



The
Monitoring
Association®

2020 July 13 TMA Virtual Town Hall

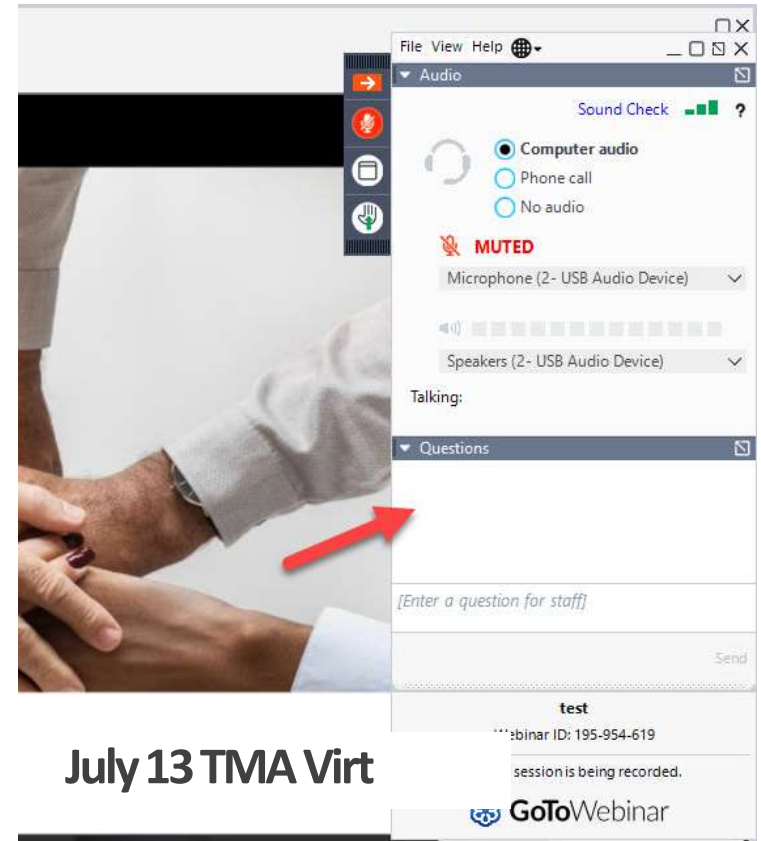
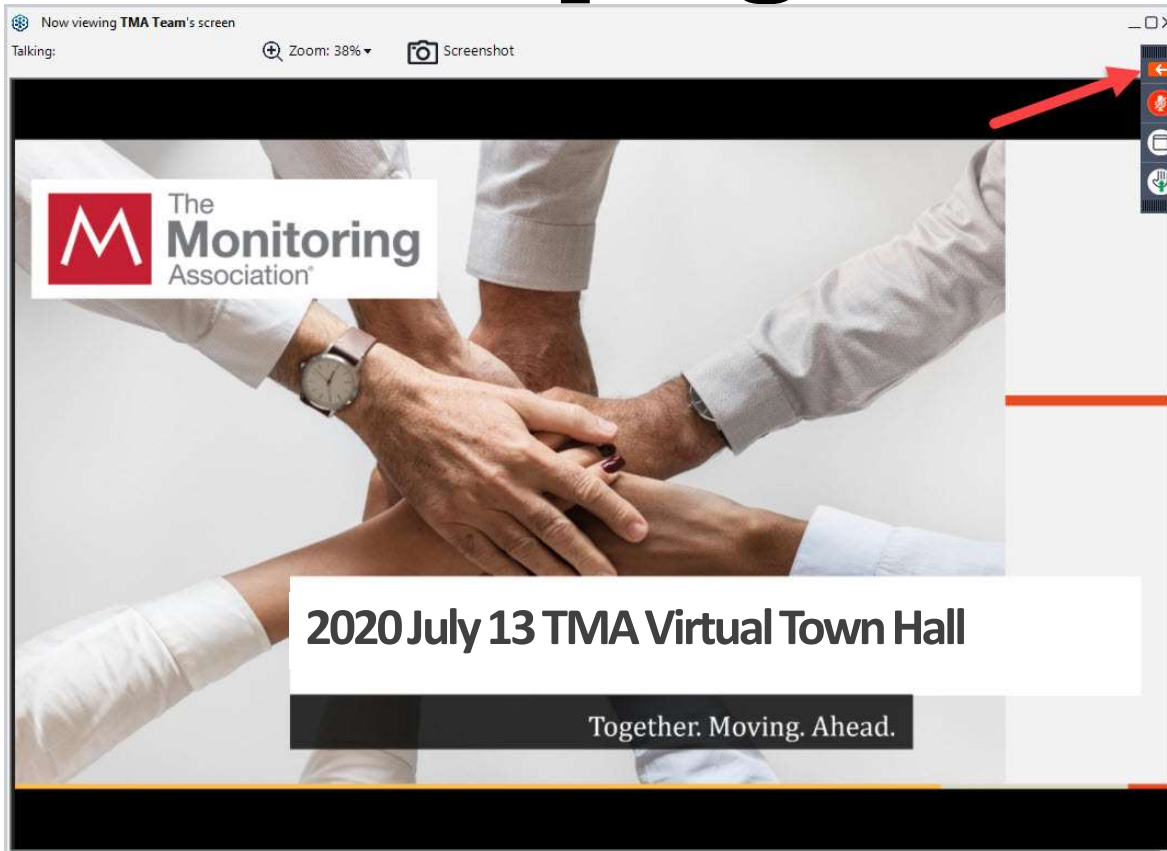
Together. Moving. Ahead.

