

SHEEHAN PHINNEY

**Before the Economy Reopens: Answers to
Workplace Questions (Part 2 of 2)**

Karen Whitley, JP Harris

May 8, 2020

Agenda

> Compliance issues

- Updated guidances
- ADA issues
- Policy changes
- Return to work issues

> Liability issues

- Early litigation
- Workers compensation claims
- Possible employee claims
- Possible defenses

Updated Guidances

Attorney Karen Whitley

> New Hampshire

- EO #40/Stay at Home 2.0/Universal Business Guidelines
 - Stay at home extended to May 31/ remote work encouraged
 - Social distancing, cleaning, PPE
 - Screening/Temperatures
 - Employee Illness Policy

> Massachusetts

- Executive Order: masks
- Stay at home extended to May 18

Updated Guidances

Attorney Karen Whitley

> CDC

- now recommends isolation for at least 10 days *after illness onset* and at least 3 days *after recovery*
- General Business FAQs
 - What to do if employee is exposed or positive (different for essential vs. non-essential)
 - Various methods of screening/ checking temperatures
 - Discourages employers from asking for doctors' notes
 - Safe workplace practices
 - Cleaning and disinfecting

Updated Guidances

Attorney Karen Whitley

> OSHA

- Guidance on preparing workplaces (workplace controls/physical/infrastructure)
- General guidance to employees:
 - Stay home if sick
 - Cover coughs
 - Wash hands
 - Flexible worksites
 - Don't use other employee's phones, desks, etc.
 - Disinfect, using approved chemicals in proper manner
 - Encourage reporting of safety/health concerns
- Industry-specific guidances (restaurants, healthcare, construction, meat processing)

EEOC

Technical Assistance Q&A

Attorney Karen Whitley

- > During pandemic, ADA allows:
 - questions to employees about COVID-19 symptoms
 - take temperatures/daily log*
 - COVID-19 testing (if test is accurate and reliable)*
 - require PPE*
 - fitness for duty note to return to work

* *as long as consistent with CDC guidance*

- > Employers must always hold medical information confidential (but non-identifying disclosure may be necessary)

EEOC Technical Assistance

Attorney Karen Whitley

- > Accommodations may reduce “direct threat” of COVID-19 to acceptable level
 - PPE (gowns, gloves, masks)
 - barriers
 - elimination of marginal job duties
 - temporary change to work schedule or location of work
 - Note: employees may need alternatives to gloves and masks due to disability
- > Interactive dialog should happen
- > Undue hardship – “significant difficulty”

Frequent Accommodation Questions

Attorney Karen Whitley

- > Remote work – is on-site presence an essential job function anymore??
- > What if employee does not have disability but family members do? No obligation to accommodate?

Changes to Policies

Attorney Karen Whitley

- > Policies relating to Executive Orders (PPE, temperature taking, social distancing)
- > Changes to sick/ leave policies
 - Emergency sick leave?
 - Unpaid leave?
 - Borrow future time?
- > Break time (hand washing)
- > Remote work arrangements
- > Harassment/retaliation

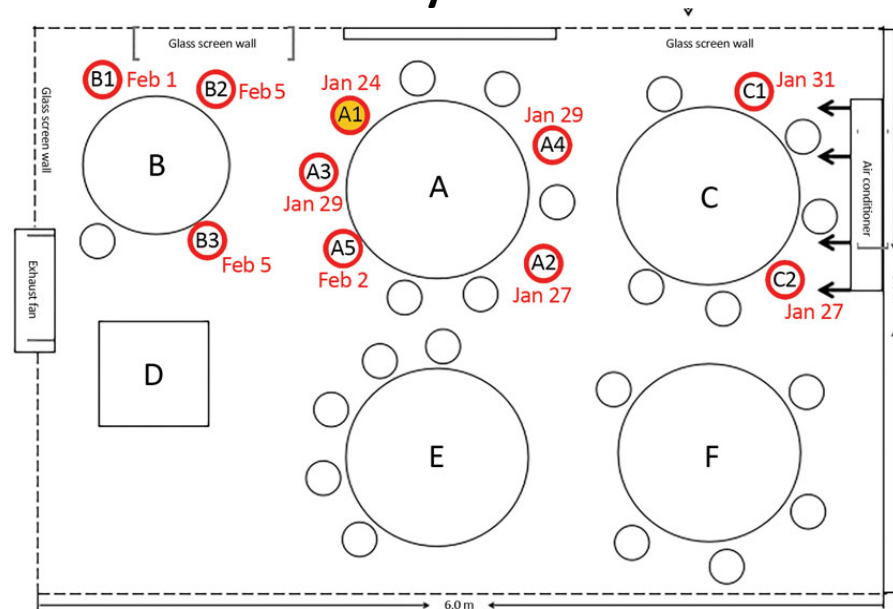
Return to Work Issues

Attorney Karen Whitley

- > Phased return to work
 - Disparate treatment
- > Handling a refusal to return to work
- > Wage issues

