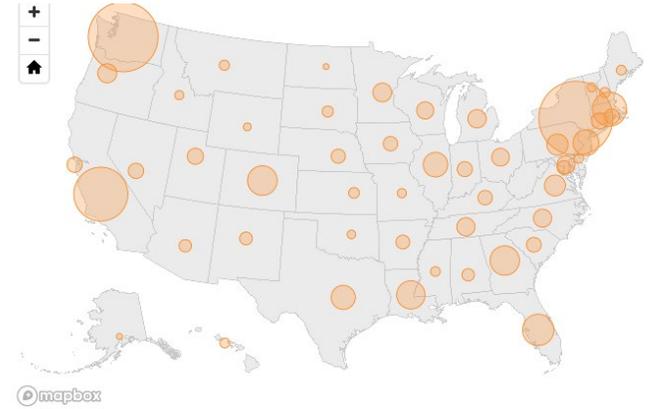
A microscopic view of several COVID-19 virus particles. The particles are spherical and covered in red, spike-like protrusions. They are set against a blurred, light-colored background that appears to be a surface or tissue.

# The Legalities of a Tough Situation: Covid-19

- with Don Phin, Esq.

---



**It's NOT What You Think!**

**N95**

**MYTH: v/s FACT:**

**MYTH:** An N95 respirator and a surgical mask provide the same protection.

**FACT:** A NIOSH-approved N95 respirator forms a seal against the user's face, preventing particle penetration around the edges. The filter has passed NIOSH tests to determine that it protects against at least 95% of airborne particles. Because surgical masks do not seal against the face and the filters have not been tested, the same level of protection against airborne particles cannot be guaranteed.

**MYTH:** I can decorate my N95 respirator to look stylish!

**FACT:** Any alteration of the N95 will void the NIOSH approval because respirator can no longer be guaranteed to provide the necessary level of protection.

**MYTH:** There's no way to verify if an N95 respirator is actually NIOSH-approved.

**FACT:** A list of approved N95 respirators is updated every month. Find it at [Kennedyschools.gov](https://www.kennedyschools.gov) under the "Approved Particulate Filtering Facepiece Respirators" tab.

**NIOSH**



# What we will discuss...

---

How to Handle Things with Responsibility and Grace

---

Emergency Paid Sick Leave Act

---

Mandatory Sick Leave and Paid Family Leave

---

Employee Termination-Layoffs vs Furloughs

---

CARE Act

---

Paying for all of this

---

Wage and Hour Concerns

---

ADA/FMLA/HIPAA

---

OSHA/Work Comp

---

Impact of state laws for sick pay, childcare leave, PFL, disability, unemployment, and more

---

Essential Operations

---

Some Best Practices

**ORDER**

**CHAOS**

# **Responsibility and Grace**

# Emergency Paid Sick Leave Act

- Takes effect April 1
- Under 500 with “exceptions” for under 50- NOT YET DEFINED!
- Any length of employment. Includes part-timers (Ave. time over 6 mos. Or “expected” time)
- Two weeks (up to 80 hrs.) pay
- An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under the Act.
  1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
  2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
  3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
  4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2), above.
  5. The employee is caring for a son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, due to COVID-19 precautions.
  6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
  7. Coverage is extended to individuals who (vii) have become the head of household or breadwinner; (viii) are forced to quit their job; and (ix) have their place of employment closed.
- Categories 1-3, 7-9 \$511 per day and \$5,110
- Categories 4-6 \$200 per day and \$2,000

# Emergency Paid Sick Leave Act, cont.

- Notices required
  - Then rolls into Emergency Family and Medical Leave Expansion Act
  - Or, they can use their own sick pay, PTO, etc.
  - Check MGAs- pay directly into the Fund.
- 

