



(Last updated March 13, 2020)

## COVID-19 is in Your Workplace. Now What?

Over the past few days, we have fielded numerous questions from employers asking what to do if, or when, an employee reports that he or she has tested positive for COVID-19 or has been exposed to someone who has. The following guidance is intended to guide employers through the process of what to do in this situation. All the steps recommended below should occur simultaneously or as quickly as possible upon learning of an employee's diagnosis and/or exposure. The following guidance is intended to be general in nature. Every employer is different, and the circumstances of your situation may call for additional or modified measures.

### Privacy vs. Protection—Finding the Balance

It is understandable that a first reaction to receipt of this news could prompt cautious employers—having their remaining employees' best interests in mind—to immediately disclose the identity of the employee who has tested positive and/or been exposed to an infected individual. The law, particularly the [Americans with Disabilities Act](#) (“ADA”), the [Family Medical Leave Act](#) (“FMLA”), and the [Health Insurance Portability and Accountability Act](#) (“HIPAA”) (as well as laws in various states and localities), suggests otherwise.

Under the ADA, FMLA, and HIPAA, employers are obligated to maintain employee health information confidential, in files separate and apart from the employee's personnel file. It would, therefore, violate one or more of these laws to disclose the identity of an employee who has tested positive or is otherwise under directions to isolate himself or herself because of potential exposure.

That does not mean employers should do nothing. To the contrary, the [OSHA](#) General Duty clause requires employers to provide employees a workplace free of known hazards. In addition, an employer that fails to take steps to protect its workforce when confronted with information of a known potential threat could be exposed to liability under numerous other laws. Thus, following the steps below will help employers meet their obligations to employees while maintaining compliance with all applicable medical privacy requirements in the law.

### STEP 1: Isolate the Employee

If the employee calls in to report a positive diagnosis and/or exposure to another with a positive diagnosis, instruct him or her to remain isolated at home for a minimum of 14 days or the number of days recommended by current [CDC](#) or local health department guidelines. If the employee has, in fact, been diagnosed as COVID-19 positive, he or she should not be permitted to return to the workplace until the employee receives medical certification from a healthcare provider that he or she no longer poses a risk to others, either through a fitness for duty examination or other medical

certification procedure. If the employee reports COVID-19 diagnosis and/or exposure while at the workplace, he or she should be sent home immediately subject to the same guidance. An infected employee and/or one who has been exposed to an infected individual should be urged to consult and follow CDC and/or local health department guidance with respect to continuing medical care, self-assessment, and monitoring.

## **STEP 2: Notify the Workforce**

Once the employee is isolated and all relevant facts are known, an employer should notify its workforce, without identifying the infected/at-risk employee, of the diagnosis and/or potential exposure and steps being taken to ensure a safe work environment. A sample notice, consistent with the recommendations herein is provided at the end of this guidance. *See General Notice of Potential COVID-19 Exposure* (below).

## **STEP 3: Coordinate with Local Health Department**

Once again without identifying the subject employee, an employer should contact its local health department and coordinate mitigation efforts. To the extent local health authorities recommend actions that seem to contradict applicable employment/privacy laws, employers are encouraged to seek legal counsel before implementing the proposed strategy.

## **STEP 4: Communicate with Infected/Exposed Employee to Gather Information**

Key among necessary proactive steps is opening a line of communication with the subject employee for purposes of identifying: (1) employees, customers, and/or vendors with whom the employee has been in close physical contact (within six feet or less) within the prior 14 days;<sup>1</sup> and (2) areas in the workplace where the employee has been present within the prior 14 days. For example, if the subject employee has been confined to a specific department, office, or floor of the employer's business, heightened focus for purpose of mitigation should be placed on those areas of contact.

## **STEP 5: Communicate with Individuals Exposed to the At-Risk Employee**

Once the infected/exposed employee has identified co-workers, customers, and vendors with whom he or she has been in close physical contact, the employer should discretely and individually notify those individuals of the potential exposure and, in accordance with CDC guidance, steps those individuals should take in response. *See Individual Notice of Potential COVID-19 Exposure* (below).<sup>2</sup>

## **STEP 6: Disinfect the Workplace**

As soon as practicable after learning of the employee's diagnosis/exposure, the employer should take proactive steps to sanitize the workplace, focusing first on all areas identified by the employee as places of contact (including phones, keyboards, desk surfaces, doorknobs, stair railing, or other objects/surfaces likely to have been touched by the subject employee). Beyond that, employers may

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<sup>1</sup> If the employee has already sought medical care, these efforts and subsequent contact with potentially impacted individuals is likely to result in redundancies with local health authorities. Employers should not, however, assume local health authorities, many of which have, understandably, had their resources stretched, will make these inquiries or make them as promptly as an employer may desire.

