



Morgan Lewis

ADVANCED TOPICS IN
HEDGE FUND PRACTICES
CONFERENCE

Manager and Investor Perspectives

WEBINAR SERIES

SESSION 3 | Wednesday, May 13

Current Employment Considerations

Restarting the Economy: Perspectives on Bankruptcy, Insolvency, and the Credit Markets

www.morganlewis.com/2020hedgefundconference

CURRENT EMPLOYMENT CONSIDERATIONS

SPEAKERS



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Current Employment Considerations: Introduction

1

- **COVID-19's Business Impact**
 - Unemployment and changes in consumer behavior
 - Government stimulus programs

2

- **Reopening The Workplace: Key Actions For Return**
 - Social Distancing, Safety Measures, Enforcement/Accommodations, COVID-19 Monitoring

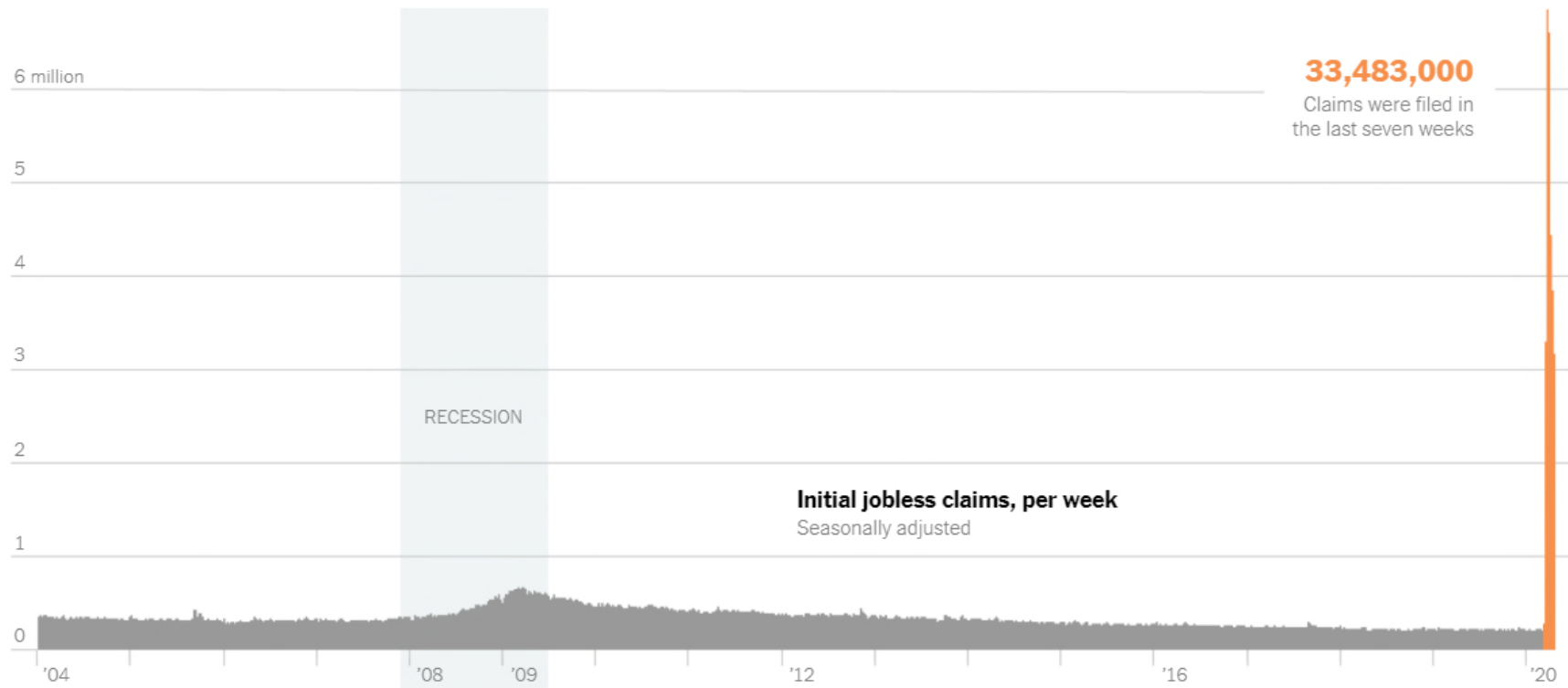
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- **Additional Considerations For Return**
 - Coordination with Building Management
 - Impact of Childcare Availability and Public Transportation
 - Returning Employees from Furlough
 - Travel, Vacation, Leave/Wellness, and Pandemic/Business Continuity Policies

