

**SHEEHAN PHINNEY**

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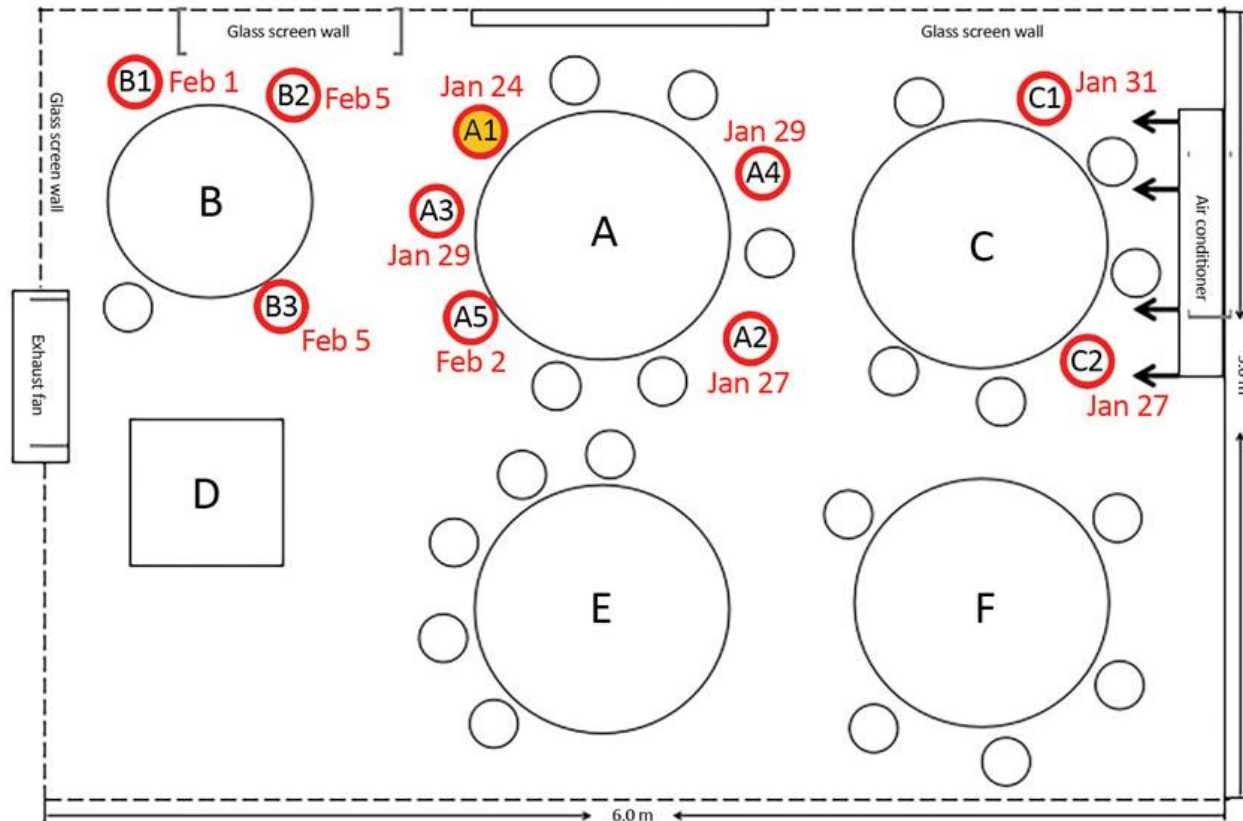
# **COVID-19 Business Liability Issues**

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**Economic Re-Opening Task Force  
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## Spread of Covid-19 - Restaurant



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## Spread of Covid-19 – Call Center



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## 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)