

# COVID-19 & Vaccine-Related Employment Issues

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*Presented to:*



# Part 1: Topics for Today

- ▶ FFCRA Mandatory Paid Leave Lapsed
- ▶ Vaccine Distribution Issues
  - ▶ Limited Availability
  - ▶ Phases of Access
- ▶ Vaccine-Related Workplace Issues
  - ▶ Can it be mandatory?
  - ▶ *Should* it be mandatory?
  - ▶ What if an employee refuses?
    - ▶ Religious beliefs?
    - ▶ Medical reasons?
  - ▶ Can we treat vaccinated employees differently?

## Part 2: Review What we Learned in 2020



- ▶ CDC Guidelines for Workplaces
- ▶ When to Quarantine
  - ▶ How long to quarantine?
- ▶ Employee Testing
- ▶ OSHA/Workers' Compensation Issues



Your questions...



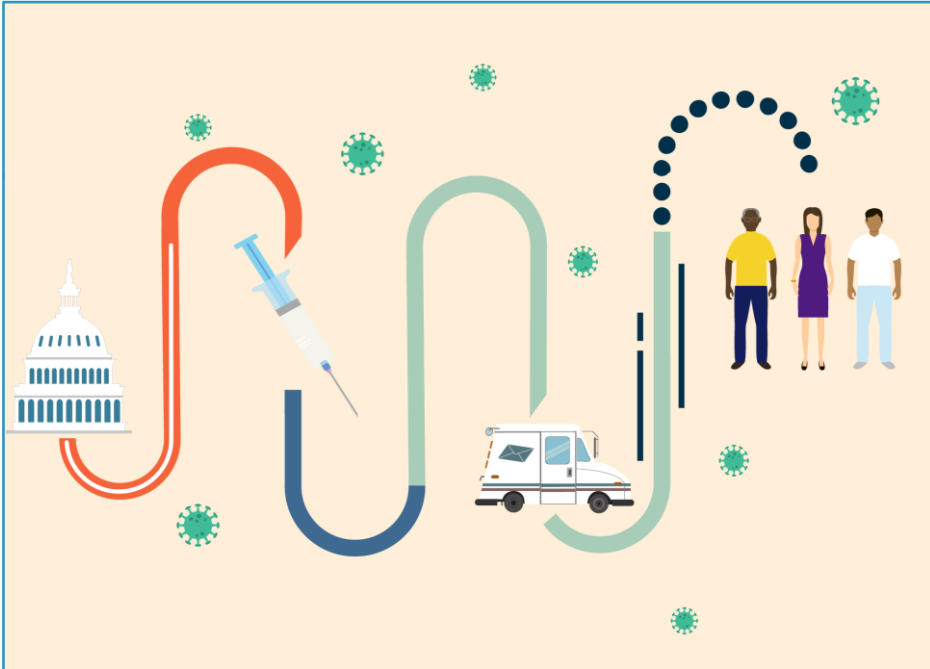


Let's get started with today's **HOT** topics...

# FFCRA Paid Leave Provisions Expired

- ▶ The FFCRA's paid leave provisions became effective on April 1, 2020 and applied to leave taken between April 1, 2020 and December 31, 2020.
  - ▶ However, Congress passed the Consolidated Appropriations Act ("CAA"), which extended certain provisions of the FFCRA until March 31, 2021. This does not require employers to provide emergency paid sick leave or emergency paid family and medical leave under the FFCRA past the original December 31, 2020 expiration date. However, it extends employers' ability to utilize the FFCRA tax credit until March 31, 2021.
  - ▶ This means that if employers voluntarily continue to provide FFCRA paid leave benefits to their employees, they can still receive the tax credit.
    - ▶ *Remember to get appropriate documentation!*
  - ▶ The CAA did not expand the amount of leave available to employees under the FFCRA.

# Vaccine Distribution Issues



- ▶ Limited availability due to early stage of distribution.
- ▶ Phases of Access:
  - ▶ Florida is currently prioritizing persons 65 years of age and older, health care personnel with direct patient contact, and residents and staff of long-term care facilities (E.O. 20-315).
    - ▶ Florida has yet to put out clear guidance on phases to come.
- ▶ Visit [FLhealth.gov](https://www.flhealth.gov) for up-to-date vaccine information.
  - ▶ Each county is handling vaccines independently.
- ▶ Cannot get the vaccine delivered to employers for distribution to employees at this time.