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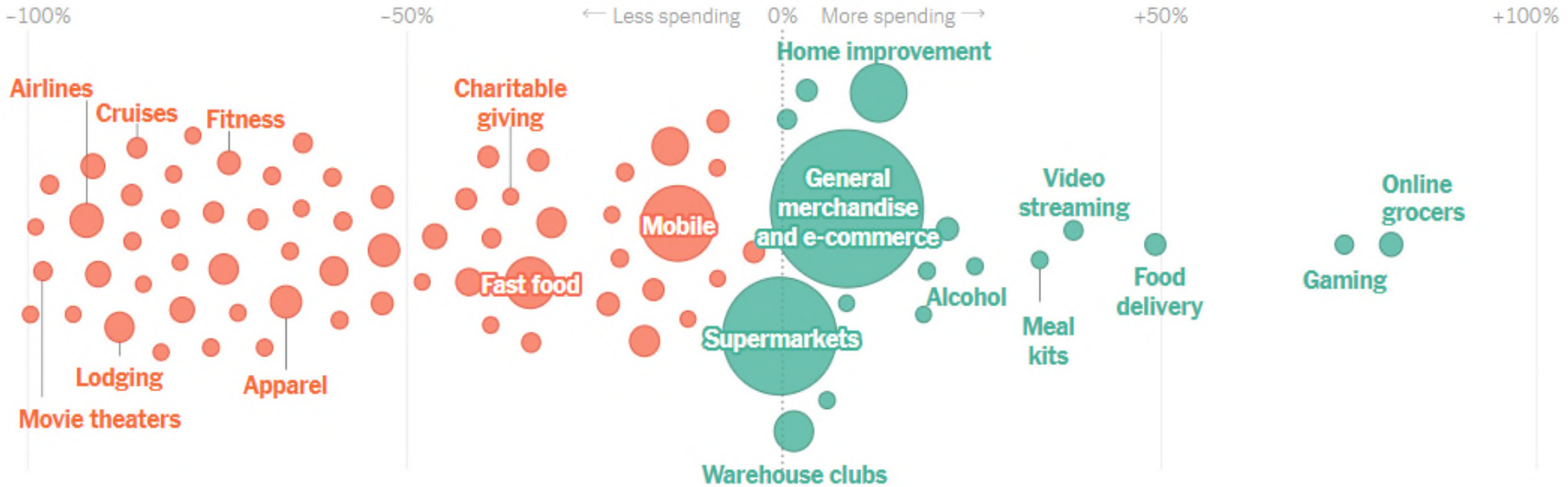
- **Litigation Risks With Return**
 - Potential claims against employers
 - Trade secret risks

Historic Levels of Unemployment Claims



Source: Department of Labor • By The New York Times

Changes in Spending Trends



See David Gelles and Lauren Leatherby. *How the Virus Transformed the Way Americans Spend Their Money*, *N.Y. Times*, April 11, 2020, <https://nyti.ms/2yMi1wM>.

Unemployment: Geographic and Industry Breakdown

Impacted States

Michigan (21.8%)
Vermont (21.2%)
Connecticut (18.5%)
Pennsylvania (18.5%)
Nevada (16.8%)
Rhode Island (16.7%)
Washington (16.0%)
Alaska (15.6%)
New York (14.4%)
West Virginia (14.4%)

Impacted Industries

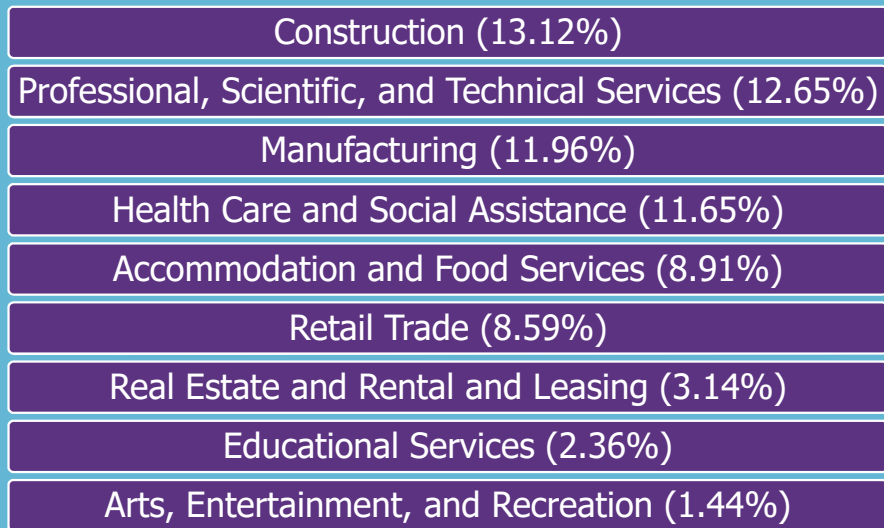
Leisure and Hospitality (39.3%)
Other Services (23%)
Wholesale and Retail Trade (17.1%)
Construction (16.6%)
Durable Goods (15.1%)
Transportation and Utilities (13.5%)
Manufacturing (13.2%)
Professional and Business Services (9.8%)
Financial Activities (5.4%)

