

**SHEEHAN PHINNEY**

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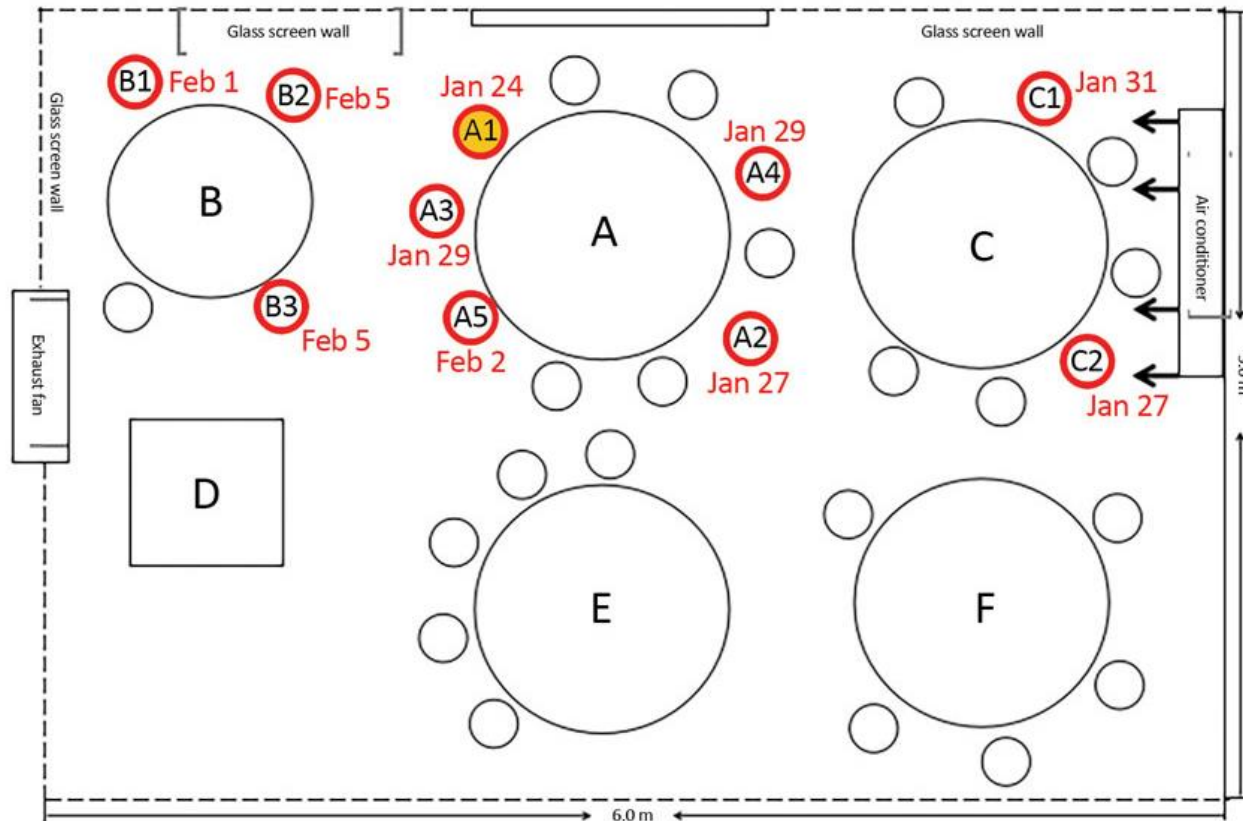
# **COVID-19 Business Liability Issues**

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**Economic Re-Opening Task Force  
May 6, 2020**

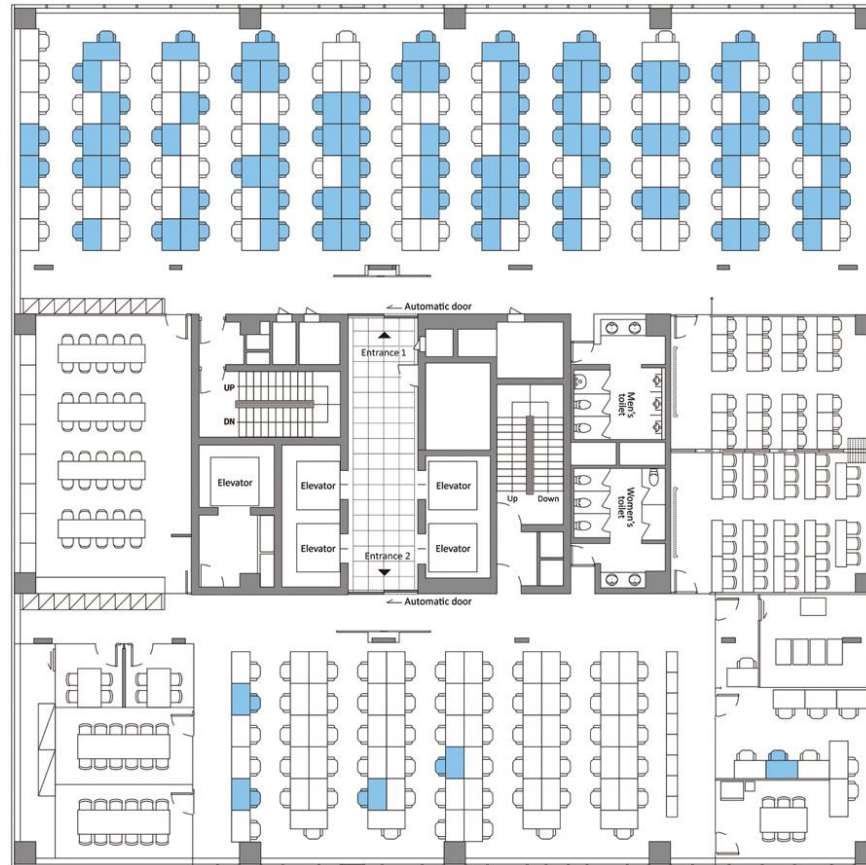
**James P. Harris, Esq.**

## Spread of Covid-19 - Restaurant



Bin Xu, Guangzhou Yuexiu District Center for Disease Control and Prevention, Guangzhou, Guangdong Province 510100, China; ;  
 Zhichong Yang, Guangzhou Center for Disease Control and Prevention, Guangzhou, Guangdong Province 510440, China