# EEOC Issued Updated Guidance on Dec. 16, 2020 for Employers Regarding Vaccinations, Titled:

**“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”**



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





Can an employer  
survey employees to  
see if they are willing  
to get the COVID-19  
vaccine?





- ▶ **Yes!** An employer can ask employees to participate in a survey regarding the COVID-19 vaccine and other workplace issues.
- ▶ If an employer chooses to survey employees, it is recommended to utilize an anonymous process (i) so that employees feel comfortable expressing their preferences and (ii) to avoid inadvertently soliciting medical information about employees.
- ▶ Caveat if you have a Union: Consult with an attorney before you issue a survey.

# Other Survey Questions to Consider:

- ▶ Would you get the COVID-19 vaccine if offered an incentive (*i.e.*, a \$25 - \$50 gift card)?
- ▶ Would you feel comfortable working with someone who has not yet received the COVID-19 vaccine?
- ▶ What steps, if any, can we take to make you feel more comfortable in the workplace and around your co-workers?



**Can an employer  
require all  
employees to get  
the COVID-19  
vaccine?**







- ▶ Yes, an employer can require its employees to be vaccinated unless employees have medical or religious reasons for not getting the vaccine.
- ▶ Employers should then ask the question:
  - ▶ “Should we require all employees to get the vaccine?”

# Consider the Pros and Cons

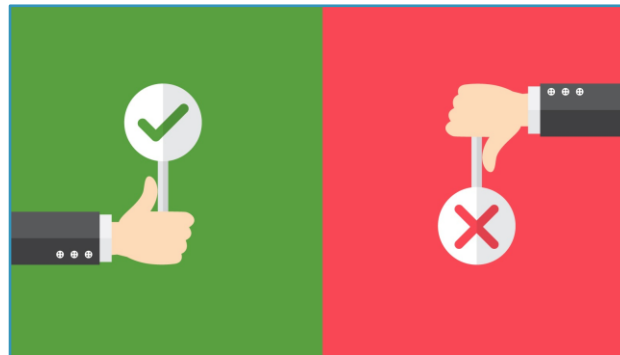
## *Some examples:*

### Pros:

- ▶ Vaccination helps reduce or extinguish the likelihood of COVID impacting the workforce.
- ▶ Employees feel safer and are more comfortable in the workplace.
- ▶ Helpful for community interaction and hurricane season.

### Cons:

- ▶ Employees refuse and quit.
- ▶ Compensation issues regarding mandatory vaccine.
- ▶ Union involvement.
- ▶ Administrative complications.



# What does OSHA say?

## Control and Prevention

Measures for protecting workers from exposure to and infection with SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19), depends on exposure risk. That risk varies based on the type of work being performed, the potential for interaction (prolonged or otherwise) with people, and contamination of the work environment. Employers should adopt infection prevention and control strategies based on a thorough workplace hazard assessment, using appropriate combinations of engineering and administrative controls, safe work practices, and personal protective equipment (PPE) to prevent worker exposures. Some OSHA standards that apply to preventing occupational exposure to SARS-CoV-2 also require employers to train workers on elements of infection prevention and control, including PPE.



# COVID-19 Vaccine and OSHA

- ▶ If workplaces involve a high risk of exposure, can vaccines be a requirement to meet OSHA requirements for a safe workplace?
  - ▶ Currently, OSHA's guidance does not differ much from that of the CDC.
  - ▶ On January 21, 2021, President Joe Biden issued an executive order instructing the Secretary of Labor to issue new guidance under OSHA within two weeks for protection of workers from COVID-19.
  - ▶ We expect to see some updates in OSHA guidance soon.



# What about the impact on Workers' Compensation?



- ▶ Greater burden of proof under **occupational disease** standards.
- ▶ “...the term ‘occupational disease’ shall be construed to mean **only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment**, and to exclude all ordinary diseases of life to which the general public is exposed, **unless the incidence of the disease is substantially higher** in the particular trade, occupation, process, or employment **than for the general public**. ‘Occupational disease’ means only a disease for which there are epidemiological studies showing that exposure to the specific substance involved, at the levels to which the employee was exposed, may cause the precise disease sustained by the employee.”

