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Safe Actions For Employee Returns



Workplace testing of COVID-19

The most recent and accurate information available on COVID-19 indicates that the virus is spread through respiratory droplets from a sneeze or cough. The droplets from an infected person can enter an uninfected person through the mucus membranes (eyes, mouth, or nose), and can be transferred easily when people are in close contact with each other, within a distance of 6 feet.¹ It has previously been estimated that 80 percent of those infected are asymptomatic or have only mild symptoms. Although they may not appear to be contagious or severely ill, these individuals can still spread the coronavirus.²

Because of the ease of transmission through close physical proximity, places of employment are especially susceptible to coronavirus outbreaks with employees and members of the public interacting with each other. The fact that many infected with COVID-19 are asymptomatic or mildly symptomatic means that it is important for organizations and workplaces to take precautionary measures to protect their workforces and the public. This includes testing and screening of employees, contractors, vendors and visitors to a workplace facility. This paper outlines the recommended procedures for testing and screening that organizations can implement, as well as the potential hurdles and legal challenges that organizations can face in taking these precautionary measures.

¹ <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics>

² https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf_4#:~:text=For%20COVID%2D19%2C,infections%2C%20requiring%20ventilation

SAFER

Safe Actions For Employee Returns

Symptom screenings and temperature checks

The Center for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA) recommend screening for symptoms of COVID-19, including elevated temperature. These symptoms³, which may appear 2-14 days after exposure, may include:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

The screenings for symptoms and elevated temperature should be conducted daily, where feasible. Although not everyone who contracts COVID-19 will be symptomatic, this is still a useful tool and prudent precautionary measure to determine if a person should be at work. Where possible, employers should encourage their workers to take their temperatures at home and answer a short questionnaire about coronavirus symptoms before leaving for work. Screening stations and areas should still be set up outside of workplaces to screen workers and visitors before entering the facility or worksite.

Examples of screening questionnaires and a flowchart for screening individuals before permitting them into the workplace can be found at the [NSC SAFER](#) site.

Employers should be aware of the limitations of performing symptom screenings, particularly temperature checks, knowing that not all who have the coronavirus will present with symptoms or a fever. For this reason, it is recommended that employers engage in a broader communications and education effort to inform employees not only about COVID-19 symptoms, but also the importance of practicing physical distancing and good hygiene and using facial coverings.

Some of the legal considerations for COVID-19 testing and screening stem from the Americans with Disabilities Act (ADA), which prohibits discrimination against people with disabilities in transportation, public accommodations, communications, employment, and access to government programs and services.⁴ Because the U.S. Equal Employment Opportunity Commission (EEOC) enforces many ADA provisions as it deals with employment, that office has released the following statement regarding measures to prevent the spread of the coronavirus: “The ADA and Rehabilitation Act rules continue to apply, but they do not interfere

³ <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>

⁴ <https://www.dol.gov/general/topic/disability/ada>

SAFER

Safe Actions For Employee Returns

with or prevent employers from following the guidelines and suggestions made by the CDC⁵ about steps employers should take regarding the coronavirus.” Furthermore, the ADA and Rehabilitation Act “do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace.”⁶ This means that employers are allowed to conduct COVID-19 screening legally, including temperature checks. It should also be noted that while employers are encouraged by the CDC and the EEOC to ask employees about recent travel, exposure, and symptoms of COVID-19, any medical information that is disclosed as part of this questionnaire should be treated as confidential under the ADA.⁷

In general it appears that COVID-19 symptom screening and temperature checks of employees before entering a facility or worksite are acceptable precautionary measures and not in violation of ADA or EEOC provisions. Even so, NSC recommends the following actions for employers regarding symptom screening and temperature checks:

1. Employers should adopt policies and practices that encourage employees and others who may be included in screening (such as onsite suppliers, visitors, etc.) to provide complete and accurate answers to questions concerning symptoms and potential COVID-19 exposures.
2. Employers should be flexible with leave policies to ensure employees feel comfortable proactively sharing their symptoms with employers and making decisions not to come to work when they feel sick or are exhibiting symptoms.
3. Employers should appropriately maintain medical information subject to ADA confidentiality requirements. Documentation of this information would represent a medical record and could also be subject to OSHA record keeping requirements (employment plus 30 years).
4. Employers should establish a safe and secure area for employees who may have an elevated temperature and ensure that temperature screeners have appropriate personal protective equipment (PPE). In addition, employers should have plans for how to transport people to appropriate medical care, as needed.
5. Workplaces conducting symptom screenings can help identify areas of potential outbreaks. Businesses should share appropriate information from these screenings with public health officials.
6. Employers should establish procedures for employees who refuse to have a temperature or other screening conducted.