Government Stimulus Efforts

- **\$2 Trillion in Aid Under CARES Act**
 - \$603.7 billion to individuals
 - \$500 billion to large business (e.g., air carriers, defense businesses)
 - \$377 billion to small business (e.g., Paycheck Protection Program (PPP))
 - \$339.8 billion to state and local governments
 - \$179.5 billion to public services
- **PPP Round 2**
 - After exhausting the first \$350 billion in PPP funds, Congress approved an additional \$321 billion in funding.
- **Sunset on Effects of Stimulus Efforts?**
 - PPP funds are only designed to cover eight weeks of payroll (and other) expenses
 - Some restrictions on loans to larger businesses expire in September
 - Additional \$600 per week in unemployment benefits to expire on July 31, 2020

Government Stimulus Efforts

PPP Recipients in Selected Industries



Phase I Return

(Based on Applicable Federal/State/Local Orders)

Conservative

- Maintain remote working for all but essential personnel
- Establish social distancing and safety measures for return of more personnel in Phase II

Moderate

- Maintain remote working for as many other employees as possible
- Conduct phased return of nonremote workers based on priority of personnel with social distancing and safety measures in place

Aggressive

- Return to full operations with social distancing and safety measures in place
- As much as possible, conduct phased return based on priority of personnel

Preparation for Phase I Return



Step 1

- Evaluate existing procedures and determine if they are sufficient for a broader return to work for nonessential personnel
- Consult federal/state/local existing orders for essential businesses to design new policies/procedures now



Step 2

- Identify a team or individual who will be responsible for COVID-19 issues and their impact at the workplace
- Develop and roll out social distancing/safety measures and deploy staff to implement workplace changes



Step 3

- Develop policy/plan for enforcement of new requirements
- Develop policy/plan for accommodations, considerations for most vulnerable employees, and COVID monitoring

Key Actions for Reopening

SOCIAL DISTANCING

- **Physical workspace modifications** (e.g., separating desks, modifying open floor plans, closing common areas)
- **Limiting in-person interactions and physical contact** (e.g., no nonessential travel, no in-person meetings)
- **Training employees** on social distancing policies and protocols, including where to go with complaints
- **Update employee schedules** (e.g., staggered scheduling, remote working for less essential personnel)

Key Actions for Reopening

SAFETY MEASURES

- **Create infectious control procedures** (e.g., require frequent hand washing, limit sharing of equipment, assign specified workspaces to each employee, reduce or eliminate access to common areas)
- **Regular screening protocols** for employees, customers/visitors (e.g., symptom, temp screening)
- **PPE procedures** (e.g., require workers and visitors to wear face coverings)
- **Workplace sanitization procedures** (e.g., provide hand sanitizer, require frequent sanitization of high-touch areas)
- **Follow current/updated guidelines** of local DOH, reopening orders, CDC, and OSHA for maintaining a clean and safe workplace

Key Actions for Reopening

ENFORCEMENT/ACCOMMODATIONS

- **Develop/update accommodations policy** for vulnerable employees, including alternative work arrangements
- **Develop policy for employees who fear returning to work or refuse to return to work**
- **Develop PPE enforcement policy**, including discipline for those who refuse to wear face covering
- **Update/develop complaint procedures and training** on enforcement/discipline/accommodations

Key Actions for Reopening

COVID MONITORING

- **Establish procedure to address workplace exposure** (e.g., separate and send home workers who appear to have symptoms consistent with COVID-19, clean and disinfect workplace)
- **Encourage employees to stay home if they are feeling sick or have COVID symptoms**
- **Develop procedures for contact tracing/notification** of known exposure consistent with ADA or state law

Additional Considerations for Reopening

COLLABORATION WITH BUILDING MANAGEMENT

- Work with building management to understand your building's plans and policies surrounding reopening.
- Ensure employees are informed of building policies to ensure seamless entry and exit.