# Can employers ask pre-screening questions before an employee is vaccinated?





- ▶ Yes, an employer may ask pre-screening questions...
- ▶ **BUT** pre-screening questions may implicate disability or medical related information and, therefore, need to be handled carefully and in accordance with the ADA.
  - ▶ A medical examination is “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.”
    - ▶ Essentially, any question that seeks information about an individual’s health can be deemed a medical examination or disability-related inquiry under the ADA.
  - ▶ If an employer asks questions which are deemed to be medical examinations, the employer must demonstrate that such questions **are job related and consistent with business necessity.**

# Medical Examinations and Inquiries

## ▶ Pre-Employment:

- ▶ Prohibited: Inquiries regarding whether a job applicant is an individual with a disability or as to the nature or severity of a disability.
- ▶ Permitted: Inquiries regarding a job applicant's ability to perform job-related functions, with or without reasonable accommodation.

## ▶ Entrance Examination (Post-Offer, Pre-Hire):

- ▶ Permitted: When such examination is required of all entering employees in the same job category regardless of disability and all information is maintained in separate files, treated as confidential, and used for permissible purposes.

## ▶ During Employment:

- ▶ Prohibited: Inquiries regarding whether an employee is an individual with a disability or as to the nature or severity of a disability unless such inquiry is shown to be job-related and consistent with business necessity.
- ▶ Permitted: Voluntary inquiries that are part of an employee health program available to employees at that work site; inquiries that are job-related and consistent with business necessity; and inquiries regarding an employee's ability to perform job-related functions, with or without reasonable accommodation.



**Is asking or requiring an employee to show  
proof of having received the COVID-19 vaccine  
a medical inquiry under the ADA?**



- ▶ **No**, proof of the COVID-19 vaccination is not considered a medical inquiry under the ADA.
- ▶ Proof of antibodies, however, is considered to be a medical inquiry.
  - ▶ An employer cannot require its employees to take the antibody test - doing so is not permissible under the ADA.





**How much information may an employer request from an employee who calls in (or comes in) sick during the COVID-19 pandemic in order to protect the rest of the workforce?**

- ▶ When an employee calls in (or comes in) sick during the COVID-19 pandemic, an employer can (and should!) request information about the employee's sickness to determine whether the employee may be ill with COVID-19.
- ▶ The employer should ask the employee **questions about symptoms** that are **specific to the COVID-19** virus.





# Ask Questions about COVID-19 Symptoms:

## Current List per CDC Guidance

- ▶ People with COVID-19 have had a wide range of symptoms reported - ranging from mild symptoms to severe illness. Symptoms may appear 2-14 days after exposure to the virus. People with these symptoms may have COVID-19:
  - ▶ 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
- ▶ This list does not include all possible symptoms. CDC will continue to update this list as we learn more about COVID-19.



## Per the CDC Guidance:

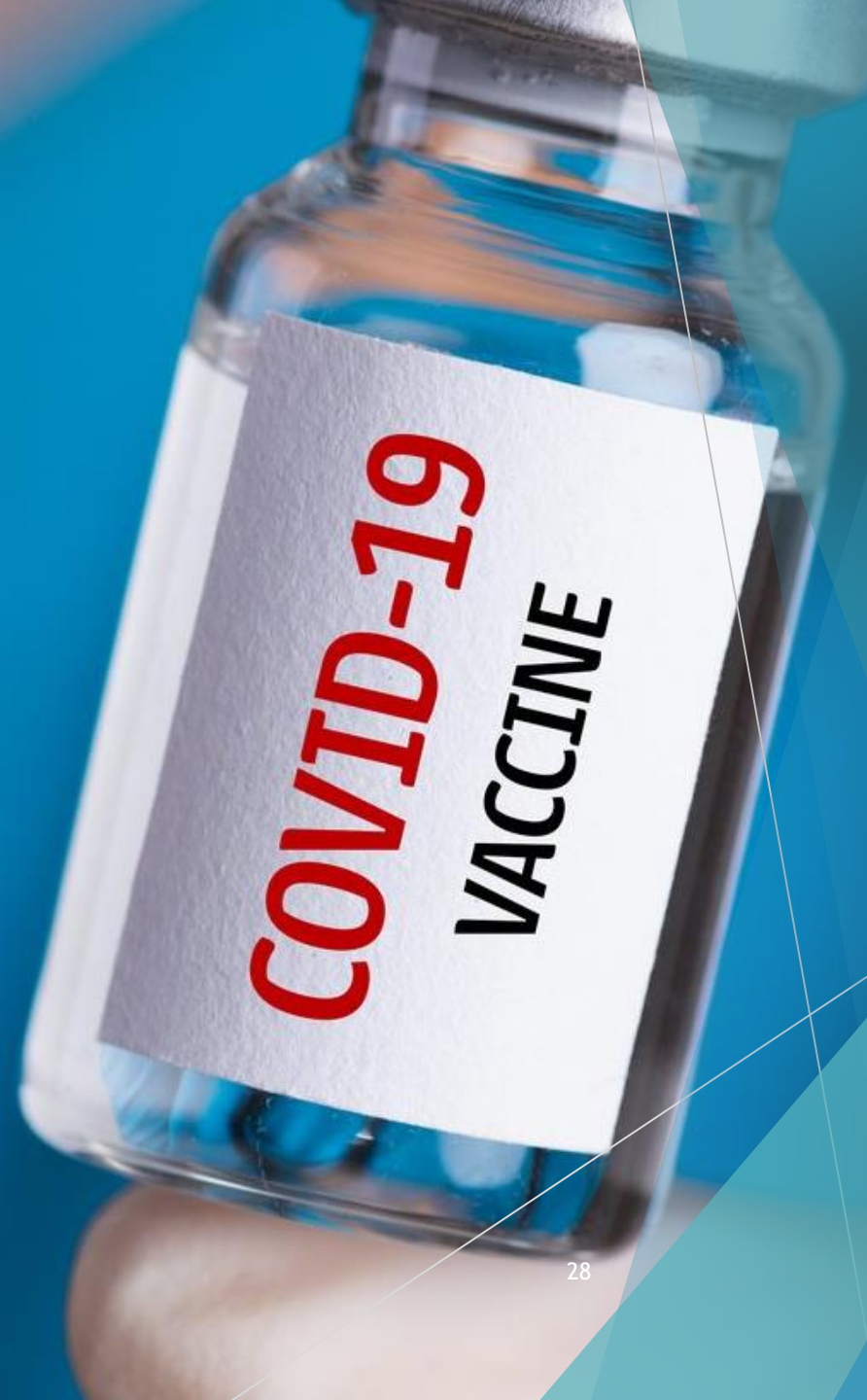
**Seek medical care immediately if someone has emergency warning signs of COVID-19.**

