objective: Balance Continued Operations and Employee Health

# Secretary Perdue's Directives to Closed Plants

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- Closed plants with **NO** clear time table of reopening must submit to USDA protocols to resume operations consistent with CDC/OSHA guidance
- USDA Food Safety and Inspection Service's:
  - › Mission to inspect processing plants;
  - › Partnering with CDC/OSHA, state and local officials to ensure plants implementing BEST PRACTICES to mitigate the spread of COVID-19, while maintaining operations

# Overview of April 26, 2020 CDC/OSHA Guidance

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- Reiterates meat and poultry processing are critical infrastructure and can face potential exposure due to work environment and close proximity to co-workers
- Guidance supplements, but does not replace other applicable laws, prior rules, guidance, etc.



# 4 Distinct Factors in Plants that Raise COVID-19 Concerns

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- Distance
  - › Workers are in close proximity on the lines, in communal areas, and in their communities
- Duration of Contact
  - › Prolonged closeness to coworkers
- Type of Contact
  - › Line workers, janitorial crew, maintenance workers using tools, and high touch surfaces
- Unique Social Implications of Food Processing Workers
  - › Often live and work in same community or same home and carpool to the plant

# Create a COVID-19 Risk Assessment and Control Plan

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- Appoint a qualified COVID-19 coordinator(s)
- All employees should be aware of who the coordinator is and know how to contact
- **Anyone** coming into the plant is subject to
- Create your COVID-19 safety plan to align with the OSHA/CDC April 26, 2020 guidance

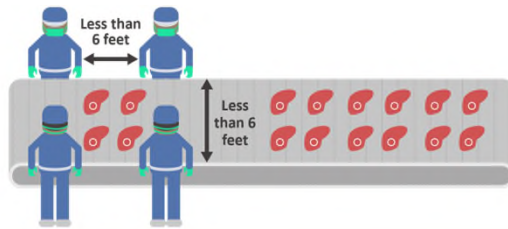
# CDC & OSHA Interim Guidelines

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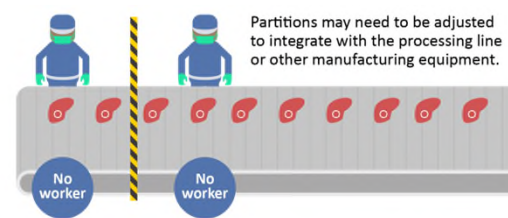
- Worker infection prevention by 2 means: engineering and administrative controls
- Engineering Controls:
- CHANGE THE LINE
  - › Configure workers to stay 6 feet apart in all directions
  - › Side to side and when facing; use markers to remind
  - › Use physical barriers such as Plexiglas to separate
  - › Consult with HVAC to ensure optimal ventilation
  - › Be careful if there are stand alone fans-minimize air blowing from one worker to another

# How to Align Workstations

**Bad:**  
Workers are within six feet of one another, including at side-by-side or facing workstations.

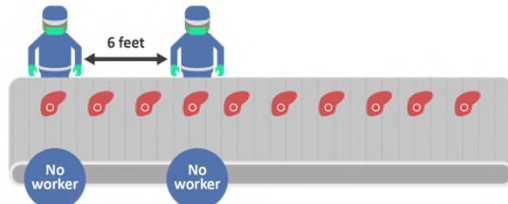


**Good:**  
Physical barriers, such as partitions, separate workers from each other.

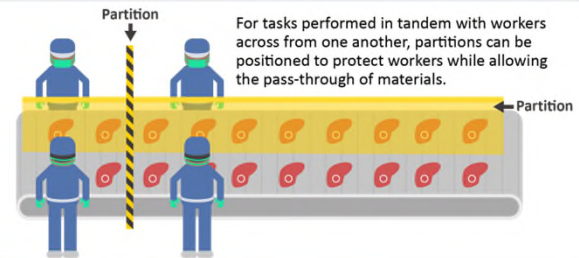


Partitions may need to be adjusted to integrate with the processing line or other manufacturing equipment.

**Good:**  
Workers are spaced at least six feet apart, not facing one another. Other configurations may be used to achieve similar distancing between workers.



**Good:**  
Physical barriers, such as partitions, separate workers from each other, including where workers need to perform tasks in tandem across from one another.



For tasks performed in tandem with workers across from one another, partitions can be positioned to protect workers while allowing the pass-through of materials.

# Other Critical Engineering Best Practices

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- Add new handwashing/hand sanitizing (at least 60 percent alcohol) stations, touch free, if possible, near lines
- Modify clock in clock out procedures-increase number, ensure 6 feet of spacing, explore touch free, stagger times for clock in/clock out
- Break rooms/cafeterias-rearrange, add more temporary facilities, use the outside with tents, conference rooms etc.