Additional Considerations for Reopening

CHILDCARE AND PUBLIC TRANSPORTATION

- Consider impact from lack of childcare availability
- Consider alternatives to public transportation or stipends for parking or rideshare apps to limit need for public transportation

Additional Considerations for Reopening

RETURNING EMPLOYEES FROM FURLOUGH

- Evaluate state laws on preference for furloughed employees
- Review furlough notices to determine promises and expectations for return
- Consider impact of timing of return and any salary reductions for wage/hour impact
- Consider impact on health and welfare benefits and vacation time
- Furloughed employees may need to reenroll or update benefit information and consider any impact on 401(k)
- Employees responsible for premium payments during furlough may be obligated to repay, but there are complications due to state deduction restrictions

Additional Considerations for Reopening

WAGE AND HOUR/COMPENSATION PLANS

- Compensable time for wait time for symptom/temp screening, temperature taking at home, building ingress/egress, and continuous workday issues
- Potential inclusion of additional incentive pay in regular rate
- Preserving exemptions, including of remote workers whose duties have been modified or exempt workers covering nonexempt work resulting from lack of hourly workers
- Expense reimbursement for masks/safety equipment and internet/cell phone for teleworking employees
- Evaluate effect of shutdown periods on existing bonus/incentive plans

Additional Considerations for Reopening

TRAVEL AND VACATION POLICIES

- Revise/implement new travel policy consistent with federal/state/local requirements (e.g., what will be considered essential travel?)
- Procedures for monitoring travel and quarantine procedures for return from travel
- Consider monitoring personal/vacation travel
- Consider encouraging employees to utilize vacation while working remotely to avoid a “run” on vacation at the end of the year

Additional Considerations for Reopening

Leave/Wellness Policies

- Consider leave entitlements for employees remaining home and unable to work remotely as well as updates to policies going forward, including ensuring continued compliance with applicable and recently enacted sick-leave laws
- Evaluate existing Wellness and EAP programs for COVID-19-specific issues

Pandemic/Business Continuity Policies/Plans

- Review and revise current pandemic response plans in order to respond to another potential outbreak of the virus
- Develop management/HR succession in the event that any leadership team is sidelined
- Consider whether to require vaccination once a vaccine is developed

Potential Legal Claims

- **Workplace Safety/Nuisance Claims** (litigation for alleged violation of safety/health standards or state laws requiring safe workplaces and related whistleblower/retaliation complaints)
- **Failure-to-Accommodate Claims** (Is fear of coronavirus a disability? Is the provision of private transportation a reasonable accommodation?)
- **Wage and Hour Claims** (e.g., reimbursable expenses; overtime/meal breaks when working from home; being “on-call”; time waiting for medical screens and temperature checks; wage reduction claims)
- **Workers’ Comp or Tort Claims** (including whether WC laws will be exclusive remedy, possible wrongful death claims and third-party liability claims from visitors, employees’ family members, etc.)
- **Claims Arising Under Local, State, and Federal Leave Laws**

Potential Legal Claims

- **Furlough and Layoff Claims** (e.g., failure to pay timely final payments, or failure to provide timely termination/benefit eligibility notices)
- **Invasion-of-Privacy Claims** (e.g., disclosure of confidential medical information; disclosure of confidential customer information by employees to family members or otherwise during remote working periods, etc.)
- **Discrimination and Retaliation Claims** (e.g., claims challenging process or decision-making for furloughs, layoffs, salary reductions, etc.; claims relating to employees' actual or perceived disabilities, etc.)
- **Labor Claims** (e.g., violations of collective bargaining agreements, failure to negotiate actions taken in response to the virus, failure to abide by collective bargaining provisions relating to recall rights)

Other Legal Risks: Trade Secrets

- **Proliferation of remote working increases the risk of trade secret theft**
- **Nonetheless, state and federal law requires companies to take reasonable measures to maintain the secrecy of trade secrets, including:**
 - Maintaining a trade secret protection policy
 - Requiring the execution of proprietary information agreements
 - Restricting access to certain documents or categories of information
 - Requiring strong passwords and maintaining secure computer networks
 - Regularly educating personnel about their obligations to maintain confidentiality

Tips for Maintaining Trade Secrets During COVID

- **Communicate Expectations and Requirements**
 - Remind employees of their existing obligations to maintain confidential information, as required under existing company agreements and state/federal laws
 - Encourage reporting of potential security threats and gaps in current remote network
- **Review Agreements with Vendors and Third Parties**
 - Determine if any third parties or vendors have access to confidential or proprietary information
 - Confirm that vendors and third parties are taking steps to secure confidential information in the current, remote working environment
- **Review and Revise Policies**
 - Confirm current policies are adequate in the current environment and consider revisions, if necessary
- **Document All Actions Taken**