- Trouble breathing
- Persistent pain or pressure in the chest
- New confusion
- Inability to wake or stay awake
- Bluish lips or face

# When Asking Employees Questions about COVID-19 Symptoms:

- ▶ Be careful not to ask about specific medical issues or histories (such as underlying conditions or propensities) regarding the employee or the employee's family members.
- ▶ Focus your inquiries on whether other members of the employee's household, or other persons with whom the employee has been in close contact, may have been exposed to or experiencing symptoms of COVID-19.
  - ▶ Remember to evaluate what “close contact” means.
- ▶ Questions regarding the health histories or medical conditions of an employee or employee's family members are more likely to be covered by the Genetic Information Nondiscrimination Act (“GINA”).

Let's get back  
to the COVID-  
19 Vaccine...



Can an employee be fired for refusing to get the COVID-19 vaccine? What if the employee says he/she can't take the vaccine for religious or medical reasons?





# Employee Refusing to Be Vaccinated

- ▶ Yes, an employer generally can terminate an employee who refuses to be vaccinated for COVID-19.
- ▶ **BUT**, an employee can refuse to get the COVID-19 vaccine due to medical or sincerely-held religious reasons; in that situation, the employer should not terminate without consulting counsel.
- ▶ **How should an employer respond to an employee who indicates that he or she is unable to receive the vaccine because of a medical condition or a sincerely-held religious belief?**
- ▶ The employee should be directed to the Human Resources Department (if not already communicating directly with HR).
- ▶ HR should engage in the interactive process with the employee to determine whether a reasonable accommodation can be made.

# What if the employer has a mandatory vaccine policy and a reasonable accommodation cannot be made?

*That is, when an employee cannot receive the vaccine due to a legitimate medical condition or a sincerely-held religious belief and the interactive process proves unsuccessful.*



- ▶ If a reasonable accommodation cannot be made, then the employer must ensure that the need for the vaccine is legitimate and the potential for harm to the employee or others due to the employee not being vaccinated is great enough to warrant the employee being separated from the physical workplace.
- ▶ Alternatives may include:
  - ▶ Requiring the employee to continue wearing a mask and/or being isolated.
  - ▶ Requiring the employee to work from home (in the same or a different position).
  - ▶ Placing the employee on a leave of absence.
  - ▶ Terminating the employee.
- ▶ Termination of the employee is not without risk. Consider all other options before termination and consider legal issues under federal, state, and local laws.