# Emergency Family and Medical Leave Expansion Act

- Under 500 ee's.
- 30 days employment . Gives an employee that was recently rehired access to paid family leave if the employee (1) was laid off after March 1, 2020, (2) worked for the employer for at least 30 of the last 60 calendar days, and (3) was rehired by the employer.
- *School and daycare* closure. Intermittent leave allowed if teleworking.
- First 10 days unpaid (use EPSLA or PTO, etc.)
- 2/3rds payment benefit is capped at \$200 per day and \$10,000 total. if receiving 2/3 and your employer permits, you may use your preexisting employer-provided paid leave to get the additional 1/3 of your normal earnings so that you receive your full normal earnings for each hour. No tax credit for amounts in excess of the FFCRA's statutory limits.
- Traditional FMLA (unpaid but continued benefits) still applies to care for other family members and one's own health. Note: common flu is not covered. OK to request documentation (Use the forms).
- Job restoration if 25 or over, same as traditional FMLA.
- Employees with fewer than 25 employees: No obligation to restore returning employees to their position if:
  - The employee's position no longer exists due to coronavirus-related economic impacts.
  - The employer makes a reasonable effort to find a similar position for the employee, up to one yr.

# So...

- Provide Notices to Employees.
- If I have the problem, 100% pay, with a maximum of \$511 each day, for up to 80 hrs. If they have the problem, 2/3 pay up to a maximum of \$200 each day, for up to 80 hrs.
- FMLA benefit applies to employees who have to stay home with a child whose school or childcare facility is closed due to the coronavirus.
- No pay for first 10 days. An employee may qualify for emergency pay, or elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave.
- Quarantined workers, or those who were caring for affected family members, are not eligible for the FMLA pay benefit.
- Note: business closure ends these leave benefits. Cannot be use for partial layoffs.

# So...

Per the DOL FAQ <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>:

- These leaves are not available to employees with reduced hours, furloughed employees, or employees' whose workplaces are closed. See questions 23-28.
- These leaves (and payroll tax credit) are not retroactive. Employees are not entitled to pay under these leaves if they were absent or out of work (for any reasons) prior to April 1. See question 13.
- Both emergency paid sick leave (EPSL) and emergency Family and Medical Leave (EFMLA) can be taken on an intermittent basis in certain situations. See Questions 20-22 for explanations about when intermittent leave is allowed.
- Employees may not be required to use other forms of paid leave prior to or concurrently with EPSL or EFMLA. See questions 32 and 33.
- Employers should keep documentation to show that employees who received leave were actually in need of leave. The documentation requirements will be outlined in soon-to-be-released IRS guidance. See Questions 15 and 16.

# Decision Time- Layoffs vs Furloughs vs Retention

- Terminate (layoff) and send ee's into unemployment and state disability. Paid Family Leave under some state laws.
  - After April 1 may generate retaliation claim.
  - Provide required notices- change of status, unemployment, COBRA, WARN, benefit plan notices.
  - Pay out accrued vacation where required to do so. (Law, practice or contract).
- 

# Decision Time- Layoffs vs Furloughs vs Retention, cont.

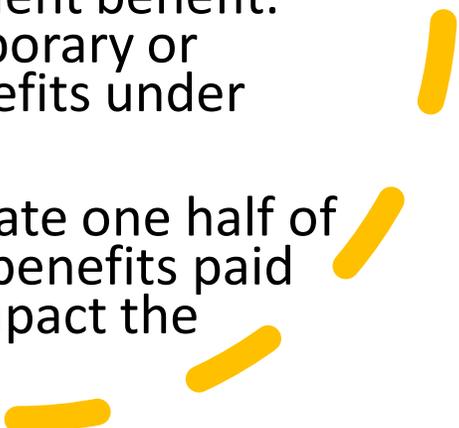
- Furlough- still an employee and remain subject to emergency sick leave and FMLA
- WA- “Furloughs are a form of temporary layoff that may consist of a complete stoppage of work or reduced work hours over a period of time (for example, a reduction of one day a week for a year).

Since unemployment benefits are determined on a weekly basis, full-time workers whose hours of work are reduced by one work day each week, usually will not be eligible for partial unemployment benefits because they earn too much in the week to be eligible.

