

Protecting Yourself Against Consumer & Visitor Claims



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Janet Ramsey



- Litigation attorney with a focus on complex (high-stakes) commercial litigation
- Represents corporate clients in mass tort and environmental litigation, and false advertising and unfair competition
- Represents a wide array of industries, from agriculture and automotive to financial institutions and pharmaceuticals
- Manages the entire litigation process from start to finish — and all its parties — to ensure a cost-effective and winning strategy

Tom Amon



- Litigation attorney with a focus on complex (high-stakes) commercial litigation
- Represents corporate clients in class action defense, toxic torts and real property litigation
- Represents large and small companies in mass tort, contract, construction, condemnation, real estate, environmental, shareholder actions, discrimination and civil RICO claims
- Excels at developing the litigation strategy, fact and expert witnesses, and implementing those strategies through discovery, motion practice and trial

Lance Zoerhof



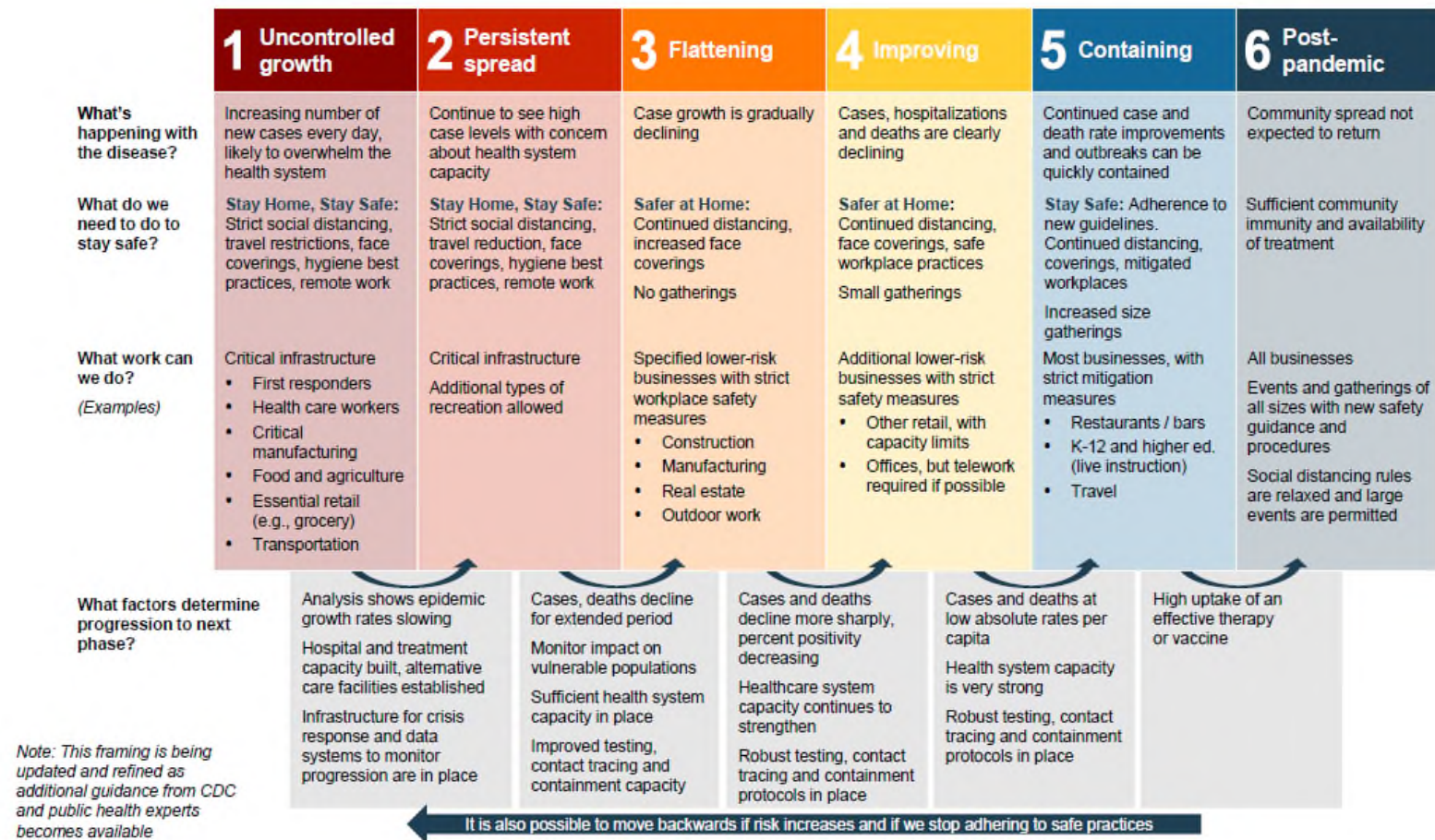
- Litigation attorney with expertise in complex (high-stakes) supply chain, product liability, and real property disputes
- Represents large and small companies in a wide variety of industries, including automotive, agriculture, commercial development, health supplements, craft beer, and commercial tools
- Handles the entire litigation process from start to finish to ensure an efficient and winning strategy