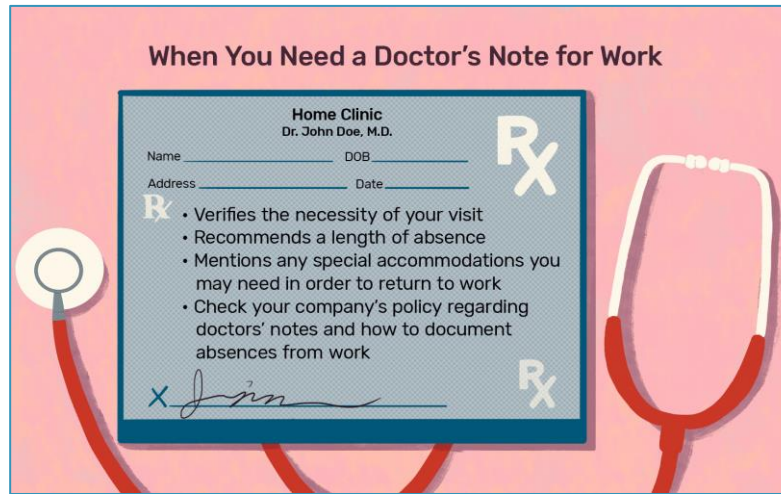
**If a job can be performed remotely, can we rewrite the job description accordingly and restrict access to the office?**

A large green circle with the word "YES" in bold, green, sans-serif capital letters centered inside it. The circle is set against a light gray square background.

Can we ask for an affidavit from the employee's medical professional if the employee refuses to get vaccinated for medical reasons?







- ▶ Yes, you can ask for medical documentation.
- ▶ An employer can require that an employee substantiate his or her medical reason for not being vaccinated, but such documentation does not (and should not) need to be in the form of an affidavit.
- ▶ Generally, a request for medical documentation and any documentation received should be handled with **HR only**.
  - ▶ *Remember: Direct managers and supervisors should not receive medical information regarding their employees unless absolutely necessary.*



## Can non-vaccinated employees be excluded from group activities or restricted from common areas?

*Examples: Social gatherings, dispatch centers, shared office spaces, break rooms, etc.*

- ▶ **Yes**, but the standard for excluding an employee is high. The ADA allows an employer to have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”
- ▶ However, “if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer **must show that an unvaccinated employee would pose a direct threat** due to a ‘significant risk of substantial harm to the health or safety of the individual or others **that cannot be eliminated or reduced** by reasonable accommodation.’”
  - ▶ *EEOC Guidance citing to 29 C.F.R. § 1630.2(r).*
- ▶ Employers should conduct an **individualized assessment** of four factors in determining **whether a direct threat exists**:
  - ▶ the duration of the risk;
  - ▶ the nature and severity of the potential harm;
  - ▶ the likelihood that the potential harm will occur; and
  - ▶ the imminence of the potential harm.



## Tread carefully!

Consult with legal counsel if you plan to exclude or terminate certain employees from the workplace for refusal to get the vaccine for medical or religious reasons.

# Can we restrict mutual aid to vaccinated personnel only?

- ▶ Yes, you could restrict mutual aid to vaccinated personnel only, but that may not provide you with enough workers in a time of need.
- ▶ You may want to wait to see how much of the workforce is able (and willing!) to be vaccinated come hurricane season before instituting such a restriction.
- ▶ What if the need for workers due to mutual aid exceeds the number of vaccinated workers? Then what happens?





*Scenario:*

**Our Cooperative is still granting employees  
FFCRA paid leave through March 31, 2021.  
What happens after that?**



# Post-FFCRA:

## Ongoing Leave of Absence Issues

- ▶ Employers are no longer required to grant paid FFCRA paid leave to employees.
- ▶ Beyond 12/31/2020 or 3/31/2021: What an employer does with short or long-term absences due to an employee being sick with COVID-19 depends on what the employer's policy and past practices are with regard to sick leave, paid time off, leaves of absence, and return to work.
- ▶ Various considerations:
  - ▶ Does FMLA apply?
  - ▶ Are employees required to use paid time off, vacation time, and/or sick time?
  - ▶ Is the employee able to and/or permitted to work from home?
- ▶ As an employer, you have the right to change your policies and practices, but remember the importance of being consistent in your treatment of similarly-situated employees.