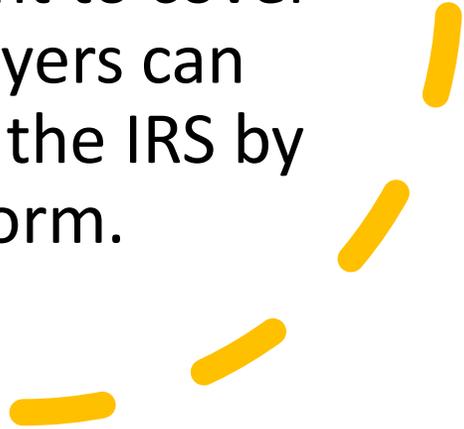
If you are placed on furlough, you may apply for unemployment benefits and we will determine if you are eligible.”

- Watch benefit eligibility! “Actively employed”
- 

# CARES Act and Unemployment

- The maximum weekly benefit in Alabama is \$275, but it's \$450 in California and \$713 in New Jersey.
  - If an employee was making \$1,100 per week in New York; she'd be eligible for the maximum state unemployment benefit of \$504 per week. Under the new program, she gets an additional \$600 of federal pandemic unemployment compensation, for a total of \$1,104, essentially replacing her original paycheck.
  - Incentivizes states to waive the week-long waiting period for the initial receipt of benefits. Provides for up to 13 weeks of emergency unemployment benefits for eligible individuals who have exhausted the 39 weeks of state benefits and remain unemployed.
  - Eligible employees subject to short-time compensation programs receive a pro-rated unemployment benefit. Individuals employed on a seasonal, temporary or intermittent basis are not eligible for benefits under short-time compensation programs.
  - Employers are obligated to pay to their state one half of the amount of short-time compensation benefits paid under such plans. This amount will not impact the employer's contribution rate.
- 

# How Do I Get Help Paying for Keeping Employees on Payroll?

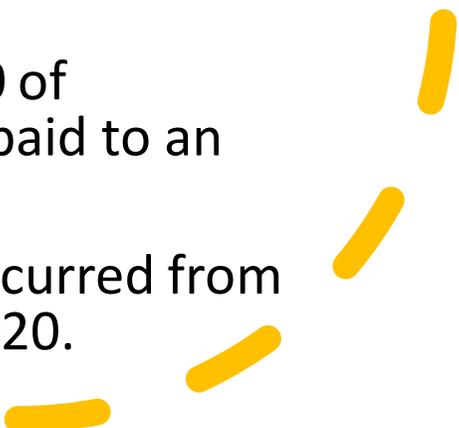
- With Credits and Loans
  - Employers can begin taking advantage of two refundable payroll tax credits, designed to immediately and fully reimburse them starting by April 2nd, 2020, dollar-for-dollar, for the cost of providing coronavirus-related leave to their employees. Wages and health care benefits.
  - If these amounts are not sufficient to cover the cost of the paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form.
- 

# How Do I Get Help Paying for Keeping Employees on Payroll?, cont.

## Employee Retention Credit for Employers Subject to Closure

- The Act provides eligible employers a payroll tax credit equal to 50 percent of wages paid to each employee for each calendar quarter, capped at \$10,000 per employee, inclusive of payments for certain health benefits. The credit amount is capped at the amount of employment taxes on the wages paid to the employees, less certain other credits.
- Eligible employers are those that were operating in year 2020 and (i) whose operations were suspended or partially suspended because of COVID-19 or (ii) have seen a significant decline in gross receipts. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.
- For employers with more than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above.
- For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order.
- Employers and self-employed individuals may defer payment of the employer share of the Social Security tax they otherwise are responsible for paying over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022.