Agenda

1. Where Michigan stands today
2. Update on business immunity for pandemic claims
3. Epidemiology and exposure - why science matters
4. Litigation update and current claims
5. Recommendations for risk mitigation
6. Questions



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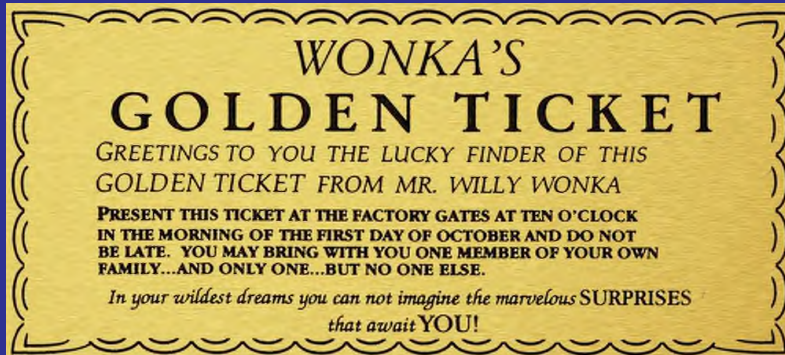


Executive Order 2020-110

The “Reopen Order”

Highlights include:

- Certain businesses remain closed regardless of region (e.g., indoor theaters, indoor public pools, gyms)
- Work capable of being performed remotely must be performed remotely (e.g., certain office work)
- All remaining businesses may reopen subject to capacity constraints and workplace standards described in Executive Order 2020-97
- Indoor social gatherings/events may include up to 10 people
- Outdoor social gatherings/events may include up to 100 people with social distancing



The Golden Ticket

Business Immunity for Pandemic
Claims

No guarantees.

Unlikely to extend to gross negligence or other claims based on recklessness or willfulness.

No one should count on immunity while operating during a pandemic.