# Administrative Controls

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## 1. Promote social distancing and proper hygiene

- › Single file lines and designate employee monitors throughout the plant
- › Stagger break times/expand break areas
- › Stagger arrival/departure times
- › Visual Cues everywhere possible-tape on the floor
- › Encourage workers to avoid carpooling/use of plant shuttle
- › If not possible, limit # of people in shuttle, stay as far apart in vehicle, use hand hygiene before entering and when arriving; wear masks in the vehicle, and clean vehicle after each trip

# Administrative Controls (cont.)

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## 2. Attendance and Incentive Pay Policies

- › Review/revise attendance; so as not to encourage sick employees to report to work (no fault especially)
- › Incentive programs that can be added or modified to retain employees
- › Monitor and respond to absenteeism-try to get ahead of any employee health issues
- › Advance future leave/allow leave donations

# Administrative Controls (cont.)

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- Keep **SAME** workers working together (COHORTING)
  - › Ensures same workers assigned to same shifts with same coworkers
- Establish alert system for employees to supervisors/HR/ COVID coordinator to report if they feel ill, they live with someone who is ill, or had contact with someone who is now positive or undergoing testing (ex: designated hotline)
- Educate, Educate, Educate: do not assume because you are operating on information overload your employees are (implement hotlines, use phone apps that send messages to employees)
- Build additional handwashing breaks into the shift, where possible



# Cloth Face Masks

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- CDC recommends wearing masks along with social distancing to everyone
- Remember masks are to protect **OTHER PEOPLE** not the wearer
- Cloth face masks are not PPE, not substitutes for respirators in positions where N95 respirators are required
- Employers must be **vigilant** on face masks and readily provide clean dry disposable face masks for workers to use when coverings become wet, soiled, or contaminated

# Mask 101-Educate and Ensure that coverings:

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- Fit over the nose and mouth and comfortably against the side of the face
- Secured with ties or ear loops
- Include multiple layers
- Can be laundered and clean mask used each day
- Are not used if become wet or contaminated
- Are replaced with clean masks provided by the employer
- Are handled as little as possible to prevent contamination

# Educating Employees and Training Supervisors

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- Supplement regular OSHA training with COVID-19 training
  - › What is COVID-19?
  - › Recognizing signs and symptoms of infection; and
  - › Prevention and protection measures
- Posters:
  - › <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>
  - › Post CDC posters in **relevant languages**:  
<https://www.cdc.gov/coronavirus/2019-ncov/communication/print-resources.html?Sort=Date%3A%3Adesc>

# Managing Sick Workers

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- If a worker appears to have symptoms, do not allow to enter plant, and if already in the plant, send home immediately
- If a worker tests POSITIVE-inform anyone they have come into contact with (fellow workers, graders, inspectors) of their possible exposure to a positive, but maintain CONFIDENTIALITY to comply with the ADA
- Disinfect, disinfect, and disinfect-tools, knives, work areas, locker, and anything else that was touched
- Protect personnel managing potentially sick employees

# Managing Return to Work-OSHA and EEOC Interplay

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- OSHA guidance is broad/EEOC has issued several COVID-19 updates at [www.eeoc.gov/newsroom](http://www.eeoc.gov/newsroom)
- EE who tests negative can return to work, ck rest of household is clear
- EE who tests positive can return to work when provides a full release to return to work
- Don't forget about unemployment obligations for employees out on leave (GA requires employer to file for employees)
- Follow other state and federal employment laws, Title VII, ADA/FMLA and other applicable state and local laws
- EEOC issued most recent guidance on May 7, 2020 emphasizing you can't bar higher risk employees without "direct threat" analysis

# Handling “Higher Risk” Employees

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- CDC broadly states: individuals at a “higher-risk for severe illness” if they contract COVID-19 currently include:
  - People 65 years and older;
  - People of all ages with **underlying medical conditions**, including:
    - chronic lung disease or moderate to severe asthma;
    - serious heart conditions;
    - Conditions that cause individuals to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications;
    - severe obesity (body mass index [BMI] of 40 or higher)
    - Diabetes
    - chronic kidney disease undergoing dialysis or liver disease



