

What Should Businesses Tell Employees and Third Parties When an Employee Tests Positive for COVID-19?

Related Professionals

Ashley Parr
864.282.1138
aparr@maynardnexsen.com

Practices

Employment & Labor Law

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As COVID-19 continues to spread rapidly, it is becoming more likely that, at some point, every employer in the country will be faced with the question of how and when to communicate information regarding an employee who tests positive for the coronavirus. Because a COVID-19 diagnosis is considered confidential medical information under the Americans with Disabilities Act (“ADA”), employers are prohibited from sharing such information and should shield screening, testing, and diagnostic information as they would other confidential medical information. Nevertheless, employers must disclose enough information to at least satisfy the Occupational Safety and Health Administration’s (“OSHA”) general duty clause—the agency’s requirement that employers maintain a safe work environment.[1]

An employee’s supervisor may be most likely to learn of an employee’s COVID-19 diagnosis. With that in mind, employers should train supervisors to report any disclosed positive COVID-19 test immediately to HR (or another designated contact), and supervisors should be reminded to maintain the confidentiality of any such report.

The following questions and answers will provide employers a starting point about employers’ disclosure and confidentiality obligations after learning of an employee’s positive COVID-19 test. Notably, the same confidentiality rules and guidance apply with respect to employees who self-report potential exposure to COVID-19 or who are treated as presumptive COVID-19 positive.

What information should the employer request from the employee who tested positive?

The employer must take immediate steps to identify the scope of the risk in its workplace by requesting certain information from the employee who tested positive for COVID-19 (the Affected Employee).

Ask the Affected Employee to provide a list of employees or other work-related third parties with whom the Affected Employee came into “close contact” during the 14-day period prior to the positive test (the Incubation Period). The CDC generally defines “close contact” as being within approximately six (6) feet of someone for at least fifteen (15) minutes, or having direct contact with infectious secretions from someone with a COVID-19 case (e.g., being coughed on). The employer should also request that the Affected Employee identify all areas within the workplace where he or she was physically present during the Incubation Period, which is generally estimated as approximately fourteen (14) days.

What should the employer tell other employees?

Most importantly, to avoid violating the ADA, the employer must not disclose the identity of the Affected Employee, or anything specific about his or her medical condition or symptoms to others in the workplace. Similarly, no information that could be used to “identify” the Affected Employee without specifically identifying the name should also be kept confidential. The only exception applies to a very limited number of individuals who need the information (e.g., a designated individual who will interview the employee to obtain a list of people with whom the employee had contact in the workplace or a supervisor who needs information about the employee’s ability to work, and who may have access to other confidential medical information).

The employer should contact directly each co-worker identified by the Affected Employee and each co-worker who worked in any identified areas of the workplace and advise—without revealing the identity of the Affected Employee—that a person with whom he or she has been in recent contact and/or with whom they recently shared a common work area has been diagnosed with COVID-19. The employer may disclose when the Affected Employee was last in the workplace in order to provide co-workers a sense of how long to watch for symptoms, which can take up to 14 days to manifest. In addition to the employer’s specific instructions regarding work, the co-workers should be encouraged to self-isolate, monitor for symptoms, and to seek all medical care and testing that they feel may be appropriate.

Depending on the employer’s size and workplace logistics, the employer should also consider issuing a general notice to its workforce that an employee has tested positive for COVID-19. Any such notice should reassure employees that, unless the employee has been notified directly by the employer, it is not believed that the employee has been in close contact with or shared a common workspace with the infected employee.

What should an employer disclose to third parties such as customers/clients, vendors, and others?

While businesses are generally not obligated to disclose the existence of COVID-19 cases within their workforce to third parties such as customers/clients, vendors, or contractors, a business may choose to inform third parties that an employee has tested positive for COVID-19. Depending on the nature of the business, many businesses decide to disclose the positive COVID-19 cases within their workforce to specific individuals who may have come into close contact with the Affected Employee. Third parties appreciate the ability to make informed health decisions, and the disclosure allows the business the opportunity to also assure third parties that all precautionary measures recommended by the CDC have been implemented.

However, with the exception of a staffing agency/contractor who placed the Affected Employee in his or her current position, the ADA does not permit businesses to disclose the Affected Employee's identity or other medical information to third parties. Similar to disclosure to co-workers, a business may share the date on which the Affected Employee last worked.

[1] Additional OSHA requirements for recording COVID-19 cases and Centers for Disease Control and Prevention ("CDC") guidance which becomes relevant when an employer learns that an employee tested positive for COVID-19 is addressed in more detail here.

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