# CARES Act Payroll Credits

- Refundable payroll tax credit for 50 percent of wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers whose (1) operations were fully or partially suspended, due to a COVID-19-related shutdown order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year.
  - For 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above. For 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order.
  - The credit is provided for the first \$10,000 of compensation, including health benefits, paid to an eligible employee.
  - The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.
- 

# CARE Act and SBA Loans

- Allows advance payments under the SBA Emergency Economic Injury Disaster Loans grants to be used to, among other purposes, “provide paid sick leave to employees who are unable to work due to the direct effect of COVID-19.”
- SBA to make loans small businesses with no more than 500 employees. – Loan amount is tied to payroll costs incurred by the business. – Allowable uses include payroll support, paid sick leave or medical leave, insurance premiums, rent and utility payments. – Maximum interest rate of 4%. – No prepayment fees. – No collateral or personal guarantee requirements. – Loan forgiveness equal to amount spent during an 8-week period after loan origination on payroll costs, interest payment on any mortgage, payment of rent, and utility payments.
- Any loan amounts not forgiven at the end of one year is carried forward as an ongoing loan with terms of a max of 10 years, at max 4% interest.
- However, you are not eligible for this if you receive the SBA disaster loan.

# CARES Act, cont.

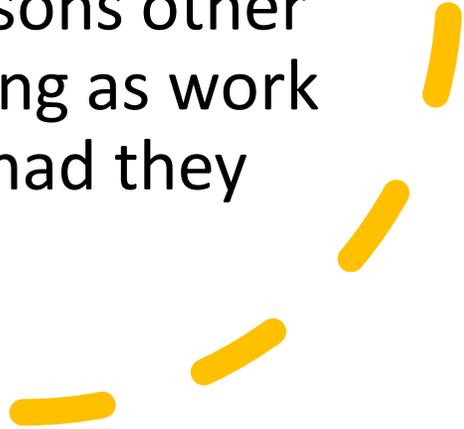
## Employer Payments of Student Loans

- The CARES Act permits employers to provide a student loan repayment benefit to employees on a tax-free basis, up to \$5,250. This amount would be excluded from the employee's income and can also include payments under employers' existing tuition assistance programs. The tax-free cap applies to any payments made by an employer for these purposes before January 1, 2021.

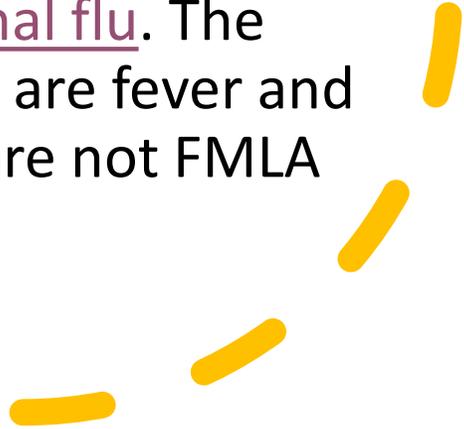
## Limits on Employee Compensation

- Employers who are recipients of direct lending under the Act are prohibited from increasing the compensation and offering certain severance benefits to highly compensated employees.
- Employers cannot increase the compensation of any officer or employee whose total compensation in calendar 2019 exceeded \$425,000 or pay any severance or other benefits to these employees or officers upon termination that exceed twice the maximum total 2019 compensation paid to the employee or officer.
- In addition, employees who earned more than \$3 million in calendar year 2019 cannot receive more than \$3 million plus 50% of the amount their 2019 compensation exceeded \$3 million. Total compensation is defined to mean salary, bonuses, awards of stock and "other financial benefits."

# Wage and Hour

- You may reduce wages down to min. wage and exempt employees down to their threshold. \$684 wk.(28 hr./35K yr.) and \$107,432 for Highly Compensated Employees. (Check with state and local wage rates)
  - Exempt employees paid for entire week. Deductions from salary may be made if the exempt employee is absent from work for a full day or more for personal reasons other than sickness and accident, so long as work was available for the employee, had they chosen to work.
- 

## ADA/FMLA/HIPAA

- ADA- telecommuting accommodation unless undue hardship.
  - ADA/FMLA- OK to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work. Notify in advance.
  - HIPAA- OK to test for fever or send home. Limit info on need to know basis. Watch California Consumer Privacy Act (CCPA)notice
  - Inquiries into an employee's symptoms should attempt to distinguish the symptoms of COVID-19 from the common cold and the seasonal flu. The most common symptoms of COVID-19 are fever and a dry cough. (Common Flu and Colds are not FMLA covered events.)
- 