Older Adults



At Risk For Severe Illness



People with Asthma

# What If They Won't Come Back Due to Fear of Possible Exposure? EEOC Weighs In.....

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- Fear of returning to work may trigger ADA duty to engage in interactive process for “higher risk” individuals
- If, following that process, employee still refuses to return:
  - Unlikely to qualify for FMLA leave unless serious health condition creates a period of “incapacity” necessitating leave;
  - Local and state paid sick leave laws normally not apply unless employee is experiencing “illness,” but some jurisdictions have expanded leave entitlement due to COVID.
- Potential risk for retaliation claims against a “higher risk” employee who refuses to return due to fear of exposure; case by case risk assessment
- NOTE: no legal obligation under ADA to accommodate an employee who is afraid to return because family member is “higher risk”

# Handling “Higher Risk” Employees (cont.)

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- Possible accommodations for “higher risk” individuals:
  - Enhanced PPE-provide face shield, if not providing face shields
  - Move physical location of EE (for example, move to the end of a line if that provides more social distancing)
  - Additional medical checks with on site medical team
- Provide the accommodation, only if **reasonable**, and on a temporary basis with an end date, while awaiting receipt of medical documentation.
- Don’t forget about unpaid leaves you can use them proactively if needed



# Note for Plants with less than 500-Don't Forget FFCRA

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- **Families First Coronavirus Response Act (FFCRA) –**
  - Applies to private employers with less than 500 employees (on the date leave is requested).
  - Includes two paid leave provisions for employees needing time away from work for reasons related to COVID-19:
    - **Emergency Paid Sick Leave Act (EPSLA)**
      - Provides 80 hours of paid sick leave for full-time employees for specified purposes, including being advised by a health care provider to self-quarantine for reasons related to COVID-19.
    - **Emergency Family and Medical Leave Expansion Act (EFMLEA)**
      - Amends Title I of the Family and Medical Leave Act (FMLA) to provide up to 12 weeks of paid and unpaid protected leave to covered employees with a qualifying need related to a public health emergency regarding COVID-19 declared by a federal, state, or local authority.
  - Both laws expire December 31, 2020.

# What to do if OSHA shows up or a complaint is filed?

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- OSHA Inspections
  - › Before the Inspection
  - › During the onsite inspection and walk around
  - › After the Inspection

# What to do if OSHA shows up or a complaint is filed?

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- During the Walk Around Inspection
  - › Designated employee should be with OSHA Inspector at all times
  - › Designated Safety employees should take notes and pictures
  - › Keep OSHA Inspector on task
  - › Document all testing and monitoring
  - › Request copies of all OSHA sample and monitoring reports
  - › Ask OSHA to put all requests for company information and/or documents in writing
  - › Don't make admissions

# What to do if OSHA shows up or a complaint is filed?

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- Closing Conference and Follow Up
  - › Listen to OSHA' proposal.
  - › Do not argue or debate the initial proposed findings.
  - › Take detailed notes on the alleged hazards identified and the problem areas identified , the applicable standards and suggested abatement procedures.
  - › Provide all notes and documents to your OSHA attorney.

# Smithfield Missouri Plant Example

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- April 23, 2020--Rural Community Workers Alliance v. Smithfield Foods (USDC/WDMO)
- OSHA issued a **rapid response investigation request** to SF the day before the Complaint was filed –April 22—asking (1) what PPE has been given to workers, (2) what engineering controls have been implemented, (3) what contact tracing methods have been employed, and (4) what policies have been changed or implemented due to COVID-19. (Likely to see this format going forward-BE PREPARED)
- Non-profit workers' advocacy group filed a lawsuit alleging that SF operated its Milan, Missouri plant without taking adequate safety measures to prevent the spread of COVID-19, including allegedly forcing workers to work shoulder to shoulder, not allowing adequate time to wash/sanitize hands, or allowing employees to take time off when are sick or exposed to the virus
- Complaint also alleges **state tort claims** that SF practices are a public nuisance and SF failed to maintain a safe workplace

# Smithfield Case Dismissed

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- May 5, 2020- federal judge granted SF motion to dismiss citing:
- OSHA has primary jurisdiction; and
- Even if OSHA didn't have primary jurisdiction, court did not agree that plaintiffs had met their burden of proof to obtain injunctive relief because of all the safety measures SF implemented

# SF Safety Measures that Persuaded the Court

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- Thermal screening upon entry, if symptomatic, EE provided instructions for next steps, including self-quarantine, contact doctor, and pays for 14 days of paid leave or until negative test result;
- EEs with underlying health condition (verified by doctor) are provided 14 days of paid leave and then shifted to STD benefits
- EEs on quarantine are required to complete questionnaire of other EEs they had contact with 2 days before symptoms arose
- EE tests positive, SF notifies and screens the close contacts
- IF EE misses work due to COVID-19 symptoms, not penalized
- SF eliminated co-pays for COVID-19 testing