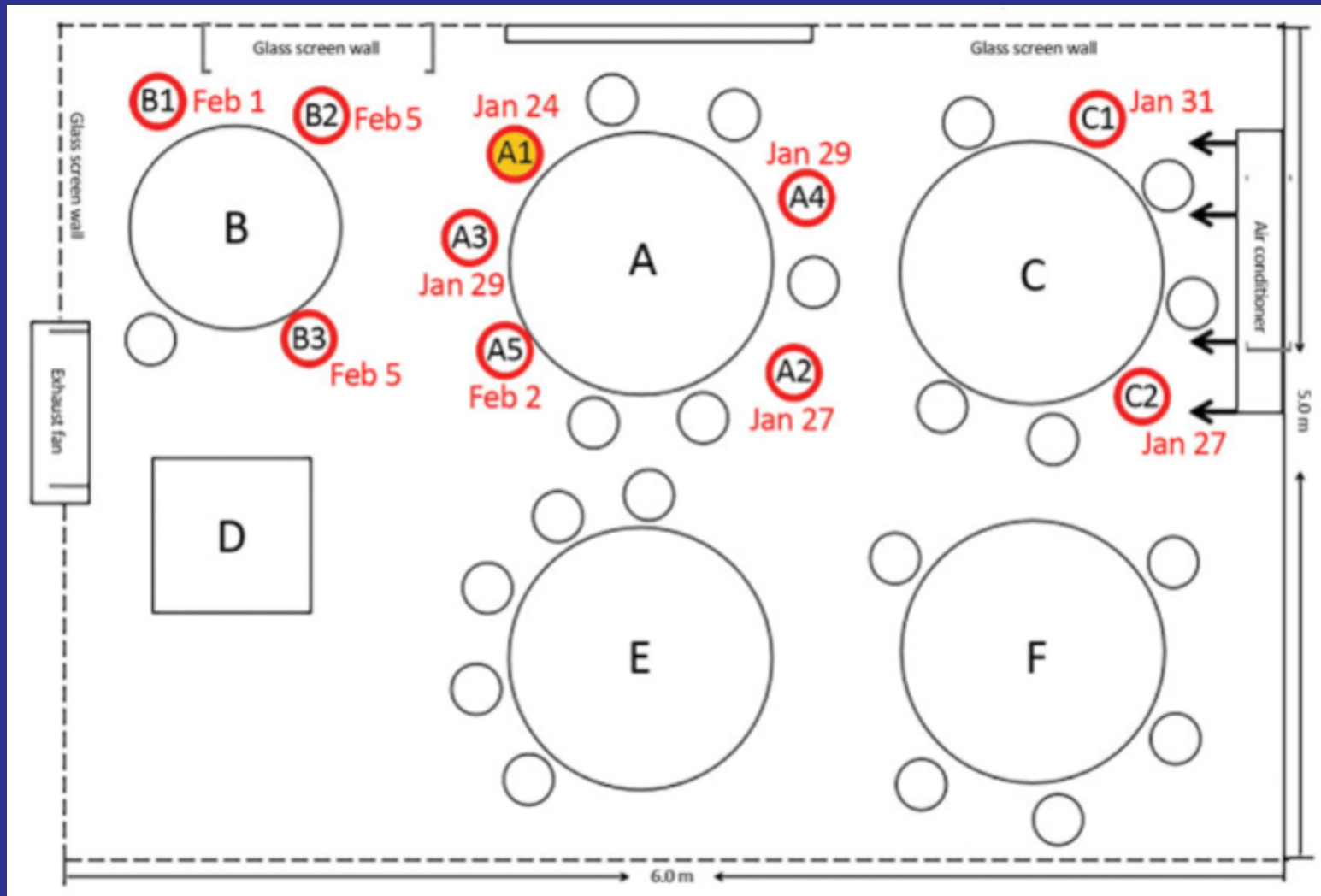
Why Science Matters

Epidemiology and Exposure

Causation is the primary hurdle for plaintiffs' lawyers.

The harder it is to prove causation, the less likely a claim will be made.

Causation = Exposure + Duration





Why Science Matters

Epidemiology and Exposure

Causation = Exposure + Duration

To decrease ability to make causation argument:

