

# CONTRACTS, LIABILITY AND RISK MANAGEMENT: PROTECTING YOUR HOSPITALITY BUSINESS

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LEGAL + WORKFORCE SYMPOSIUM  
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# AGENDA

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- Innkeeper's Duty under Tennessee Law
- Hospitality Risk Priorities – 2025
  - Cyber Risk
  - Premises Liability
  - Food Safety
  - Liquor Liability
- Contractual Risk Management
  - Franchise/License Agreements
  - Management Agreements
  - Vendor Agreements

# TENNESSEE INNKEEPERS LAW

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- Common law made innkeeper strictly liable for guests' loss of property
  - In the guest room is under the control of innkeeper
- TCA 62-Chapter 7. Rarely litigated simple rules that supersede common law
  - 101: post rate card in every room; at least 25% of rooms available at posted rates
  - Violation is a Class C misdemeanor (30 days, \$50 fine)
  - 103: Posted offer for safekeeping valuables prevents liability for theft
    - Conspicuous, legible posting (front desk, in guest room)
  - 104: Innkeeper is liable for injury to or loss of personal property within their control
    - Innkeeper is liable for guests' valuables (up to \$300) stored in a safe provided by the innkeeper; if safe is not used, the innkeeper is not liable for loss

# TENNESSEE INNKEEPERS LAW

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- 105: Baggage storage with notice posted conspicuously in lobby or office avoids liability for lost baggage (Excludes valuables that should be placed in safe) if no charge for storage, unless hotel employee is thief.
  - 106: Innkeeper is liable for guests' baggage (up to \$150) stored by the innkeeper in a checkroom; if checkroom is not used, the innkeeper is not liable for loss
- 107 – Crimes against hotels and restaurants – fraud or false presence to obtain accommodations or food commits Class C Misdemeanor (\$200 or less) or Class E Felony (1-6 year prison term, fine up to \$3000)
- 109: Right to exclude person from Premises (Don't come back law)
- 110: Prohibits turbulent or riotous conduct, civil cause of action or Class C misdemeanor

# TENNESSEE INNKEEPER'S LAW

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- It is the duty of the innkeeper to take reasonable measures to protect guests from crime or injury – to be adequate.
- The innkeeper is liable only if the injury was made possible by the innkeeper's failure to exercise reasonable care, if the innkeeper knew or should have known about the unsafe condition that caused the injury.
- Courts have discretion to admit evidence of prior criminal acts to demonstrate the innkeeper's knowledge of dangerous conditions
- Juries decide what protective measures a prudent innkeeper would have taken not to be negligent

# INDEMNITY AND HOLD HARMLESS AGREEMENTS

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- Despite the plain meaning differences, Tennessee courts equate the terms “indemnify” and “hold harmless”
- Courts may distinguish between
  - An indemnity against loss – protects against event
  - An indemnity against liability – protects against consequences
- Indemnity against a party’s own negligence must express intent clearly and unequivocally
- Part of standard contracts to assign risk to party best able to manage risk for third party liability
- Covered by contractual liability component of commercial general liability insurance

# INDEMNITY AND HOLD HARMLESS AGREEMENTS

CONTINUED

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- Scope – what risks are covered
- Who is covered – actors, entities, owners, employees, agents, officers, managers, successors, and assigns
- Who is liable
- How is it funded – insurance? Balance Sheet?
- Exclusions – gross negligence, reckless conduct, intentional misconduct
- Process and procedure – defense, investigation, resolution
- Duty to notify
- Avoiding finger pointing among co-defendants

# COMPARATIVE FAULT

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## Tennessee is a modified comparative fault state

- A plaintiff partially at fault can recover damages only if their fault is 49% or less
  - 50% or more at fault = plaintiff barred from recovery
  - 49% or less at fault = plaintiff's damages reduced in proportion to percentage of fault
- Contribution among liable parties may still be available in a few cases, such as when the doctrine of joint and several liability is applicable