# OSHA/Work Comp

- OSHA- [Guidance on Preparing Workplaces for COVID-19](#)
- Is anyplace “safe”?
- Work Comp- Health Care workers, first-responders.
- WA- quarantine normally would not be covered by workers’ comp unless the worker was made ill by workplace exposure.  
Coronavirus claims by Washington workers outside of health care or emergency services will be decided on a case-by-case basis.
- Most state workers’ comp statutes exclude “ordinary diseases of life” such as the common cold or flu. Greater exposure to the general public tends to limit liability for workers’ comp insurers.

## Occupational Risk Pyramid for COVID-19





# State Laws



State mandated sick pay



School or daycare closure



Paid Family Leave



First responder leave



State disability



Unemployment



Vacation accrual laws



# Essential Businesses

<https://www.cisa.gov/critical-infrastructure-sectors>

# Business Continuity

- Dislocation from office or key physical assets due to an emergency situation
- Information backup processes and procedures
- System restoration processes and procedures
- Continuation of customer service and customer communications
- Loss or unavailability of business operational systems and components
- Loss or unavailability of key personnel
- Supply or distribution channel impacts
- Processes and procedures for training employees
- Recordkeeping and supervisory obligations
- Emergency contact and communications trees
- Risk and liability mitigation strategies
- <https://www.bain.com/insights/ceo-plan-for-coronavirus-actions-to-take-now/>

## CEO checklist:

We recommend organizing efforts around the following six urgent priorities

 <p><b>Protect Your Employees and Customers</b></p> <ul style="list-style-type: none"> <li>• Implement the best known guidelines available for both employees and customers - overinvest</li> <li>• Monitor global health guidelines, other companies - and continue to fine tune</li> <li>• Over-communicate with full transparency</li> <li>• Provide assistance to epidemic-limiting initiatives in any way possible (CSR)</li> </ul>	 <p><b>Model your exposure; Stress test P&amp;L and liquidity</b></p> <ul style="list-style-type: none"> <li>• Outline macro scenarios by market, translate to revenue decline and P&amp;L scenarios               <ul style="list-style-type: none"> <li>– Units, revenue, costs</li> <li>– Cap Ex, working capital, cash/liquidity</li> <li>– 13 week, 4Q outlook</li> </ul> </li> <li>• <b>Build extreme downside scenarios – this has the potential to be a “100 year” event</b></li> <li>• Outline major operational actions triggered               <ul style="list-style-type: none"> <li>– Do now ‘handbrake’ actions vs. do-later ‘break glass’ initiatives</li> </ul> </li> </ul>	 <p><b>Defend against revenue declines</b></p> <ul style="list-style-type: none"> <li>• Take a customer centric view to this situation – how will you build trust, loyalty and market share through and beyond this crisis?</li> <li>• Build specific revenue mitigation actions for core revenue stream declines</li> <li>• Pivot resources to pockets of current and future growth, online and beyond</li> </ul>	 <p><b>Stabilize operations to “new normal”</b></p> <ul style="list-style-type: none"> <li>• Stabilize supply chain of physical goods from likely geographic and labor disruptions               <ul style="list-style-type: none"> <li>– Manufacturing, distribution, suppliers, suppliers to suppliers</li> </ul> </li> <li>• Build contingency operational plans for all aspects of business               <ul style="list-style-type: none"> <li>– Front line facilities, costs, variable labor staffing</li> <li>– Cross regional variations in utilization</li> <li>– HQ, IT</li> </ul> </li> </ul>	 <p><b>Plan urgent cost take-out to conserve cash</b></p> <ul style="list-style-type: none"> <li>• Spend handbrakes               <ul style="list-style-type: none"> <li>– Immediate actions (e.g. hiring freeze, op ex, cap ex, working capital)</li> </ul> </li> <li>• Set aggressive ‘break glass’ cost actions triggered by more extreme revenue scenarios               <ul style="list-style-type: none"> <li>– This is (may be) about saving the company – no ideas are too extreme</li> </ul> </li> <li>• Mid-term, outline a plan to lean out the cost structure for the future – more automated, more variable, more shock resistant</li> </ul>	 <p><b>Play Offense, not just defense</b></p> <ul style="list-style-type: none"> <li>• Define how you will outperform competitors and take share through and beyond the crisis               <ul style="list-style-type: none"> <li>– M&amp;A roadmap</li> <li>– Product/service/customer intimacy investments</li> </ul> </li> <li>• Prepare for ‘bounce-back’ and recovery               <ul style="list-style-type: none"> <li>– E.g. Marketing investment, leveraging macro trends for ‘if, then’ moves</li> </ul> </li> <li>• Plan for and leverage a ‘leap-frog’ change in customer behaviors               <ul style="list-style-type: none"> <li>– Especially digital</li> </ul> </li> </ul>
---	--	---	--	--	---