# SF Safety Measures Inside the Plant

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- A Nurse and Health and Safety clerk perform safety checks throughout the plant each shift;
- Ramp up EE communications: TV, billboards, apps, signs are in multiple languages and apps allow employee to choose language of their choice
- Masks to all EEs and if becomes soiled employee is given a new mask; masks must be worn at all times except while eating
- EEs on production floor wear gloves and a plastic face shield; when they leave floor and dispose of gloves and sanitize hands before entering common areas; before returning to line must wash hands and put on new gloves before returning to the floor; hand sanitizer provided to EEs every 30 minutes to use on gloves on line; added 110 hand sanitizers stations to plant
- Mass cleanings of the plant high touch areas are 2 hours each work day; deep plant cleanings occur on the weekend and SF is working to use fogging/misting disinfectant
- Does not provide tissues because USDA violation on floor; could be allowed on breaks



# Additional Safety Measures at SF

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- To address social distancing:
  - › Staggered workday start times;
  - › Staggered breaks and lunches;
  - › SF working to secure a wireless means of clocking in and out, but has expanded its number of clocks;
  - › Erected 2 large tents and 3 carport structures on the Plant lawn with tables and chairs so more space on breaks;
  - › Tables contain plastic barriers; and
  - › Tables and chairs are sanitized after one employee leaves and before another sits down

# Production Safety Measures

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- Reduction in number of hogs harvested each day
- Fewer EEs at the plant to minimize crowding, but also impacts hours worked
- SF added \$5 additional premium pay per hour to each EE working less hours paid the \$5 premium to workers on leave for COVID related symptoms
- Plastic barriers between employees working side by side and across from each other

## Bottom Line: Don't become SF-Be Proactive NOW

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- Whether or not SF was in compliance with OSHA is OSHA's domain not the court's
- Although the court sympathized with Plaintiffs' concerns for their health, it advised:

“no one can guarantee health for essential workers-or even the general public-- in the middle of this global pandemic.

But given the significant measures SF is now taking to protect its essential workers from COVID-19 and the fact that there are no confirmed cases of COVID-19 currently at the Plant, the Court cannot conclude that the spread of COVID-19 at the Plant is inevitable or that SF will be unable to contain it if it occurs.”

# NLRA Basics: How to Deal with the Union, Walkouts, and/or other employee protests

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- Union or no union, communicate with employees, their representatives and document the conversations
- In non-union, the NLRA **PROTECTS** non-union employees when they engage in “concerted activity” including protests, walk outs, work stoppages to draw attention to employee concerns.
- If union plant, know your CBA inside and out and refer to it
  - › Most CBAs contain a No Strike clauses prohibiting striking in order to change the parties’ agreement.
  - › **RISK REDUCTION NOTE:** No Strike provisions do not supersede Section 13 (a) of the OSHA entitling all employees to refuse to work if they reasonably believe they are in imminent danger
- Evaluate case-by-case, involve counsel BEFORE not after and in communication with the authorized bargaining representative.
- Don’t wind up like Amazon!!!!

# What are we seeing from the UFCW?

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- United Food and Commercial Workers
- Response to EO was strong backlash to ensure worker safety-which is what all employers want despite the media stereotyping of processing plants
- UFCW is providing educational resources to its members via text message and its website UFCW.org
- If you are a UFCW plant, partner as best as you can, to utilize these educational resources
- If you received PPP money don't forget the union neutrality provision that was included

# Wage and Hour Potential Potholes

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- Temperature checks.
  - › Is measuring an employee's temperature a "principal activity"?
  - › Is the time employees spend waiting to have their temperatures taken a "preliminary" or "postliminary" activity?
- Additional PPE/Hand Sanitizing Measures before and after breaks
  - › Integral and Indispensable?
- Clocking In/Out
  - › Standing in social distancing lines
  - › Multiple time clocks
  - › Touchless Time clocks/Apps

# Key Take Aways-Employment Issues In Play

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- OSHA; Section 11(c) retaliation claims based on workplace safety complaints-Be proactive and have your COVID-19 plan ready to go
- NLRA (protected, concerted activity based on protests, complaints about safety, etc.); don't forget NLRA applies to non-union environments
- Title VII/ADEA/WARN/FFCRA (rehire decisions, position elimination, salary reductions, etc.)
- COBRA-New notices recently issued ensure HR/TPA compliant
- UI benefits-make sure to be filing employer part if state required
- Non-COVID FMLA; absences become even more complex to manage during the crisis

# Questions?



# Get Connected

**Christine Tenley, Esq.**  
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emack@burr.com  
**615.724.3204**

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