Trade Secrets and Departing Employees

Step 1 – Prepare for exit interview

- Identify any agreements that are already in place
- Prepare a certification to be signed by the employee confirming he or she has returned all company information

Step 2 – Confirm departing employee understands his or her obligations with respect to company information

- Ask the employee about future plans to determine if there is heightened risk of trade secret theft
- Consider sending the employee a letter regarding his or her confidentiality obligations

Step 3 – Secure employee's computer and other devices

- Establish a plan for the return of company information, including computers and other company-issued devices
- Facilitate the return of company information (e.g., prepaid mailing, courier service, etc.)
- If necessary, engage a computer forensics firm to confirm that no information was improperly sent or retained by the departing employee

Step 4 – Cut off the employee's access to your systems

- Access to all computer and email systems should be terminated immediately

Related LawFlashes

[Reopening the Workplace: A Preliminary Guide for Employers>>](#)

[Show Me the Masks: Supplying Face Coverings and Respirators to Essential Employees>>](#)

RESTARTING THE ECONOMY: PERSPECTIVES ON BANKRUPTCY, INSOLVENCY, AND THE CREDIT MARKETS

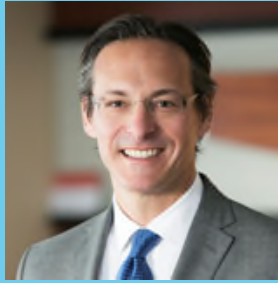
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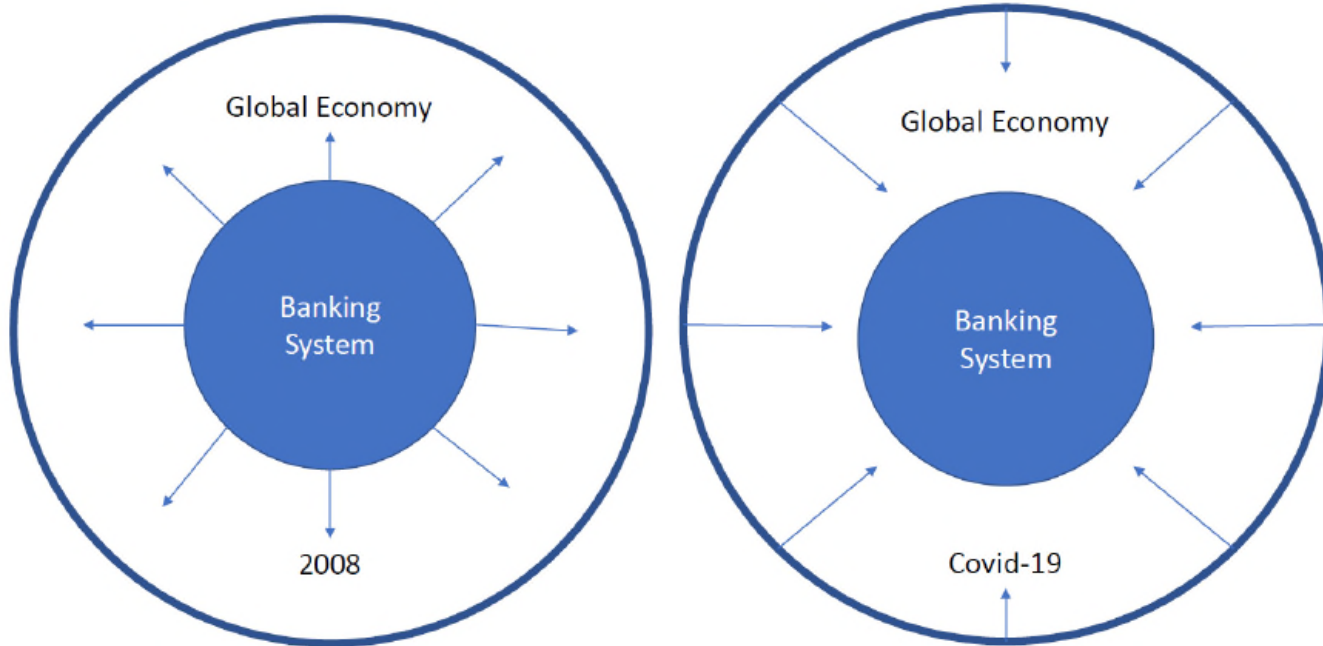
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Restarting the Economy – How?



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Current Economic Situation vs. Global Financial Crisis



WHERE IS THE DEBT?



