

EMPLOYER GUIDELINES

Responding To a Positive COVID-19 Diagnosis in the Workplace

Updated April 17, 2020

Prepared by Ballard Spahr LLP
www.ballardspahr.com

EMPLOYER GUIDELINES

Responding To A Positive Covid-19 Diagnosis In The Workplace

When an employer receives confirmation that an employee has had a positive COVID-19 diagnosis, there are important measures that should be promptly taken. In addition, consideration should be given to whether coworkers, customers, and others who may have had close contact with the individual should be notified that they may have been exposed to ensure appropriate steps are taken. A variety of legal and practical issues are implicated by such circumstances.

TOOLS AND FORMS

To assist employers with these issues, we have attached to these Guidelines the following tools and forms:

- Exhibit A: Timeline for responding to COVID-19 infection report
- Exhibit B: Sample questions for discussion with diagnosed employee
- Exhibit C: Sample notification to workforce
- Exhibit D: Sample notification to customers or other third parties
- Exhibit E: Sample media notice

When evaluating the dissemination of information about a positive COVID-19 diagnosis in the workplace, the following legal issues should be taken into consideration:

CDC GUIDANCE

According to the Centers for Disease Control and Preventions (CDC), if an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace, but maintain confidentiality as required by the Americans with Disabilities Act (ADA). See EEOC Pandemic Guidance, below. Co-workers should then self-monitor for symptoms (e.g., fever, cough, or shortness of breath).

CDC Guidance: [click here](#)

In addition, the CDC has issued Interim Recommendations for US Community Facilities with Suspected/Confirmed Coronavirus Disease to address cleaning and disinfections measures that should be taken in the workplace.

CDC Guidance: [click here](#).

Finally, the CDC has issued Interim Guidance on Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19. The interim Guidance relaxes

restrictions on critical infrastructure employees and permits them to continue to work following potential exposure to COVID-19 so long as the employer takes additional measures and precautions to protect its employees and the community. It is important to note that this guidance currently applies only to employees in one of the 16 critical infrastructure industries (e.g., law enforcement, 911 call centers, fusion centers, hazardous material responders, janitorial and custodial staff, food and agriculture workers, critical manufacturing, information technology, transportation, energy and government facilities).

CDC Guidance: [click here](#)

OSHA GUIDANCE

The Occupational Safety and Health Administration (“OSHA”) issued Guidance on Preparing Workplaces for COVID-19 to help employers monitor, respond and reduce the impact of a coronavirus outbreak in the workplace. OSHA noted that the Guidance is not a standard or a regulation, and it does not create new legal obligations, nor alter existing obligations for employers under the Occupational Safety and Health Act. The Guidance is advisory and informational in nature, and intended to be used for planning purposes.

The OSHA publication encourages employers to identify risk levels in workplace settings and implement appropriate controls, such as engineering and administrative controls, as well as safe work practices, including physical barriers, social distancing, staggered work shifts, remote work and encouraging sick workers to stay home.

OSHA also released a new poster published in English and Spanish listing steps that all workplaces can take to reduce the risk of exposure to the coronavirus. The poster lists 10 infection preventative measures every employer can implement to protect workers’ safety and health during the coronavirus pandemic. The list of preventive measures includes recommendations that employers encourage sick workers to stay home; establish flexible worksites and staggered work shifts; discourage workers from using other workers’ phones, desks and other work equipment; and use Environmental Protection Agency-approved cleaning chemicals.

OSHA Guidance: [Link 1](#). [Link 2](#). [Link 3](#).

EEOC PANDEMIC GUIDANCE

The EEOC endorses the CDC’s recommendations: “Employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public.” This statement suggests that the EEOC agrees with the CDC’s recommendation to notify coworkers. The EEOC confirmed this position in a recent webinar responding to questions from employers. In the webinar, the EEOC reminded employers that they are prohibited from confirming or revealing the identity of a diagnosed employee except to those appropriate management officials who will be tasked to take actions consistent with guidance from the CDC and other public health authorities. The EEOC directs employers to limit the number of people who are informed of the identity of a diagnosed employee. The EEOC takes the position that an employer’s notification to those who may have come into contact with the diagnosed employee does not require disclosing the employee’s name. However, the EEOC has explicitly stated that an employer may disclose the name of an employee with a positive diagnosis to a public health agency.