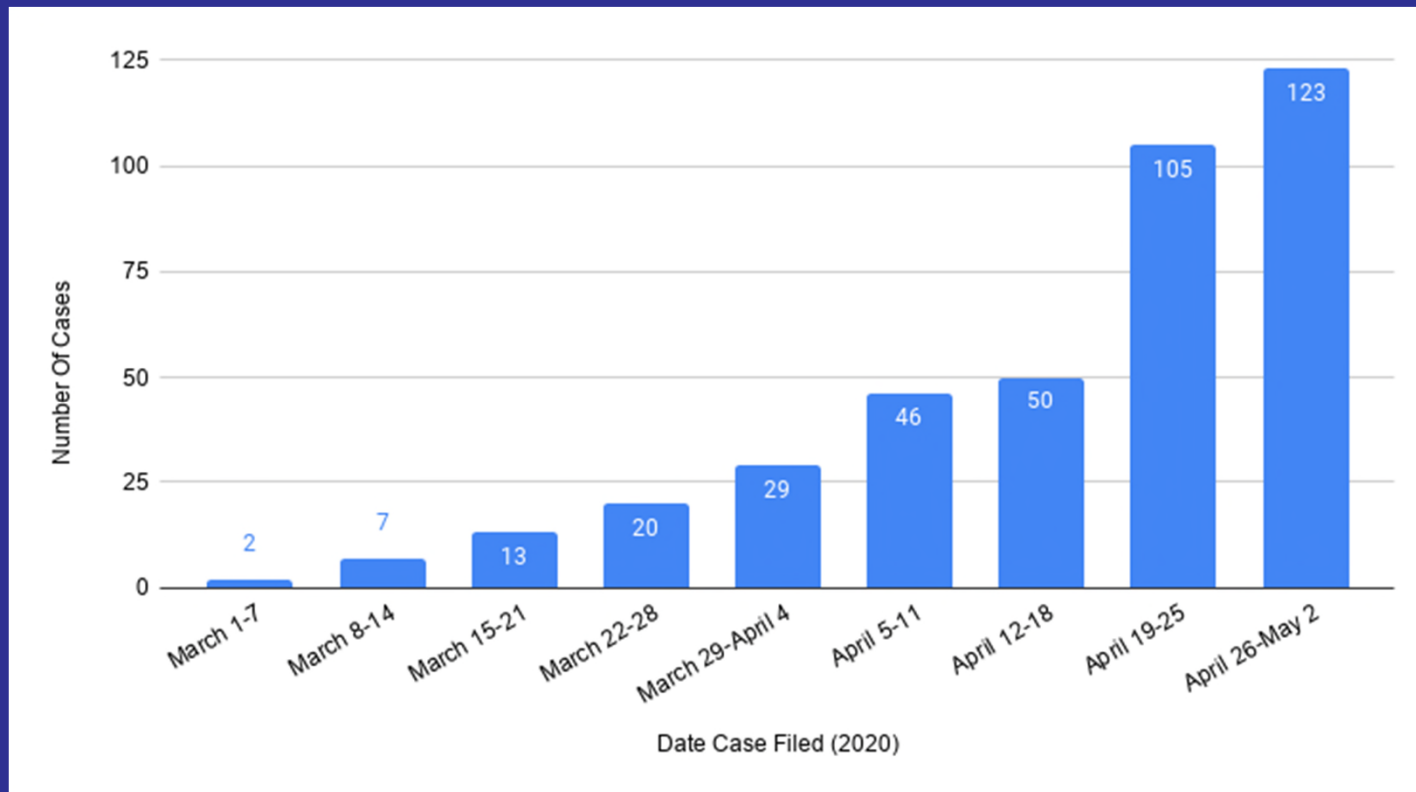
- 1. Follow applicable orders and guidelines.**
- 2. Reduce potential for exposure onsite.**
- 2. If potential for exposure, reduce duration.**

COVID-19 Claims



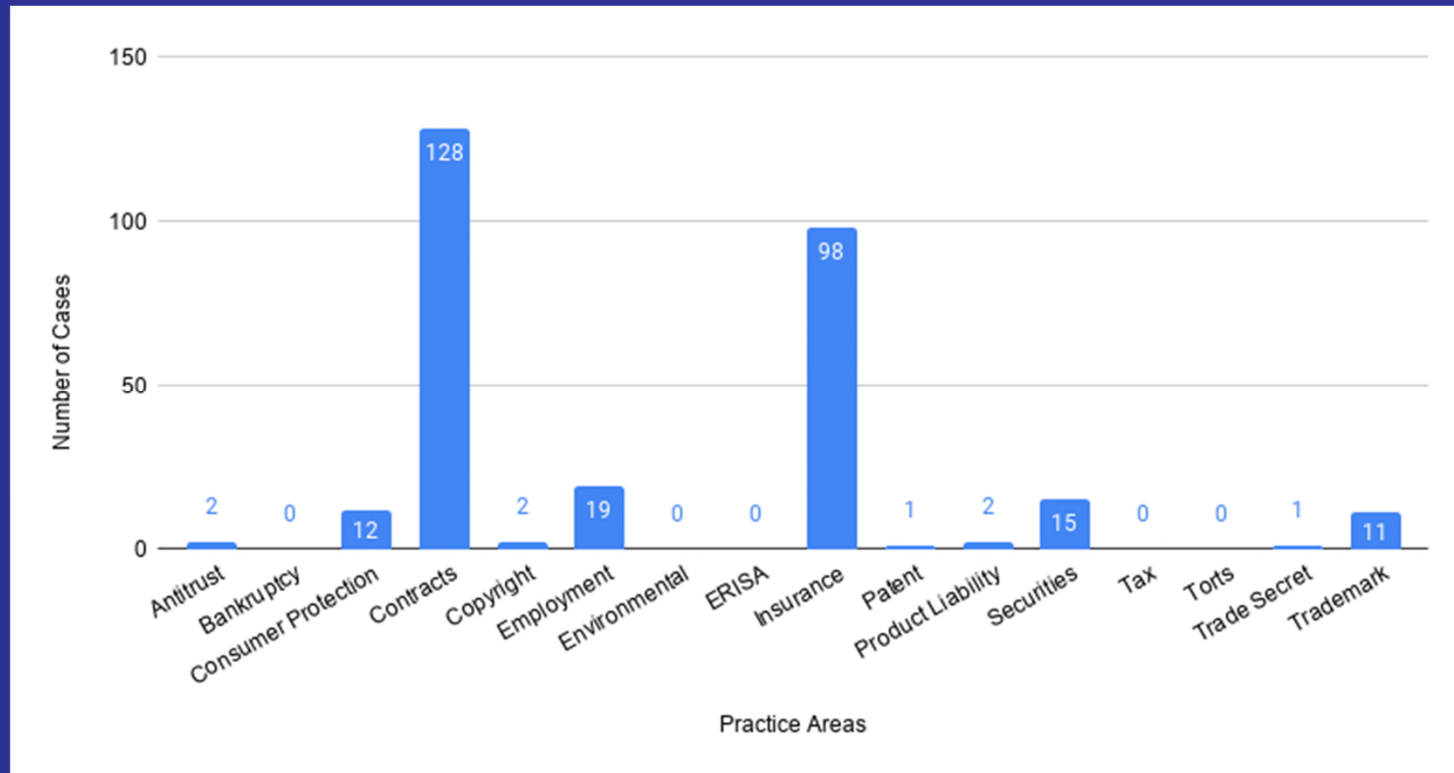
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New Cases With Complaints Citing COVID-19