Transportation



Banking



Energy



Healthcare



Insurance



Investment funds



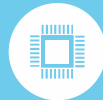
Life sciences



Retail & eCommerce



Sports



Technology

Bankruptcy – Rise of Alternative Lenders

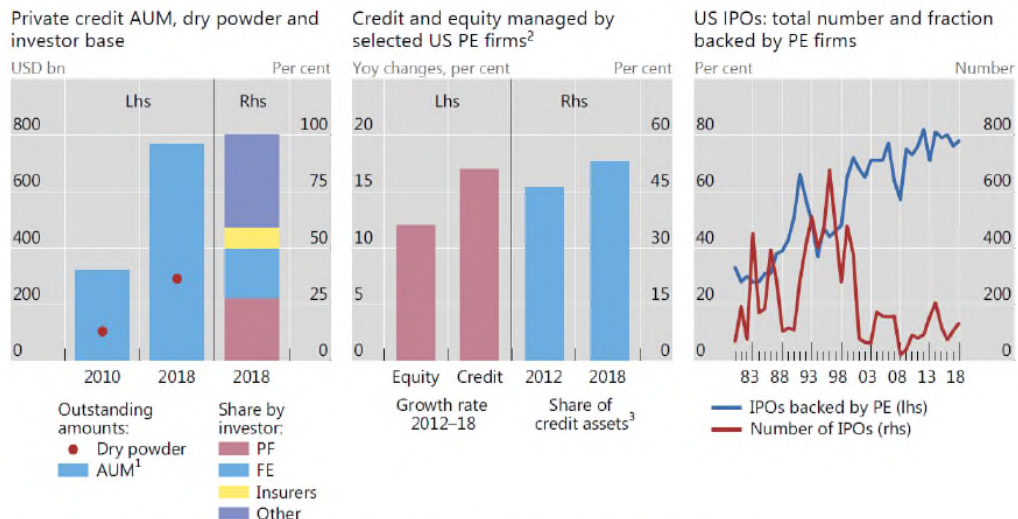
“High-yield companies will continue to be starved for credit unless the US government extends its program to include private lenders. Private equity will struggle to raise fresh capital as traditional sources...face unprecedented pressures.”

View from the Peak, The Absence of White Knights, Paul Krake, April 8, 2020

Growth of Private Credit

Growth of private credit

Graph A



AUM = assets under management; FE = foundations/endowments; PE = private equity; PF = pension funds.

¹ As of end-year (as of June for 2018). ² Calculations from 10-K filings. Companies are Apollo Global Management, Blackstone Group, The Carlyle Group and KKR & Co. "Credit" refers to all credit assets. ³ Share is calculated as credit AUM divided by the sum of credit and equity AUM.

Sources: IPE, "Private debt activity slowed sharply in 2019, but 2020 starts crowded", 13 January 2020; McKinsey&Company, "Private markets come of age", *McKinsey Global Private Markets Review*, 2019; Preqin, *2019 Preqin Global Private Debt Report*; Preqin Insights, "Private debt dry powder: Europe and North America-based managers seeing fundraising success", 13 November 2015; Jay R Ritter, *Initial public offerings: updated statistics*, University of Florida, Table 4, 2018; company reports; author's calculations.

Bank of International Settlements,
 Quarterly Review March 2020 –
 International banking and financial market
 developments

The Absence of White Knights

1

Sovereign Wealth Funds

2

China

3

Warren Buffett

4

University Endowments

UNIVERSITY STRESSES

Dramatic reduction in sporting related revenues

Removal of revenues from international students and general fall in tuition of students taking online courses versus attending on campus

Lost revenue from residential refunds and highly capital intensive business model

Capital losses on endowments and a general over-reliance on illiquid strategies in endowments

Bankruptcy Courts Adjusting to Unprecedented Times

- Most Courts have implemented general orders and procedures to remain open to debtors and parties in interest
- Hearings being conducted telephonically and by video-conference if witnesses are necessary
- All non-time-sensitive matters are being deferred
- 341 meetings being held telephonically
- But courts remain open



Impact on Pending Chapter 11 Cases

- Inability to operate and economic uncertainty have curtailed exit alternatives
- Even companies close to the finish line have had to move back their timelines and expectations (e.g. EP Energy and Alta Mesa)
- Novel suspension motions or “mothball” procedures have been enacted



LAWYER BIOGRAPHIES

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Recognized by legal industry observers for his labor and employment work, Leni D. Battaglia defends clients in a variety of employment litigation in courts, arbitral tribunals, and agencies around the United States. Leni also develops proactive litigation-avoidance strategies for clients in various industries, including financial services, technology, media, entertainment, retail, hospitality, ecommerce, and transportation. Additionally, he currently serves as co-leader of the firm's fashion and luxury brands initiative.