<sup>2</sup> If the subject employee has been present in a customer's or vendor's place of business, notice of his/her presence should be provided.

want to consider hiring an outside vendor to professionally clean the workplace more thoroughly than routine cleaning customarily provides, such as cleaning of air ducts or ventilation systems. Note however, that the CDC presently recommends “[n]o additional disinfection beyond routine cleaning . . . .”<sup>3</sup>

## **STEP 7: Prepare for Additional Issues Likely to Arise**

Employers should prepare in advance for questions and issues likely to arise following a confirmed COVID-19 case in the workforce, including but not limited to the following:

- How to handle requests for absences from employees in the workforce concerned about potential exposure;
- How to handle pay issues for exempt or non-exempt employees who take time off because of potential exposure, pay issues for the infected/exposed employee;
- Whether work from home/telecommuting options are available to employees;
- How to continue business operations if the virus spreads among the workforce;
- How to handle media inquiries likely to follow once information of a diagnosis is shared with the workforce or public health department;
- How to legally handle returning infected employees to work in compliance with the ADA, FMLA, and/or state law;
- How to deal with future diagnoses in the workforce following initial exposure including whether any illness will be compensable under state workers’ compensation laws, whether short term disability benefits are available to workers who become ill, whether unemployment benefits are available to workers who become ill and must be isolated from work, etc.;
- Whether there is business interruption coverage applicable to reduced output or temporary closing;
- Whether *force majeure* or other contractual provisions protect against contractual non-performance in the event of business interruption/closures.

As these questions/issues arise, employers are encouraged to contact your Kutak Rock attorney or any of the attorneys in the [Employment Law Group](#), and we would be happy to discuss these with you.

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<sup>3</sup>[https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html)

## ***GENERAL NOTICE OF POTENTIAL COVID-19 EXPOSURE***

*(To All Employees at the Subject Worksite)*

As we continue to actively monitor the rapidly changing landscape related to the COVID-19 outbreak, our priority is the health and safety of our employees and their families. We want to notify you that on [DATE AND TIME] we received confirmation that one of your co-workers was confirmed to [have contracted OR have been in close contact with an individual who has contracted] the COVID-19 virus.

The individual has voluntarily isolated and/or quarantined himself/herself and will remain in isolation and/or away from work until he/she is medically certified to be virus and/or symptom-free and pose no risk of contagion to any of his/her co-workers. In addition, additional steps [have been OR are being] taken to thoroughly disinfect the workplace to prevent contamination.

All [employees, vendors, AND/OR customers] who have been in close physical contact (within six feet or less) and/or those working in/at the same [department/office/jobsite] as the employee will be contacted separately so appropriate additional precautions may be taken, if necessary. In the interim, we continue to urge all employees to follow the protocol recommended by the U.S. Centers for Disease Control and/or the [INSERT local health department], which include the following:

- Stay home, except to get medical care, if you or a family member with whom you are in close contact are experiencing any of the following symptoms: fever of 100° F or higher, cough or shortness of breath, or fatigue;
- Clean your hands often with soap and water for at least 20 seconds or, if not readily available, use a hand sanitizer that contains at least 60% alcohol;
- Avoid touching your eyes, nose, and mouth with unwashed hands;
- Avoid close contact with people who are sick;
- Cover your mouth and nose with a tissue when you cough or sneeze or use the inside of your elbow, throw the tissue in the trash, and immediately wash or sanitize your hands; and,
- Clean and disinfect frequently touched surfaces daily with disinfectant wipes available in the workplace.

If you have any questions or concerns, please contact [identify appropriate contact/department].

***INDIVIDUAL NOTICE OF POTENTIAL COVID-19 EXPOSURE***

*(To Employees, Customers, Vendors Who Were In Close Contact)*

On [DATE AND TIME] we received confirmation that one of our employees was confirmed to [have contracted OR have been in close contact with an individual who has contracted] the COVID-19 virus and has been, within the last 14 days, been in close physical contact (within six feet) with you. The health, safety, and well-being of our employees, customers, and business contacts is of utmost concern to [EMPLOYER] during these difficult times.

Thus, consistent with recommendations from the U.S. Centers for Disease Control, you are encouraged to consult with your medical care provider and/or local health department by phone for guidance about clinical management. If you are experiencing severe symptoms, such as difficult breathing, we recommend you seek care immediately. Older individuals and those who have underlying medical conditions or are immunocompromised should contact their medical provider early, even in the case of mild symptoms.

[FOR EMPLOYEES ONLY] Please contact [identify contact/department] to facilitate any leave of absence [and discuss options to allow you to work from home] pending further guidance from your medical care provider.

Please understand that by law we are prohibited from providing you any further information about the individual whose condition prompted this notice and ask that you respect that individual's right to privacy as we will respect yours. If you have other questions or concerns, please contact [identity of contact].