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PH COVID-19 Client Alert Series: Expanded Guidance from the CDC and EEOC

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Last week, the Centers for Disease Control (“CDC”) issued new and expanded guidance concerning workplace safety for critical infrastructure workers who may have been exposed to COVID-19, and the Equal Employment Opportunity Commission (“EEOC”) issued a new set of questions and answers related to anti-discrimination laws during the COVID-19 pandemic. We highlight some of the key takeaways from the new guidance below.

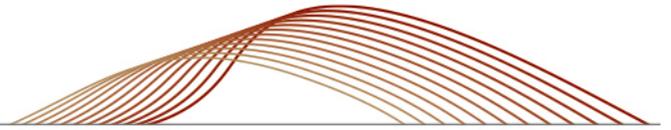
I. The CDC’s Safety Practices for Critical Infrastructure Workers

On April 8, 2020, the CDC posted new [interim guidance](#) entitled “Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19.” The interim guidance applies only to “critical infrastructure workers” as identified by the U.S. Department of Homeland Security’s (“DHS”) Cybersecurity and Infrastructure Security Agency (“CISA”) in its March 28 (Version 2.0) [“Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response Version 2.0”](#) (“CISA Guidance”). A poster distilling the guidance is available [here](#).

The CISA Guidance, on which the CDC’s new interim guidance relies, was issued to support industry partners in identifying critical infrastructure sectors and essential workers needed to maintain services, noting that “certain critical infrastructure industries have a special responsibility in these times to continue operations.” Although not binding in its own right, it was developed to “help State, local, tribal, and territorial officials as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security.” Accordingly, many state and local jurisdictions have incorporated, or cited approvingly, the CISA Guidance in their stay-at-home and shelter-in-place orders.

The CDC, in its interim guidance, acknowledges that critical infrastructure workers are necessary to “ensure continuity of operations of essential functions.” As a result, the CDC has now said that critical infrastructure workers who have had a potential exposure are not required to self-isolate if they are asymptomatic. Instead, critical infrastructure workers may continue to work following potential exposure, as long as they remain asymptomatic and additional precautions are implemented.

Specifically, the CDC recommends that if a critical infrastructure worker has had an exposure to COVID-19 (defined as being a household contact or close contact within six feet of an individual with confirmed or suspected COVID-19, including 48 hours prior to the individual becoming symptomatic) the following measures should be adopted:



1. **Adopt Pre-Screening:** Employers should measure the employee's temperature and assess symptoms prior to starting work.
2. **Monitoring:** The employee should self-monitor for COVID-19 symptoms (e.g., fever, cough, shortness of breath).
3. **Wear a Mask:** The employee should wear a face mask in the workplace for 14 days after the exposure.
4. **Maintain Social Distancing:** The employee should practice social distancing and remain six feet from others.
5. **Disinfect and Clean:** The employer should clean and disinfect all areas, especially high-touch surfaces (e.g., doorknobs, counters, bathrooms, shared equipment, etc.) on a routine basis.

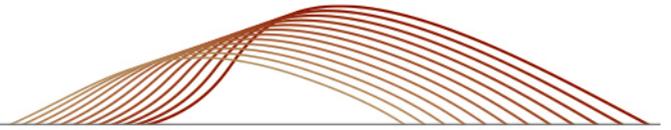
Should an employee become sick, the employer should send the employee home immediately, clean and disinfect their workplace in accordance with [CDC guidance](#), and collect information on individuals who had contact with the employee (i.e., others at the facility within close contact of the employee) so they may be notified of potential exposure.

Ultimately, employers should review, understand, and implement CDC and OSHA recommendations regarding methods to protect employees, including social distancing, routine cleaning, sanitation, and hygiene. However, although the CDC guidance is an important guide to good practices, we note that some jurisdictions are requiring more specific steps with regard to worker health and safety.¹ It is critical that employers review and understand any state and local orders that may also apply to their workforce.