In addition to unpaid overtime, minimum wage, and other wage and hour class and collective matters, Leni litigates sexual harassment, defamation, age, race, sex, national origin, and disability discrimination, and whistleblower claims. He also represents clients in contract, denial of employee benefits, noncompete, and trade secret matters.

In the realm of preventative practice, Leni counsels on gig-economy and on-demand workforces, sexual harassment prevention and #MeToo issues, arbitration agreements and class action waivers, compensation plans, independent contractor and exemption classification, restrictive covenants and trade secrets, and employment policies. He regularly conducts internal wage and hour audits and navigates employers through investigations brought by federal and state agencies. Leni also trains employees and managers on how to prevent harassment and discrimination in the workplace, and regularly authors articles and conducts seminars on developments in New York employment law and class and collective action litigation.

Leni enjoys an active pro bono practice and is a recipient of numerous awards, including the Award for Pro Bono Service from the New York City Family Court (2013) and the Award for Outstanding Pro Bono Service from the Legal Aid Society of New York (2006), and has repeatedly received the Empire State Counsel Honor (NY) in 2007–2010 and 2013–2014.

Jennifer Feldsher



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Jennifer Feldsher focuses her practice on corporate restructuring and insolvency law. She represents interested parties in bankruptcy proceedings and complex corporate debt restructurings with an emphasis on the representation of secured creditors, special situations investment funds, ad hoc groups, and acquirers of assets in all aspects of distressed situations. Jennifer also has experience representing troubled corporate debtors in in-court and out-of-court reorganizations, asset sales, loan restructurings, and commercial loan transactions.

Jennifer has directed all aspects of the bankruptcy process for debtors and creditors, including contested plan confirmation hearings, contested relief from stay and cash collateral hearings, and DIP loan negotiations and related hearings. In addition, Jennifer is routinely called on to advise directors, managers, creditors, and institutional investors on zone of insolvency issues and fiduciary duties.

She has acted as counsel to companies involved in many of the largest restructurings, including in the energy, retail, telecommunications, technology, healthcare, airline, automotive, gaming, and financial services industries.

Paul Krake, *View from the Peak*



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Paul has over 25 years' experience as an economic and political strategist. He founded View from the Peak in 2011, seeing a need for a truly global, multi-asset class research platform that focuses on the interactions between public policy, economic trends, technology and geo-politics. View from the Peak takes its name from Victoria Peak, the highest point on Hong Kong Island and the firm aims to look at the world from a 360-degree view with an Asian perspective. Clients include endowments, family offices, government agencies, asset managers, and corporates. The firm has offices in Hong Kong, Chicago, and London.

Paul, like many China watchers, has been disappointed with the tone and substance of the debate regarding the future of US-China relations over the course of the last several years. The need for a more sensible debate forms the genesis behind the US-China Series, which seeks to rationally cover these complex issues, while being cognizant of different opinions and philosophies. The US-China series also aims to promote a message of co-ordination that is critical when discussing the future of the most important geo-political relationship of the 21st century.

Prior to forming View from the Peak, Paul spent 15 years in Investment Banking and Asset Management. He was the Managing Partner of Corus Capital Management, a multistrategy Asian focused hedge fund based in New York. Prior to forming Corus in 2005, he held Asia-focused roles at Moore Capital Management, Goldman Sachs, and Macquarie Bank. Paul holds a Bachelor of Economics and Politics from Monash University in Melbourne, Australia.

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Timothy W. Levin, leader of the firm's investment management practice, counsels investment advisers and other financial services firms on the design, development, and management of pooled investment vehicles and investment advisory programs. He also advises fund managers in connection with organization, registration, and ongoing regulatory compliance. Additionally, he represents managers and sponsors of unregistered pooled investment vehicles.

Timothy's clients include many types of registered investment companies, such as mutual funds and registered funds of hedge funds, and funds focused on alternative investment strategies, including business development companies (BDCs). His unregistered pooled investment vehicle clients include private funds, bank collective investment trusts (CITs), and companies seeking exemption from investment company status.

Since 2008, *Chambers USA: America's Leading Lawyers for Business* has recognized Timothy for his work.

He speaks frequently at conferences and moderates panels. He also co-chairs the annual Hedge Fund Conference. Timothy is the editor of *Morgan Lewis Hedge Fund Deskbook: Legal and Practical Guide for a New Era* and the *Mutual Fund Regulation and Compliance Handbook*.