The EEOC advises that all information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept confidential. Even when an employer is permitted to ask employees if they are experiencing influenza-like symptoms (as is the case under the COVID-19 pandemic), such as fever or chills and a cough or sore throat, employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. This includes an employee's statement that he or she has COVID-19, or suspects he or she has the disease, as well as the employer's notes from questioning the employee. This information must be stored separately from the employee's personnel file.

Similarly, during the pandemic, employers are permitted to measure employees' body temperature, but the fact that an employee had a fever or other symptoms is subject to ADA confidentiality requirements. The EEOC also cautions that some people with COVID-19 will not have a fever, so that information is not dispositive of a positive diagnosis.

According to the EEOC Guidance and the responses given in the EEOC webinar, the only exceptions to the ADA's confidentiality requirements are the following:

1. Employers are permitted to share with employees who may have had close contact with the diagnosed employee that "someone at this location" or "someone on this floor" has COVID-19, without revealing or confirming the diagnosed employee's name.
2. Supervisors and managers may be told about necessary restrictions on work duties and about necessary accommodations;
3. First aid and safety personnel may be told if the disability might require emergency treatment;
4. Government officials may access the information when investigating compliance with the ADA;
5. Employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws; and
6. Employers may use the information for insurance purposes.

The EEOC Guidance also asks employers to engage in an analysis of who needs to know the identity of the employee with COVID-19. This is a fact-specific analysis that focuses on issues particular to each workplace and the reasons why specific management official may need to receive the confidential medical information. Employers should limit the number management officials who are informed of the name of the diagnosed employee.

The EEOC has also clarified expectations surrounding reasonable accommodations during the pandemic. Even if a job can only be performed at the workplace, the EEOC encourages employers and employees to be flexible, with temporary job restructuring, temporary transfer or modified workspaces and schedules. If an employee is forced to stay home due to a positive COVID-19 diagnosis, or exposure to same, the EEOC encourages employers to discuss any requests for reasonable accommodations before the employee returns to the workplace. This process facilitates the making of any necessary arrangements in advance of the employee's return to work.

EEOC Guidance: [Link 1](#). [Link 2](#).

HIPAA CONSIDERATIONS

According to a Bulletin issued by the Office of Civil Rights, U.S. Department of Health and Human Services, the privacy rules of Health Insurance Portability and Accountability Act (HIPAA) continue to apply in an emergency, although there are considerations to allow for the responsible use and disclosure of protected health information (PHI) in the case of a serious contagion.

HIPAA's privacy rules extend only to covered entities (health plans, health care clearinghouses, and most health care providers) and their business associates. Thus, if an employee notifies the employer that the employee has tested positive for COVID-19, the employer would not be subject to HIPAA's requirements with regard to that information. If, on the other hand, an employer finds out that an employee has the virus from the employer's health plan, that information would be subject to HIPAA.

If the information is HIPAA protected, an individual's protected health information (PHI) may be disclosed – without the individual's authorization -- in certain circumstances that include: (a) to individuals at risk for contracting or spreading the virus (if permitted by other applicable laws); or (b) to a person in a position to prevent or lessen a serious and imminent threat to the health and safety of an individual or the public (consistent with other applicable laws and standards for ethical conduct).

Thus, information may be disclosed to the CDC and to state and local health departments that are collecting information about the spread of the virus, and HIPAA will not prevent reasonable and appropriate actions to alert individuals who have been exposed to the virus.

Nevertheless, PHI still must be safeguarded from inappropriate uses and disclosures, such as by using only the minimum amount of PHI necessary and to verify the identity and, where appropriate, authority of individuals making inquiries. Particular care, for example, should be taken in communications with the media.