Agenda



- Housekeeping Celia Besore
- Welcome Don Young
- In Memoriam Celia Besore
- Legal Briefing Lessing Gold, Partner, Corporate & Business Transactions
Jean Nogues, Partner, Litigation
Anthony Amendola, Partner, Labor & Employment
- Open Forum
- Wrap-up Don Young/Celia Besore

Housekeeping



Today's VTH is off the record and it is NOT being recorded



Welcome

Don Young, TMA President

In Memoriam: Robert (Bob) Bitton



Bob Bitton
1939 - 2020

Former President, Supreme Security Systems
First recipient of TMA's Stanley Lott Award: 1991
CSAA/TMA President: 1987-89
TMA Volunteer Frequency Coordinator: 1989-2020
TMA Board Member through July 9, 2020

Let's honor him with a minute of silence



Legal Issues in the Wake of COVID-19



Lessing Gold
Partner, Corporate &
Business Transactions



Jean Nogue
Partner, Litigation



Anthony Amendola
Partner, Labor &
Employment

Force Majeure and Act of God

- **Contractual provisions generally control**
- **Vary greatly in form, content and allocation of risk**
 - “Quick and dirty” clauses
 - “Kitchen sink” clauses
- **Rules of construction vary by state** – e.g., in NY “catchall” provisions construed to include only events of the same general kind or class as those specifically mentioned
- **Useful place to start, though not definitive:**
[https://www.uslaw.org/files/Compendiums2020/COVID19 ForceMajeure 2020/2020 USLAW Compendium of Law COVID19 ForceMajeure.pdf](https://www.uslaw.org/files/Compendiums2020/COVID19%20ForceMajeure%202020/2020%20USLAW%20Compendium%20of%20Law%20COVID19%20ForceMajeure.pdf)

Statutes and Common Law Principles May Excuse Performance

- **Statutes dealing with force majeure in some states** – e.g. California Civil Code § 1511(2); Louisiana Civil Code Articles 1873-1878
- **Illegality** – Does government statute, regulation or ordinance make obligation or performance illegal?
- **Impossibility** – Is obligation objectively impossible?
- **Impracticability** – Is performance impracticable because of extreme and unreasonable difficulty, injury, risk or loss? Increased cost not enough.
- **Frustration of Purpose** – Does a change in circumstances make one party's performance virtually worthless to the other party, frustrating the principal purpose of the contract?
- **Party asserting defense must not be at fault**
- **Application or principles varies by state** – e.g., Alabama has repeatedly refused to recognize impossibility or impracticability