## Spread of Covid-19 – Call Center



Shin Young Park, Young-Man Kim, Seonju Yi, Sangeun Lee, Baeg-Ju Na, Chang Bo Kim, Jung-il Kim, Hea Sook Kim, Young Bok Kim, Yoojin Park, In Sil Huh, Hye Kyung Kim, Hyung Jun Yoon, Hanaram Jang, Kyungnam Kim, Yeonhwa Chang, Inhye Kim, Hyeyoung Lee, Jin Gwack, Seong Sun Kim, Miyoung Kim, Sanghui Kweon, Young June Choe, Ok Park, Young Joon Park, and Eun Kyeong Jeong

## Today's Discussion

- > Liability to employees
- > Liability to patrons, customers
- > Possible government action

## The Causation Element

- > Plaintiffs will have to prove that they contracted the virus at a specific location, that the owner of that location caused or failed to prevent the injury
  - Two-week incubation period, delayed symptoms
  - Lots of possible sources in daily life – have to identify the one
- > Cluster of infections may provide evidence of source and make class actions more likely

## Liability to Employees

- > Workers compensation system
  - Employees cannot sue employer in court; benefits through administrative process
  - Have to prove causation
  - Have to prove exposed to risks greater than in non-employment life
- > Secondary infections – family members of employees, not barred by workers compensation
- > Can the WC system handle these claims?

## Liability to Employees

- > What standard applies to employers?
  - OSHA: required to maintain a safe workplace
  - N.H.'s Universal Guidelines for Employers
    - Sick employees must stay home
    - Must develop process to screen employees for symptoms
    - Hygiene and cleaning practices
    - Face coverings and social distancing
  - Other industry-specific guidance

## Liability to Employees

- > Discrimination-based claims
  - ADA: deciding who returns based on health conditions
    - Affording reasonable accommodations
  - Discrimination: deciding who returns to work and when based on race, national origin, age, etc.
- > Developed body of statutes and case law that will adjust to Covid-19



## Duty of Care Owed to Patrons, Customers

- > What is the standard of care?
  - Negligence: duty to act reasonably
  - Landowner liability: reasonable precautions to prevent foreseeable injury
    - Dangers about which had actual knowledge or that should have known about

## Duty of Care Owed to Patrons, Customers

- > Failing after voluntarily undertaking a duty
  - e.g., undertaking sanitizing measures or making representations to the public about safety
- > Strict liability
  - Product was defective and unreasonably dangerous
  - Does not require a showing of lack of reasonable care
- > Duty to disclose?
  - Employee who interacted with customers tests positive

## Duty of Care Owed to Patrons, Customers

- > Regulation setting the standard of care
  - CDC, OSHA or other authorities' guidance sets the duty?
- > Violation of statute or ordinance is evidence of standard of care

## Will There Be Insurance?

- > Normally, coverage for bodily injury
- > Is this an “occurrence” (not accidental)?
- > Exclusions: communicable diseases and damages resulting from fungi, bacteria and mold
- > COVID-19 exclusion in renewals?

## Possible Government Action: Limited Immunity

- > Proposals in several states
  - Goal: allow claims with merit; prevent frivolous claims
  - Limited immunity
    - Require proof of conduct more egregious than negligence
      - Immune unless grossly negligent\*, willful misconduct, intentional harm and/or
      - Immune if follow state/federal guidance

## Possible Government Action: Limited Immunity

- > Arguments against limited immunity
  - Employees (essential workers especially) deserve protection and do not control working conditions
    - Expansion of Executive Order #36 (first responders)
  - Businesses that act irresponsibly can cause a lot of harm
  - Communal responsibility to stop the spread

## Possible Government Action: Limited Immunity

- > Arguments for limited immunity
  - Asymptomatic carriers, limited testing, limited efficacy of taking temperatures, long incubation
    - Guidance changes over time
    - Could work hard to prevent spread but be unsuccessful
  - Defense costs for defending frivolous claims, pressure on insurance market
  - Want/need to re-start economic activity
  - Plaintiffs' contributory fault – also need to follow guidance

## Possible Government Action: Other Proposals

- > Heightened burden to prove proximate causation
- > Shortening statutes of limitations
  - 1 year from accrual of cause of action
  - N.H. general statute of limitations is 3 years, plus discovery rule
- > Limiting immunity to first responders, front-line workers, companies that provide PPE
- > Expanding presumption of coverage for workers compensation coverage



## Possible Constitutional Challenges: Equal Protection

- > “Legislative classifications of the right to recover for personal injuries must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.”
- > The restriction of private rights sought to be imposed is not so serious that it outweighs the benefits sought to be conferred upon the general public.

*Gould v. Concord Hosp.*, 126 N.H. 405, 406 (1985)