What We're Up Against

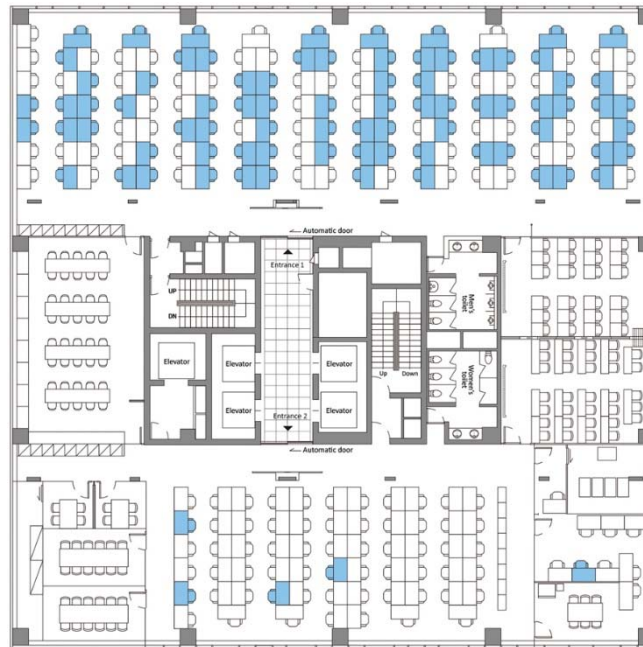
Attorney JP Harris



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

What We're Up Against

Attorney JP Harris



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

Early Lawsuits

Attorney JP Harris

- > Cruise Lines: negligent response to outbreak; allowing passengers to board despite sick passengers on prior voyage
- > Refund Cases: Colleges not refunding tuition, room and board; gyms with recurring fees; cancelled concerts and events

Early Lawsuits

Attorney JP Harris

- > Force Majeure/Impossibility/Frustration: Real estate deals, franchise agreements, leases, asset purchase agreements
 - Not all force majeure clauses include “pandemics”
- > Securities Fraud: management indicates positive financial outlook despite outbreak; stock prices drop

Early Lawsuits

Attorney JP Harris

- > False Advertising: Hand sanitizer that falsely claims could stop spread of virus
- > Price Gouging: excessive prices for paper goods, PPE

Early Lawsuits

Attorney JP Harris

- > Class action against China
- > Insurers: Business interruption coverage
- > Walmart Employee Suit: failed to protect employee with reasonable safety measures
- > FFCRA Enforcement: Failing to give paid leave

Workers Compensation

Attorney JP Harris

- > Employee contracts virus on the job
- > Employees normally cannot sue employers
- > Difficulty proving causation
- > Exposed to risks greater than non-employment everyday life?
- > Likely will **not** bar lawsuits from family members, secondary infections

Regulatory Risk

Attorney JP Harris

- > OSHA: required to maintain a safe workplace
- > Watch out injuries suffered while working at home (e.g., ergonomic, falls)

Employment Related Claims – ADA Issues

Attorney JP Harris

- > Americans with Disabilities Act and Rehabilitation Act apply during pandemic
- > If already aware of a condition/disability, cannot use that information in re-hiring decision
- > Failure to provide reasonable accommodations
- > Same interactive process (can start now)

Employment Related Claims – Discrimination

Attorney JP Harris

- > When selecting who returns and when, it is unlawful to discriminate based on national origin, race, disability (or other protected criteria)
- > In particular, unlawful to discriminate against older workers
 - But, potentially conflicts with OSHA requirement to classify workers based on risk (really by type of job and exposure, not employee characteristics)

Employment Related Claims – Retaliation

Attorney JP Harris

- > Ubiquitous risk – cannot take adverse employment action against an employee who reported a good faith belief of discrimination or who participated in protected activity
 - e.g., complained that company did not make a reasonable accommodation

Liability to Patrons, Customers

Attorney JP Harris

- > Same causation analysis
- > Standard of care is unclear
 - Negligence – duty to act reasonably?
 - Voluntarily undertaking a duty?
 - CDC, OSHA, State guidelines set standard?
- > Immunity proposals under consideration
- > Plaintiffs' contributory fault

Questions?

THANK YOU

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