II. The EEOC's Expanded Technical Assistance Q&A

On April 9, 2020, the EEOC posted [additional guidance](#) addressing questions arising under federal equal employment opportunity laws related to the COVID-19 pandemic. The new guidance provides answers to common inquiries from the public, and expands beyond the agency's previous technical assistance Q&A, which focused on the Americans with Disabilities Act and the Rehabilitation Act (the prior version of the [technical assistance Q&A](#) and the EEOC's [March 27, 2020 webinar](#) were described in earlier client alerts). Key takeaways from the new Q&A include the following:

- **Employer inquiries about COVID-19 symptoms are not limited to examples identified by the EEOC.** The guidance makes clear that employer inquiries need not be limited to the symptoms the EEOC has previously identified as examples, but *should* be limited to symptoms of COVID-19 identified by the CDC, other public health authorities, and "reputable medical sources." Up-to-date information on COVID-19 symptoms can be found on the [CDC's website](#), and employers should check frequently to ensure their screening questions are appropriate.
- **New section on handling confidentiality issues provides additional clarity on disclosing and storing medical information.** An employer does not need to create a new file system solely for COVID-19-related information; information about a particular employee's COVID-19 symptoms or illness (including the results of that employee's temperature check, responses to screening questionnaires, or self-identification as having

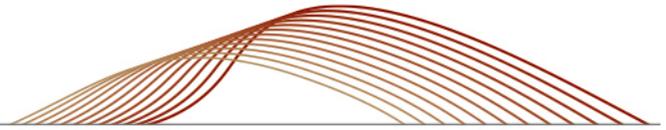


the virus) may be stored in that employee's existing medical file, if any.² Employers requiring daily temperature checks may maintain a log of the results, but must keep this information confidential. Upon learning an employee has COVID-19, employers can disclose the employee's name to a public health agency, and temporary staffing agencies or contractors may disclose the employee's name to the employer at whose worksite the individual was placed or assigned.

- **Employers may not unilaterally postpone start dates or withdraw job offers for members of high-risk populations.** Employers may, however, ask if high-risk individuals, including those who are 65 and older or pregnant, would like to postpone a start date. Alternatively, employers may choose to allow telework if that is an option.
- **Employers should consider accommodations for individuals whose pre-existing disabilities put them at a greater risk from COVID-19.** If an employee's pre-existing disability makes him or her particularly vulnerable to COVID-19, and telework is not an option, he or she may request an accommodation to reduce exposure to colleagues or customers in the workplace. Such accommodations may include changes to the work environment like designating one-way aisles or using on-hand materials like plexiglass or tables to ensure a minimum safe distance or barrier between individuals. Accommodations may also include temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment to reduce exposure to others. The EEOC does not take the position that these suggested accommodations are *per se* reasonable.
- **An employee may be entitled to an accommodation if his or her preexisting mental health condition makes it more difficult to adjust to any changes imposed by COVID-19.** An employer should engage in its usual interactive process with any such employee to determine whether the condition qualifies as a disability, and what reasonable accommodations may allow the employee to continue working (absent undue hardship).³
- **New Q&As deal with accommodations that predate COVID-19 and those that may be required when employees finally return to the workplace.** Employees who received accommodations prior to the pandemic may be entitled to additional or altered accommodations due to a change in working conditions, and employers may explore why a new accommodation is needed, and whether any additional accommodation requests are based on the same or a different disability. If employees will need accommodations upon returning to the workplace, employers may begin those discussions now and make arrangements for accommodations in advance (but may prioritize requests from those who need more immediate accommodations while teleworking).

We will continue to monitor for additional guidance from all relevant agencies during the COVID-19 pandemic. [Click here](#) to read more from our Coronavirus series.





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- ¹ For example, the San Francisco Bay Area counties require that Essential Businesses implement a detailed “Social Distancing Protocol,” which includes symptom checks for all employees. See, e.g., Order of the Health Officer No. C19-07b, available at: <https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07b-ShelterInPlace-03312020.pdf>.
 - ² As we noted in our prior Client Alerts, medical information (including COVID-19-related information) must be stored separately from the employee’s personnel file.
 - ³ Employers should carefully consult any state and local laws concerning their interactive process obligations, in addition to the ADA.

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