Source: Lex Machina on May 11, 2020

New Cases Caused By COVID-19



Source: Lex Machina on May 11, 2020

Consumer/Visitor COVID-19 Claims



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Your Product/Service

Product Liability, Advertising and
Marketing Claims

- False/misleading advertising claims (e.g., Purell)
- Price gouging - pricing statutes are changing quickly and vary by jurisdiction (e.g., Amazon)
- General negligence/tort, including public nuisance
- Unfair competition (e.g., GrubHub)

How You Deliver Your Product/Service

Premises Liability and Tort
Claims

- Failure to protect visitors/consumers from contracting COVID -19 (e.g., cruise ships)
- Privacy violations
- Closures without refunds
- Service was not provided by method described

Risk Mitigation



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Risk Mitigation Strategies

Available Guidance

- CDC/OSHA: Guidelines by industry
- Local/state government for both regions and industries
- Trade Associations
 - American Hotel & Lodging Association (AHLA) “Safe Stay” Program
 - National Restaurant Association “ServSafe” Program
 - Michigan Licensed Beverage Ass’n
- Small Business Association of Michigan

Risk Mitigation Strategies

On Paper

- Have a plan consistent with current guidance and keep it updated.
- Clearly communicate what you are doing, when you are doing it, and why. Then do it.
- Use multiple communication pathways (e.g., website, in-store, social media) and keep them updated.
- Implement waivers/disclaimers, if practical and applicable.



Disney Springs

Reopening Communication Example

Source: <https://www.disneysprings.com/reopening/>

Know Before You Go

As we navigate through this unprecedented time as responsibly as we can, we have implemented a number of new safety measures based on guidance from health authorities, such as the Centers for Disease Control and Prevention (CDC) and appropriate government agencies. We, along with third-party Operating Participants, are all committed to a responsible reopening of Disney Springs.

For Cast Members, Operating Participant employees and Guests, there are 6 key things to know before arriving at Disney Springs, and they include:

- Limited parking and reduced entrances
- Temperature screenings prior to entry
- Face coverings required for Guests ages 3 and up
- Physical distancing practices including physically-distanced queues and physical barriers
- Temporary operation modifications, including reduced hours at select locations and no scheduled entertainment offerings or high-touch interactive areas
- An increased focus on disinfecting and sanitation, including the addition of hand-washing stations and hand sanitizers in key areas

Since many of these measures will be new, and may evolve, we want to be sure Guests, Cast Members and Operating Participant employees are aware of all these changes.



Disney Springs

Disclaimer Example

Source: <https://www.disneysprings.com/reopening/>

COVID-19 Warning

We have taken enhanced health and safety measures—for you, our other Guests, and Cast Members. You must follow all posted instructions while visiting Disney Springs.