# JOINT AND SEVERAL LIABILITY

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- In most cases, Tennessee does not follow the doctrine of joint and several liability
  - Joint and several liability – if multiple parties are liable for the same harm, each can be held responsible for the entire damage
  - TCA § 29-11-107 – In cases governed by comparative fault, a defendant is only severally liable for the percentage of damages in which it was at fault
- Joint and several liability applies in some cases
  - Financial responsibility in a civil conspiracy
  - Some product liability actions
  - Foreseeable intentional acts of third persons when a duty exists to prevent/warn
  - Vicarious liability and respondent superior (employer liable for employee acts)

# INSURANCE DRIVEN RISK AND NEEDS ASSESSMENT

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## Risk consultant or broker inquiry

- Organizational goals
- Strategy
- Risk profile
  - Activities for guests
    - Preventive Measures
    - Safety Record
    - Training
    - Event Planning
  - Loss history
  - Claims & Resolution
  - SWOT

# CYBER RISK FOR HOTELS AND RESTAURANTS

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- Do you have a privacy policy for consumer facing digital media?
- Websites that collect tracking information are high risk for litigation
  - Latest trend from CA – suing out of state sites that collect data
  - Update privacy policy for all tracking and data collection tools
  - Cookie choice by user at landing page before cookies/tracking placed
- Guest data – personally identifiable information collected from or about guests
  - Credit card information
  - Preferences are private
- Business data and records
  - POS/PMS/Back of the House
  - Operations/Kitchen & Bar manual

# COVID PANDEMIC LESSONS AND EVOLUTION

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- Reputational risk more significant with social media
- Loss/Diminution of revenue not covered by business interruption insurance
- Buildings with little or no occupancy suffer property damage, vandalism, crime, and other calamity
- Touchless contact points (digital keys, ordering kiosks) and commerce enhances the risk of cybercrime, identity theft, lack of personal connection between the hospitality business and guest.

# CYBER RISK MANAGEMENT

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- Hospitality businesses are prime targets
  - Collect and store PII on guests, most transactions with online ordering and payment
  - Transient customer contacts and limited accountability
  - Low wage work force with high attrition, many terminals, and lots of idle time
- Cyber Risks:
  - Data breach
  - Phishing Scam/Business email scams
  - Malware
  - Ransomware
  - Cryptojacking
  - Distributed Denial of Service Attacks

# CYBER RISK MANAGEMENT

CONTINUED

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- Preparation with experts
  - Analyze environment
  - Identify threats
  - Risk control analysis
  - Impact on business
  - Likelihood of attack
  - Vendor vetting about cyber hygiene
  - Ultimate risk
- Plan in advance of cyber event with carrier, consultants, and counsel
  - Breach, discovery, remedy, recovery
  - Develop, practice, test, refine, revisit, update

# CYBER RISK MANAGEMENT

CONTINUED

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- People, Process, Technology
  - People – training, testing, vigilance, access control
  - Process - protocols, audits, backups, attack simulation, defensive perimeter
  - Technology – firewalls, anti-virus, and defensive software
- Cyber insurance coverage
  - Forensic study on scope of breach
  - Business interruption and loss of income
  - Public relations and reputational damage and cost of repair
  - Defense of regulatory action, fines, penalties
  - Data restoration
  - Customer and employee PII data monitoring and repair
  - Defense of third-party claims for damages

# PREMISES LIABILITY

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- Review TN Innkeepers Liability
- Floors, walks, stairs, and path of travel
- Lighting
- Housekeeping and pest control
- Recreational facilities and amenities
- Vehicles – condition, operation, drivers
- Infrastructure – HVAC, electrical, plumbing, gas, water
- Security – guards, locks, cameras, response
- Emergency planning

# PREMISES LIABILITY

CONTINUED

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- Commercial landowner duties to persons entering premises:
  - Trespasser: no permission to enter, assumes risks, no intentional harm from patent defects
    - Children protected from attractive nuisance
    - If trespassing is known and tolerated, landowner creates higher duty of care
  - Licensee: enters with permission for licensee's own purposes (mail carrier): greater duty of care, includes warning of known patent and latent hazards
  - Business invitee: invited to conduct business with landowner. Landowner duty to keep property in reasonably safe condition. Becomes trespasser in unauthorized access area