Ballard Alert: [click here](#)

DHHS Bulletin: [click here](#)

OTHER PRIVACY LAWS

The collection, use, and disclosure of information may be limited by other privacy laws, including state privacy laws.

STATE GUIDANCE

Many states, including Pennsylvania, have issued explicit guidance on how employers should respond to suspected or confirmed positive cases. Employers should also cross-reference state laws, state executive orders and state public health orders when developing response plans.

Ballard State Legislative Tracker: [click here](#)

Ballard Spahr's COVID-19 response team includes both Labor and Employment and Employee Benefits and Executive Compensation lawyers. We are ready to respond to your specific questions about COVID-19 infection and exposure at the workplace.

EXHIBIT A

TIMELINE FOR RESPONDING TO COVID-19 INFECTION REPORT

Immediately

1. If the employee is currently in the facility, quickly determine a strategy for the employee to leave
2. Consider how to handle this situation to avoid exposure to others, while protecting the dignity and privacy of the individual

1-2 hours

1. Meeting of employee's manager/supervisor, key executives, HR
2. Assess whether to send all employees home for the day/close the building where the employee worked
3. Identify a designated employer representative to obtain additional information from infected employee and conduct telephone interview (assuming employee is medically able to participate)
4. Develop list of individuals likely to have had close contact with the infected employee within the past two days (i.e. within 6 feet of distance)
5. Identify individual(s) responsible for communication plan for those who had close contact with infected individual and prepare plan
6. Prepare communication to employees
7. Determine compensation (including benefits) for employees sent home
8. Identify person to arrange for thorough cleaning/disinfecting per CDC Guidance
9. Assign individuals to implement response plan and action items

2-5 hours

1. Assess work impact of closure of facility
2. Determine whether remote work is possible and set up systems/equipment
3. Execute communication plan for coworkers and others who had close contact with infected individual
4. Communicate with workforce about closure and anticipated return to work timing
5. Per CDC guidelines, businesses are strongly encouraged to coordinate with state and local health officials so timely and accurate information can guide appropriate responses
6. Prepare media statement, if applicable
7. Prepare statement for customers, vendors, business associates, if applicable
8. Confirm arrangements for cleaning/disinfection of facility

Within 24-48 hours

1. Conduct cleaning of facility. Note that for facilities that do not house individuals overnight, CDC recommends:
 - a. Closing off areas used by an infected person and waiting as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets.
 - b. Opening outside doors and windows to increase air circulation in the area.
 - c. If possible, wait up to 24 hours before beginning cleaning and disinfection.
 - d. Follow CDC steps for enhanced cleaning: <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>
2. If the employer is subject to OSHA record keeping requirements, update OSHA 300 Log if *all* of the following are true:
 - a. The case is a confirmed case of COVID-19;
 - b. The case is work-related, meaning an event or exposure in the work environment either caused or contributed to the resulting condition; and
 - c. The case involves one or more of the general recording criteria set forth in [29 CFR 1904.7](#) (which includes injuries that will result in days away from work, injuries that require medical treatment, and injuries that will result in work restrictions)
3. Develop plan for compensation of impacted employees, taking into account any governmental leave mandates
4. Develop a plan to address potentially impacted essential employees:
 - a. If employees remain asymptomatic, the CDC recommends that employers:
 - i. Pre-screen employees by taking temperatures
 - ii. Regularly monitor employee symptoms
 - iii. Enforce masks and social distancing in the workplace
 - iv. Disinfect and clean workspaces regularly
 - b. If employees have symptoms, be prepared to send them home immediately and clean and disinfect their work areas.
5. Develop plan to address impact on production of goods, provisions of services to customers