Insurance

- Business Interruption
- Liability Insurance and Reopening
- D&O Coverage

Government Loan Programs

- **PPP Loans**
 - Program recently reopened until August 8
 - Over \$100 billion still available as of July
 - Forgiveness questions and issues
 - <https://register.gotowebinar.com/recording/7340899686285842703>
- **Main Street Loan Program**

A Panoply of Pandemic Problems: 6 Issues of Importance to Employers

Employers must keep up with the constantly changing COVID-19 rules imposed by federal, state and local governments.



- There remains a patchwork of inconsistent rules.
- Federal OSHA has issued only a very general statement noting employer obligations to provide necessary personal protective equipment (PPE) and to provide a safe workplace under the “general duty clause.” See, <https://www.osha.gov/SLTC/covid-19/standards.html>
- The CDC has also issued recommendations for employers. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> and <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (In some jurisdictions, e.g., California, following CDC guidelines is mandatory.)
- Many state and local governments have issued far more detailed requirements with respect to workplace protocols in response to COVID-19.

The failure to follow COVID-19 safety protocols can lead to serious problems!



- While, in most jurisdictions, an employee's exclusive remedy for work-related injuries is workers' compensation, if the employer maintains an extremely unsafe workplace, there may be additional penalties or an employee may be able to pursue a civil personal injury lawsuit in court.
- Federal, state and local governments also can impose stiff fines or seek injunctive relief if required protocols are not followed.
- Employees are filing lawsuits under various theories (e.g., "public nuisance") where safety protocols are allegedly not implemented or followed (e.g., Walmart, McDonalds and many others.)

Employers must be prepared to deal with employees who do not want to return to work.



- If an employee's stated reason is medical, the ADA and state law likely requires the employer to engage in the "interactive process" and to "reasonably accommodate" the employee. In many circumstances, working from home may be a "reasonable accommodation."
- Even if it may be difficult to accommodate, the employer must conduct a case-by-case review and may only deny a requested accommodation if it would impose an "undue hardship" on the employer.
- Even if an employee does not raise a medical issue, in some jurisdictions, an employer may need to consider alternatives. For example, in Los Angeles County, the return-to-work protocols state that employees who can work from home should be directed to do so.

Medical inquiries and testing are permitted, but must be conducted in accordance with law.



- The EEOC has expressly stated that medical screenings, temperature checks and COVID-19 diagnostic testing (not anti-body testing) is permitted, if they are “job related and consistent with business necessity.”
- However, employers that receive medical information must limit who may access it and it must be maintained in strict confidence per the ADA and various privacy laws.
- Never put medical information in an employee’s personnel file!

Beware of potential wage issues.

- All medical screening and testing required by an employer should be conducted “on the clock,” as such time is likely “hours worked” under the FLSA and state laws.

Be wary of “waivers.”

- In some jurisdictions, requiring employees to sign an assumption of risk/liability waiver will violate public policy and may be unenforceable.
- Also, requiring employees to sign one may suggest that the employer intends to maintain an unsafe workplace.
- It is generally better to have employees sign an acknowledge of receipt of the employer’s safety protocols and an agreement to abide by them.
- However, requiring an assumption of risk/liability waiver may be advisable for a third party, e.g., an independent contractor. Any such agreement should state that the employer is following all required safety protocols, but that it is impossible to eliminate the risk of contracting COVID-19.

Open Forum / Q & A

- This Town Hall is **off** the record and it **is NOT being recorded.**
- Please write your questions in the question box or raise your hand so we can unmute you.
- Make sure you have entered the audio pin number if you are using your phone or if using your computer audio that your computer microphone is working.



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Thanks for Attending!

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