# PREMISES LIABILITY RISK MITIGATION

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- Code compliance – avoids negligence per se
- Regular inspections and prompt repairs
- Preventive maintenance program
- Clear policy and procedure, assignment of staff responsibility, training
- Reactive protections – detectors, fire sprinkler, intrusion alarms, personnel
  - Active shooter drills and plans
  - Parking lot coverage for theft
  - Bar security, de-escalation
  - Emergency power supply

# FOOD SAFETY

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- Identify off site and on-site risks
  - Supplier label errors
  - Allergen disclosure
- Food borne illness
  - Proper food handling – Storage, sanitation, surface cleanliness, rotation, disposal
  - Contaminants – chemicals, body fluids, hair, contact of raw, and cooked foods
  - Allergen exposure
  - Handling by sick employees
  - Undercooking, hot holding under 135 degrees, rapid cooling, delivery at cooler than 165 degrees
  - Refrigeration

# FOOD SAFETY

CONTINUED

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- Personal hygiene
- Sufficient staffing to cover ill employees
- Food Safety training – SERVSAFE
- Food safety audits – shift manager testing of holding temps, storage, and handling
- Pest control
- FIFO inventory management and stock rotation
- Refrigeration temperature checks
- Allergy controls and disclosures
- Supply chain controls and tracking

# FOOD SAFETY – SUPPLY CHAIN

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- Identification of suppliers for all supplies
- Digital tracking of supplies
- Food safety training of suppliers
  - Evaluate and train if needed
  - Monitor
- HACCP – Hazard Analysis and Critical Control Point

# LIQUOR LIABILITY RISK MANAGEMENT

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## Tennessee Dram Shop Law – TCA 57-10-102:

- Notwithstanding § 57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has sold any alcoholic beverage or beer, unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:
  - (1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or
  - (2) Sold the alcoholic beverage or beer to a visibly intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

# LIQUOR LIABILITY RISK MANAGEMENT

CONTINUED

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- Employee licensing and training
  - Alcohol awareness training to detect intoxication
- Procedures for managing intoxicated patrons
  - Stop serving
  - Arrange ride home
  - Incident reports and records
- Proper mixology – overpouring leads to liability
- Serve food
- Don't rush service
- Declutter and clean serving area to reduce risk of injury

# CONTRACTUAL RISK MANAGEMENT

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- Franchise/License Agreement
  - All franchise agreements shift first dollar liability risks to franchisee
    - Includes franchisor negligence – selection, training, standards specifications, supply chain
    - Require insurance specified in system standards– primary and umbrella
    - Indemnify franchisor and affiliates for risks associated with unit operation
    - Cover uninsured risks like contract breach, employee claims, confidentiality breach, willful misconduct of unit employees
    - Cyber risk covered
    - If you own it, the risk is yours

# CONTRACTUAL RISK MANAGEMENT

CONTINUED

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- Under most HMA's:
  - Owner undertakes risk of ownership
  - Manager isn't liable for hotel staff negligence or misconduct unless directed by manager executive staff
  - Owner takes risk of employment law violations
  - Owner obtains insurance
  - Owner indemnifies manager for risks of operation

# CONTRACTUAL RISK MANAGEMENT

CONTINUED

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- Third party suppliers should undertake practices that reduce risk of customer liability for supplier acts and omissions:
  - Comply with applicable laws and regulations
  - Protect confidential information
  - Avoid unethical business practices
  - Maintain a safe and healthy work environment
  - Sustain high quality of goods and services meeting specified standards, meet performance standards
  - Identify and eliminate risks of joint liability

# CONTRACTUAL RISK MANAGEMENT

CONTINUED

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- Due diligence on supplier business management
  - Loss and litigation history
  - Recruitment, selection, verification, and training of supplier staff
  - Quality assurance and error correction
  - Pre-delivery inspections
  - Legal compliance and licensing
  - Corporate culture
  - Cyber security program and standards
  - Insurance coverage
  - Financial statements – financial risk assessment

# Q&A DISCUSSION

PRESENTER

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