Within 72 Hours

1. Prepare a plan for the diagnosed employee to return to work.
 - a. CDC Guidelines for Health Care Employees can be useful in this regard. The CDC indicates that:
 - i. *Symptomatic* employees with a positive COVID-19 diagnosis:
 1. Can be excluded from work until at least 3 days have passed since recovery (no fever without the use of fever reducing medication and improvement of respiratory symptoms); and
 2. At least 7 days have passed since symptoms first appeared.
 - ii. *Asymptomatic* employees with a positive COVID-10 diagnosis:
 1. Can be excluded from work until 10 days have passed since the date of their first positive test.
 - b. Consider requiring returning employees to:
 - i. Wear face mask;
 - ii. Minimize contact with any high risk co-workers; and
 - iii. Self-monitor for symptoms

EXHIBIT B

SAMPLE QUESTIONS FOR DISCUSSION WITH DIAGNOSED EMPLOYEE

If the employee is onsite when the diagnosis is revealed, he/she immediately should be isolated in an enclosed space, such as a conference room or office. The employee should be advised to seek medical attention and to leave the workplace immediately. The employer should designate a representative to engage the employee in the following conversation over the telephone.

Thank you for letting us know about your diagnosis. We hope you and your family take whatever steps are necessary to focus on your health. Let us know if we can help in any way.

We want to be sure we take appropriate steps to address the safety and work issues. Given your diagnosis, and your display of symptoms, we ask that you remain away from the workplace per guidance from your healthcare provider and CDC guidelines. According to the latest from the CDC, those who have COVID-19 should continue home isolation until:

- At least 3 days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications AND improvement in respiratory symptoms (e.g., cough, shortness of breath); and
- At least 7 days have passed since symptoms first appeared.

Alternatively, if you live in an area where there is ample testing available, laboratory capacity, and convenient access to testing, we reserve the right to enforce a test-based strategy. Under that process, you should continue home isolation until:

- Resolution of fever without the use of fever-reducing medication; and
- Improvement in respiratory symptoms; and,
- Negative results of an FDA Emergency Use Authorized molecular assay for COVID-19 from at least two consecutive nasopharyngeal swab specimens, collected more than 24 hours apart.

If you have been diagnosed with COVID-19, but have otherwise experienced no symptoms, you should continue home isolation until:

- At least 7 days have passed since the date of your first positive COVID-19 diagnosis and you remain asymptomatic

Then, for 3 days following your return to work, you shall practice social distancing and wear a face covering in the workplace.

Direct the employee to the CDC's Interim Guidance: Discontinuation of Home Isolation for Persons with COVID-19. [Click here.](#)

NOTE: In some instances, company policy may provide for a longer period of home isolation. Legal counsel is advised on this issue.

Personal Issues

- Do you have any personal property at work that you need or would like?
- Is there anything that we can do that would be helpful to you?
- Discuss any questions or issues around leave benefits during the isolation period.
- Discuss any questions about health care coverage, if applicable.

Work Issues

- Discuss any questions about coverage and transition of work with the employee.
- Discuss whether the individual wishes to work remotely (assuming appropriate for the job) and whether the employer will permit such work.
- What does your workload look like for the next two weeks?
- Do you have any recommendations as to which job duties or upcoming projects are essential versus non-essential?
- Do you have any meetings scheduled that are not on your calendar?
- Are there any employees with whom you work, or who are cross-trained in your area, who could assist with your job duties in the next few weeks?

Assessment of Contact with Others

Notify employee that employer will let coworkers, customers, business partners, or others with whom employee had close contact know of the diagnosis, without identifying the employee by name (although some individuals may discern the identity based on context).

Also, let employee know that, if a coworker inquires about who has been diagnosed with the infection because they are concerned they had close contact, employer may contact the employee to ask about whether he/she believes such contact occurred.

- What has your work schedule/work day been like the past 14 day (i.e. what percentage of the days were spent on which tasks and in which areas/locations)
- With whom did you work in close proximity (3 to 6 feet) within the last 14 days?
- Have you shared tools or worked on products or projects with other employees in the last 14 days? If so, when, where and with whom?
- Have you spent time in any community/shared spaces at work in the last 14 days? If so, when, where and with whom?

- Have you attended any company meetings on or offsite in the last 14 days? If so, when, where, and with whom?
- Have you met any clients/customers/vendors or other business partners in the last 14 days, whether on or offsite? If so, whom?