Douglas T. Schwarz



Douglas T. Schwarz is a trusted advisor to and advocate for employers in all aspects of labor and employment law. He litigates in court, arbitration, and administrative proceedings; counsels employers on human resources matters; negotiates and drafts executive employment and separation agreements; advises on labor and employment aspects of corporate transactions, both domestic and cross-border; and conducts internal investigations of employee complaints. Doug also handles ADA Title III and state law matters involving access of persons with disabilities to public accommodations.

Doug's clients include financial services firms (mutual funds, hedge funds, private equity, venture capital, commercial and investment banks, wealth management); educational institutions; and media, technology, telecommunications, pharmaceuticals, and life sciences companies.

He represents numerous non-US companies, from Japan and elsewhere in Asia, the United Kingdom, and Europe, regarding their US labor and employment matters, and US companies on international labor and employment issues.

Doug's experience includes litigating claims of discrimination, harassment, and reasonable accommodation (race, gender, age, disability, pregnancy, sexual orientation, religion), whistleblower retaliation, wage and hour violations (bonus, commission, overtime and minimum wage), non-competition, non-solicitation, and trade secret breach, defamation and privacy; counseling on reorganizations, reductions-in-force, and executive hiring and termination matters; developing and implementing litigation-avoidance strategies, diversity and affirmative action plans, and training programs on harassment prevention, diversity, and performance management; and advising on government audits (by OSHA, the Department of Labor and OFCCP) and labor-management relations.

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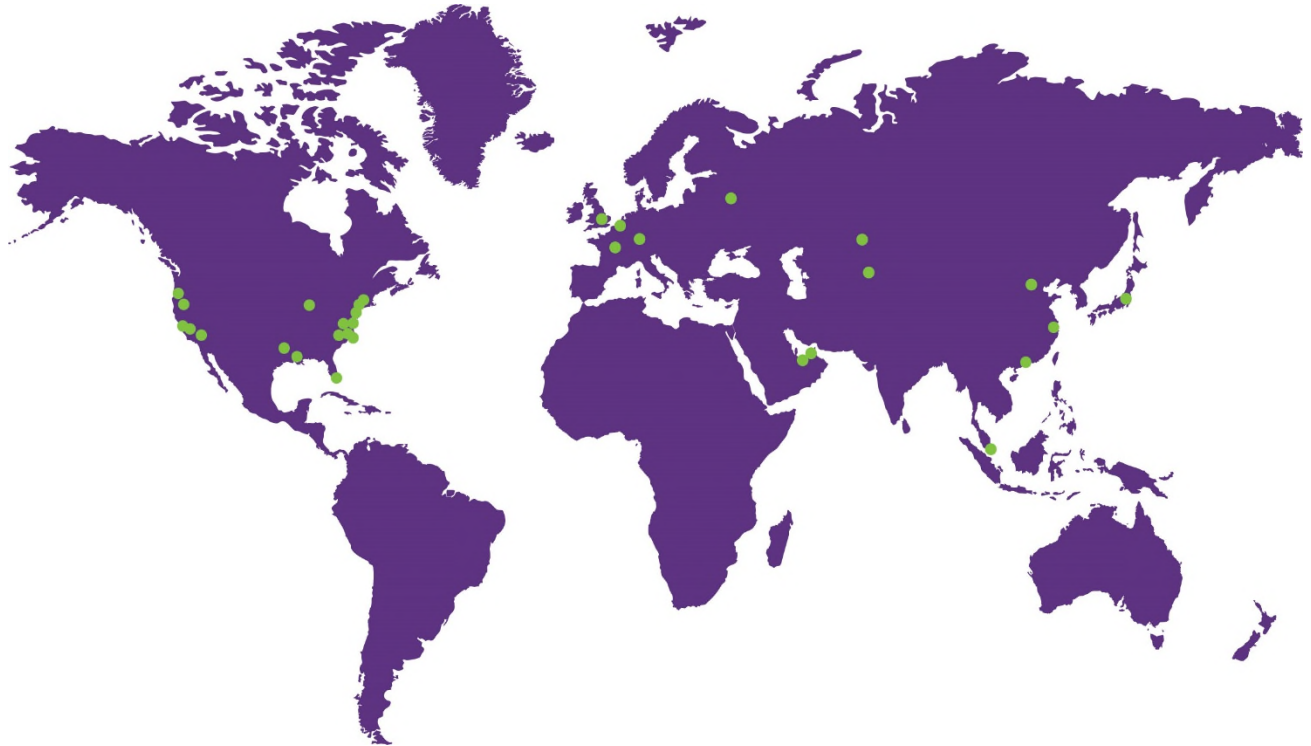
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