This information is confidential and was prepared by Bain & Company solely for the use of our client; it is not to be relied on by any 3rd party without Bain's prior written consent

# Learn or Create Something!

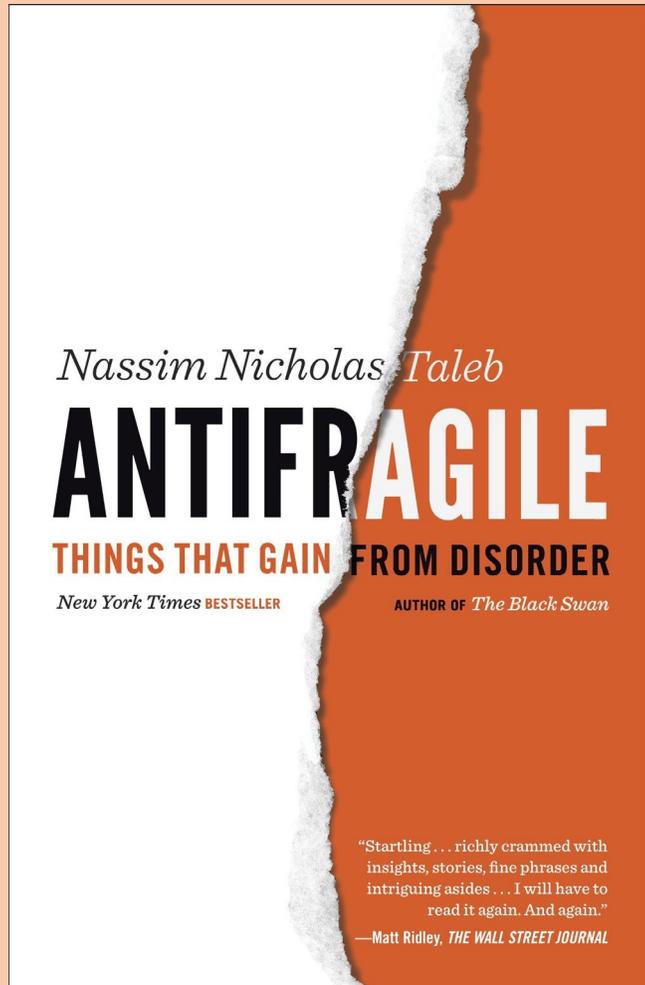
- Read some good books- including *The 40/40 Solution to Managing Emotional Energy!* and *Stop Making Mistakes*
- **LinkedIn Learning**-check out my programs on Employee Engagement and Increasing Performance.
- Don's programs- **GreatHR** and **Great Employee**.
- Industry blogs, magazines, etc.
- Get a Certification.
- Check into something you've been curious about.
- Run an experiment, survey, test, online focus group, etc.
- Write an article, blog post, video, checklist, SOP, book!
- Create a new product. Get creative!



# Take Care of Yourself and Loved Ones



# Come Back Stronger!



## Contact Info

**[www.donphin.com](http://www.donphin.com)**

**[don@donphin.com](mailto:don@donphin.com)**