Voluntary Identification

- *If the employee says he or she has no problem with disclosing his or her identity to coworkers* – Request that the employee confirm this information in writing (email is fine), stating that he or she consents to disclosure of the employee's identity to those individuals identified as having had close contact. Any individuals to whom the employee's identity is disclosed should be instructed to keep the information confidential.

Is there anything else we can do that would be helpful to you? If employee would like to contact EAP, provide information.

If you have any questions or think of any additional information you would like to pass on feel free to contact

_____.

EXHIBIT C

SAMPLE NOTIFICATION TO WORKFORCE

The health and safety of our employees is a top priority, and, in these unprecedented times, this priority continues to guide our business decisions. Today, we learned that one of our employees in the _____ facility tested positive for COVID-19. After making sure that this individual is not in the workplace and suggesting they receive care, we want to make sure that our workforce understands the steps we are taking to ensure your health and safety, including anyone who may have had close contact with this individual.

Facility Closure and Disinfection

We are closing the facility, effective _____, and sending all employees home while we undertake thorough cleaning and disinfection the facility. These steps will be taken in accordance with the Centers for Disease Control and Prevention's (CDC) Environmental Cleaning and Disinfection Recommendations. We anticipate that these steps will be completed by _____, and that all employees will return to work on _____. Until then, only personnel with prior authorization will be permitted access to the facility.

Continued Attention to Heightened Hygiene


Upon return to work, we will continue our heightened environmental cleaning regimen in accordance with CDC recommendations, including routinely cleaning of all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails, and doorknobs. We advise all employees to continue their personal regimens related to reducing transmission of the COVID-19 virus.

Potential Exposure

We have notified those employees and others who potentially have been exposed to the infected individual through close contact at work. According to the CDC, close contact means being within approximately 6 feet of a person with symptomatic laboratory-confirmed COVID-19 case for a prolonged period of time. The CDC categorizes such exposure as a Medium Risk, which means the exposed individual, if asymptomatic, should remain at home, practice social distancing, and actively monitor for symptoms.

[OPTIONAL: Given the broad potential for COVID-19 exposure in our workplace, all employees will be expected to adhere to the following practices going forward:

- Pre-Screening. We will measure employee temperatures on a daily basis before any employee is allowed to enter the facility. Any employee with a temperature of over 100.4 degrees F. will be required to return home immediately.
- Regular Monitoring. We reserve the right to take employee temperatures throughout the day.
- All employees are required to wear a face mask while at work. We will provide face masks for your use.
- All employees should practice social distancing at work as work duties permit within the workplace.
- We will continue to routinely clean and disinfect bathrooms, common areas and shared electronic equipment.



We understand that you may have questions and concerns, and we will update you as we move forward. We reiterate our commitment to the health and safety of our workforce. This is new territory for all of us, and we welcome your feedback and suggestions as we move forward together.

Thank you for your understanding during this challenging time. Should you have any questions please see your supervisor or Human Resources.

EXHIBIT D

SAMPLE NOTIFICATION TO CUSTOMERS OR THIRD PARTIES

We care about the health and safety of our customers and business partners and, in this time of an unprecedented pandemic, we are treating health and safety as a top priority guiding our business decisions. Today, we learned that one of our employees in the _____ facility tested positive for COVID-19. We are notifying you because we understand you may have had recent contact with the infected individual. We want you to be aware of this situation so that you can self-monitor for development of symptoms and, if necessary, self-isolate and/or seek medical attention.

Community-Related Exposures

The Centers for Disease Control and Prevention (CDC) has updated its guidance for the management of contacts of persons with known, suspected or possible COVID-19, as well as guidance for essential worker and health care workers. You can review this information on the CDC's website at [Community-Related Exposures](#). We wanted to share this information with you so that you can make an informed decision appropriate for your circumstances.