Communication of positive coronavirus cases

The communication of an employee who has tested positive for COVID-19 should be handled with consideration to the privacy provisions of the EEOC and the Health Insurance Portability and Accountability Act (HIPAA). Employers should not share the identity of the individual who has tested positive, but instead communicate with other employees about the confirmed positive case and the measures the employer is taking to clean and sanitize the affected area(s) of the workplace to keep the workforce safe.

⁵ 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

⁶ <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

⁷ <https://www.natlawreview.com/article/covid-19-what-employers-need-to-know-about-hipaa>

SAFER

Safe Actions For Employee Returns

It should be noted that one permitted disclosure under HIPAA allows employers to disclose a positive COVID-19 case to public health authorities, which include state and local health departments, the department of Health and Human Services (HHS), or the CDC as appropriate.⁸

Examples of talking points for supervisors and managers to communicate about a positive coronavirus test in the workplace can be found at the [NSC SAFER](#) site.

To remain in compliance with the privacy provisions of the EEOC and HIPAA, yet at the same time also protect the health and safety of other employees, NSC recommends taking the following actions. It is assumed that cleaning and sanitization protocol is implemented and carried out after knowledge of a confirmed coronavirus case.

1. Human Resources or COVID management team contacts employee to confirm the date of symptoms and dates when s/he was at the worksite. Employee identifies close contacts at work while symptomatic and indicates areas where s/he worked.
2. HR or management team contacts employee supervisor about confirmed COVID case.
3. Supervisor notifies site manager and individual department leads to make necessary changes in operations and initiate site cleaning and disinfection.
4. Supervisor or HR or management team informs the identified close contacts of employee using organizational talking points and without disclosing the identity of employee.

Employer participation in testing

To respond effectively to the coronavirus, the Food and Drug Administration (FDA) states “rapid detection of cases and contact, appropriate clinical management and infection control, and implementation of community mitigation efforts are critical.”⁹ To this end, employers should encourage participation of their employees in community testing programs.

If feasible, the employer may consider setting up its own testing capabilities to provide employees a convenient place to be tested and to increase the speed at which test results are known. This of course must still be performed within the guidelines of the EEOC¹⁰ and following health department reporting requirements. Should employers decide to provide testing for COVID-19, they should be aware of their obligation to refer positive employees for treatment or to provide treatment directly through company or contact services. The test results should still be interpreted and verified by qualified medical personnel, preferably occupational physicians or others with experience in managing public health.

According to the EEOC, employers may administer tests for COVID-19 if certain conditions are met.¹¹ First, any mandatory viral testing for the coronavirus must be job-related and consistent with business necessity. Employers can make the case in the current pandemic that if employees infected with the coronavirus enter the workplace, they pose a direct threat to the health of others.

⁸ <https://www.natlawreview.com/article/covid-19-what-employers-need-to-know-about-hipaa>

⁹ <https://www.fda.gov/medical-devices/emergency-situations-medical-devices/emergency-use-authorizations-medical-devices#coronavirus2019>

¹⁰ <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

¹¹ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

SAFER

Safe Actions For Employee Returns

Second, employers need to ensure that their testing capabilities are sound and reliable. The Food and Drug Administration (FDA) has stated that labs certified under its Clinical Laboratory Improvement Amendments (CLIA) will be allowed to perform COVID-19 testing before receiving its emergency use authorization (EUA) from the FDA, and that these labs should submit EUA approval within 15 days of validating the test. Businesses contracting with testing organizations should ask for the FDA validation and check it on the FDA website too.¹²

Third, because viral testing detects only current infection, employers still should require employees to practice physical distancing and good personal hygiene in order to prevent transmission of the coronavirus in the workplace.

Should an employer decide to participate as a COVID-19 testing site for employees and visitors, NSC recommends taking the following actions.

1. Employers should appropriately maintain medical information subject to ADA confidentiality requirements.¹³ Documentation of this information would represent a medical record and could also be subject to OSHA record keeping requirements (employment plus 30 years).
2. Employers should establish a safe and secure area for employees who may have a positive COVID test and ensure that test providers have appropriate PPE. In addition, employers should have plans for how to transport people to appropriate medical care, as needed.
3. Workplaces conducting COVID testing can help identify areas of potential outbreaks. Businesses should also share these results with public health officials.

¹² <https://www.google.com/url?q=https://www.fda.gov/medical-devices/emergency-situations-medical-devices/emergency-use-authorizations%23coronavirus2019&sa=D&ust=1589484095845000&usq=AFQjCNF1gZZduRenKB8jvSrPINbdJ1evzg>

¹³ <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>