

EMPLOYER GUIDELINES

# Responding To a Positive COVID-19 Diagnosis in the Workplace

*Updated March 26, 2020*

Prepared by Ballard Spahr LLP  
[www.ballardspahr.com](http://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 ought to 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: [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)

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: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>.

## 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. However, the EEOC's Guidance does not address this issue specifically.

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. Similarly, during the pandemic, employers are permitted to measure employees' body temperature, but the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

Nothing in the EEOC Guidance addresses when or whether an employer is permitted to disclose that a specific employee has contracted COVID-19, whether with respect to coworkers or customers or others who may have had contact with the employee. According to the EEOC Guidance, the only exceptions to the ADA's confidentiality requirements are the following:

1. Supervisors and managers may be told about necessary restrictions on work duties and about necessary accommodations;
2. First aid and safety personnel may be told if the disability might require emergency treatment;
3. Government officials may access the information when investigating compliance with the ADA;
4. 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
5. Employers may use the information for insurance purposes.

Notably absent from the list of exceptions cited by the EEOC is whether coworkers or customers can be informed of a positive diagnosis of COVID-19 by an employee.

We believe a reasonable interpretation of the EEOC Guidance is to allow disclosure of a positive COVID-19 diagnosis, if done appropriately. This conclusion is based on the EEOC's endorsement of the CDC guidelines, and the EEOC's finding that COVID-19 now is recognized to pose a "direct threat" to health and safety under the ADA. Nevertheless, while disclosure of the fact of a positive COVID-19 diagnosis is likely appropriate, due consideration should be given and caution taken in assessing whether it is necessary to disclose the specific identity of the employee, as well as determining the sphere of coworkers or others to whom the disclosure should be made.

EEOC Guidance: [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html).

## 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 the 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: <https://www.ballardspahr.com/alertspublications/legalalerts/2020-03-13-disclosing-information-about-the-novel-coronavirus-under-hipaa>

DHHS Bulletin: <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>

## OTHER PRIVACY LAWS

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

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

#### **One-Two 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 person to obtain additional information from infected employee and conduct telephone interview (assuming employee is medically able to participate)
4. Develop list of likely individuals to have had close contact with infected employee
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

#### **Two-Five 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, and 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
4. Develop plan for compensation of impacted employees, taking into account any governmental leave mandates
5. Develop plan to address impact on production of goods, provisions of services to customers

## **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 following conversation should take place by 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, we ask that you remain away from the workplace per guidance from your health care provider and CDC guidelines. According to the latest from the CDC, those who have COVID-19 should continue home isolation until:

- At least three 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 seven days have passed since symptoms first appeared.

Direct the employee to the CDC's Interim Guidance: Discontinuation of Home Isolation for Persons with COVID-19. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>.

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 whether he/she believes such contact occurred.

- What has your work schedule/work day been like the past 14 days (*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 (three to six 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 the 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 routine 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 six feet of a person with a 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.

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.

#### **Exposure Risk Assessment**

The Centers for Disease Control and Prevention (CDC) has published guidance for risk assessment and public health management when someone potentially has been exposed to COVID-19. You can review this information on the CDC's website at [CDC Risk Assessment Guidance](#). The CDC categorizes contact with a COVID-19 infected individual on a scale of High, Medium, Low, or No Identifiable Risk, with attendant precautions at each level.

Under the CDC Guidance, most casual professional interactions are classified as "Low Risk," meaning that an individual has been in the same indoor environment as an infected person with symptomatic COVID-19, but has not had close contact. The risk classification becomes a "Medium Risk" if there has been close contact with an infected, symptomatic individual, meaning that they were within approximately six feet of each other for a prolonged period of time.

For Low Risk situations, the CDC recommends no precautions if the individual has no symptoms of COVID-19. If symptoms develop, then the CDC recommends self-isolation, social distancing, and seeking health advice to determine if medical evaluation is needed. For Medium Risk situations, the CDC recommends remaining at home or in a comparable setting, practicing social distancing, and active monitoring through state or local public health authorities. If symptoms develop, the CDC recommends self-isolation and public health assessment to determine the need for medical evaluation.

This is, of course, a personal decision. 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 routine 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.

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](mailto: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