Steps We Have Taken

In addition to notifying those who may have come into contact with the infected individual, we are taking additional measures to ensure our facility is properly cleaned and disinfected. If you have occasion to visit our facility again, we want you to be aware of these measures. We are closing the facility and will undertake thorough cleaning and disinfection in accordance with the CDC's Environmental Cleaning and Disinfection Recommendations. We anticipate that these steps will be completed by _____. No customers or third parties will be permitted to access the facility before then.

When we reopen, we will continue our heightened environmental cleaning regimen in accordance with CDC recommendations, including routinely cleaning of frequently touched surfaces within the facility. We have instructed our employees to continue their personal regimen related to reducing transmission of the COVID-19 virus.

[[OPTIONAL: Additionally, we will measure all employees' temperatures on a daily basis before they are allowed to enter the facility. Once inside the facility, we will provide, and employees will be expected to wear, face coverings. We will also encourage employees to maintain six feet of social distance as their work duties permit.]]

We reiterate our commitment to the health and safety of our workforce, our customers, and others with whom we interact. Thank you for your understanding during this challenging time.

EXHIBIT E
SAMPLE MEDIA NOTICE

IMPORTANT NOTICE: *Any notice to media outlets requires careful consideration and balancing of the need to provide notice with privacy and confidentiality concerns. Ideally, no public notice should be warranted or needed. If, however, the need for public notification is desired, under no circumstances should a media notification contain the identity of the diagnosed individual, personal health information, personally identifying information, or other information that may allow identification of the individual.*

The Company is offering its full and unqualified support to an employee who recently tested positive for COVID-19. The employee is not currently at work and has received medical attention. In accordance with CDC guidelines, those who have had close contact were notified to ensure that they are self-monitoring for symptoms and, if appropriate, receiving medical attention and limiting contact with others.

In an effort to curb transmission of the virus, we temporarily [closed and] restricted access to our facility and ensured that the facility has been cleaned and disinfected in accordance with CDC recommendations. The Company is obtaining guidance from public health officials and will continue to monitor additional guidance as it becomes available.

We have and will continue to take steps to ensure the health and safety of our employees, our business partners, and their families. We are proud of our workforce and offer our whole-hearted support of and continued commitment to everyone's health and safety in these unprecedented times.

Contact hr@companyabc.com

OUR LOCATIONS

ATLANTA

999 Peachtree St., NE, Suite 1000
Atlanta, GA 30309-3915
678.420.9300

LAS VEGAS

One Summerlin
1980 Festival Plaza Drive, Suite 900
Las Vegas, NV 89135-2658
702.471.7000

PHILADELPHIA

1735 Market St., 51st Floor
Philadelphia, PA 19103-7599
215.665.8500

BALTIMORE

300 E. Lombard St., 18th Floor
Baltimore, MD 21202-3268
410.528.5600

LOS ANGELES

2029 Century Park E., Suite 800
Los Angeles, CA 90067-2909
424.204.4400

PHOENIX

1 E. Washington St., Suite 2300
Phoenix, AZ 85004-2555
602.798.5400

BOULDER

5480 Valmont Road, Suite 200
Boulder, CO 80301-2369
303.379.2275

MINNEAPOLIS

2000 IDS Center
80 South 8th St.
Minneapolis, MN 55402-2113
612.371.3211

SALT LAKE CITY

One Utah Center, Suite 800
201 S. Main St.
Salt Lake City, UT 84111-2221
801.531.3000

DELAWARE

919 N. Market St., 11th Floor
Wilmington, DE 19801-3034
302.252.4465

NEW JERSEY

210 Lake Drive E., Suite 200
Cherry Hill, NJ 08002-1163
856.761.3400

SIOUX FALLS

101 South Reid St., Suite 302
Sioux Falls, SD 57103
605.978.5200

DENVER

1225 17th St., Suite 2300
Denver, CO 80202-5596
303.292.2400

NEW YORK

1675 Broadway, 19th Floor
New York, NY 10019-5820
212.223.0200

WASHINGTON, DC

1909 K St., NW, 12th Floor
Washington, DC 20006-1157
202.661.2200

Ballard Spahr
LLP