An inherent risk of exposure to COVID-19 exists in any public place where people are present. COVID-19 is an extremely contagious disease that can lead to severe illness and death. According to the [Centers for Disease Control and Prevention](#), senior citizens and guests with underlying medical conditions are especially vulnerable.

By visiting Disney Springs you voluntarily assume all risks related to exposure to COVID-19.

Help keep each other healthy.

Risk Mitigation Case Studies



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What Pandemic? Mayhem and Mother's Day



Lessons Learned:

1. Going against governing guidance increases risk and makes you an easier target for regulators and plaintiffs' attorneys.
2. Waiver or disclaimer provides little protection without compliance.
3. Business license can be taken away.

A Failure to Plan is a Plan for Failure



Lessons Learned:

1. Clearly communicate what is (and is not) going to be available and when. Do not expect patience.
2. Don't rush reopening. If you're not ready or haven't had time to properly draft and implement a plan, consider a short delay.

Non-Compliant Customers: Not Your Typical Target Run



Lessons Learned:

1. These are not normal times. Think Black Friday, not “back to normal.”
2. Reasonable, good faith and consistent efforts for customer compliance.
3. You may have to call in the cavalry.



Disney Springs

Do I really need to wear a mask?

Source: <https://www.disneysprings.com/reopening/>

What if I don't want to wear a mask?

Given this unprecedented situation, we appreciate everyone's patience and understanding as we navigate these challenges as responsibly as we can. With our robust measures in place, we believe a key factor in our success in reopening Disney Springs will be our Guests' acceptance and adherence to our new protocols. Guests without masks will not be allowed entry to Disney Springs.

Executive Order 2020-110

Face Masks

- Individuals that leave home are required to wear a face covering over their nose and mouth when in any enclosed public space, unless the individual is unable medically to tolerate a face covering.
- An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes.
- An individual may remove a face covering to eat or drink when seated at a restaurant or bar.
- Businesses are permitted to deny entry to any individual who refuses to wear a face covering.

Michigan Reopening: Lessons Learned from Regions 6/8



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The Omelette Shoppe®

Monday-Friday 6:30am - 2:00pm
Saturday-Sunday 7:30am - 2:00pm

Per Executive Order 2020-92
**CUSTOMERS
& EMPLOYEES MUST KEEP
6-FEET
SOCIAL
DISTANCE**
WHILE INSIDE THIS FACILITY


Per Executive Order 2020-92
**YOU MUST WEAR A
FACE MASK TO ENTER
THE BUILDING**
A face mask includes a homemade cloth
mask, scarf, or bandana. Your mask must
cover your nose and mouth.

STOP Feeling Sick?
Stop here when you are sick

If you feel unwell or have the following symptoms
please leave the building and contact your health care provider.
Then follow up with your supervisor.

DO NOT ENTER if you have:

-  COUGH
-  FEVER
-  SORE THROAT

Call your supervisor if you have any of these symptoms.



Dear Guest,

Were it as simple as turning the handle of the "hospitality faucet" back on, even in a limited capacity, we certainly would do so.

Unfortunately there are other factors to add to the equation, the health of our staff and guests being first and foremost.

When it makes sense for us to open our doors again we will do so.

Be safe!

Creativity During Crisis: Social Distancing



Creativity During Crisis: Rethink Seating



Common Sense as Creativity



Risk Mitigation Strategies

Additional examples

Compliance with the applicable orders and guidance is critical. You may also want to consider additional exposure reduction techniques:

- Clean touchpad surfaces between users
- Increase outdoor, pickup, and online offerings
- Open doors, windows, and/or use of portable air cleaners
- Reduce customer shared items or make shared items disposable
- Have patrons wait offsite or in vehicles
- Provide sanitizer (touchless, if possible) dispensers at entrances, elevators, etc.
- Remove furniture to allow people to keep their space

Summary

1. Have a written plan based on applicable orders and guidance that accurately reflects all of your current practices.
2. Reasonably and consistently execute the plan.
3. Update the plan as needed, both in writing and actual execution.
4. Goal: If a claim is made in the future, you want to have at your fingertips an accurate and reliable record of what you did and why.

Questions



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Conclusion



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