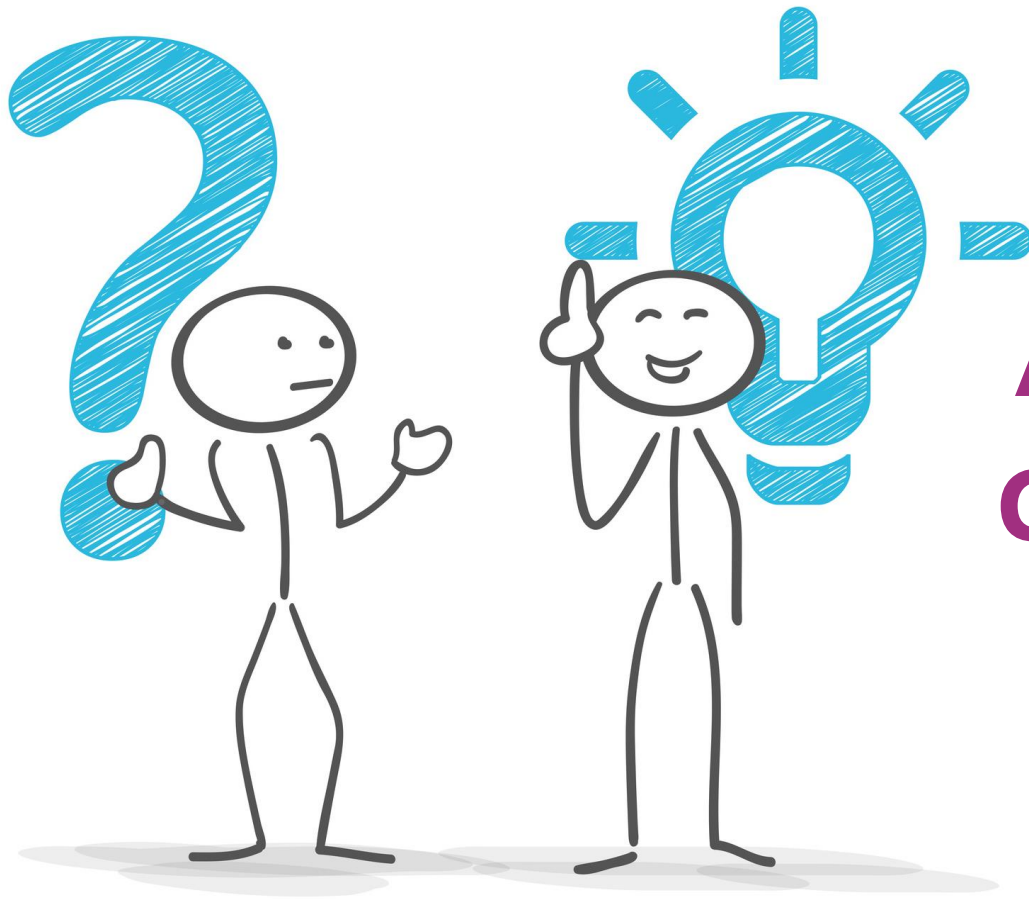


# When an employee tests positive for COVID-19, can we reveal his or her name to other employees?

*What if just to alert other employees that they may have been exposed to the employee who tested positive, and we require the employees to keep the name confidential?*

# Confidential Medical Information

- ▶ Revealing the identity of an employee with COVID-19 should be avoided whenever possible.
  - ▶ The information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information that should be maintained as confidential.
- ▶ The EEOC recommends that: “employers should focus on using a generic descriptor, such as telling employees that ‘someone at this location’ or ‘someone on the fourth floor’ has COVID-19 or has a possible exposure event. This provides notice and does not violate the ADA’s prohibition of disclosure of confidential medical information.”
- ▶ Employers should have a policy in place so that supervisors and managers know what to do and who to report this information to when an employee has tested positive for or been exposed to COVID.
  - ▶ While this information is considered medical information, supervisors and managers are allowed to report this information to appropriate employer officials so that they can take actions consistent with guidance from public health authorities.
  - ▶ Employers should limit the number of people who get to know the name of an employee who has been exposed to or tested positive for COVID-19 to the maximum extent possible.



**Any other  
questions?**



## Part 2:

# Let's Review What we Learned in 2020



# CDC Guidance: Employee Health Checks

For **in-person health checks**, conduct them safely and respectfully and in a way that maintains [social distancing](#) of workers in and entering the screening area. Workers should not enter the worksite past the screening area if any of the following are present:

- [Symptoms](#) of COVID-19
- Fever of 100.4 degrees Fahrenheit (°F) or higher or report feeling feverish
- Undergoing evaluation for SARS-CoV-2 infection (such as pending [viral test](#))
- Diagnosis of SARS-CoV-2 infection in the prior 10 days
- [Close contact](#) to someone with SARS-CoV-2 infection during the prior 14 days

## **Actively encourage sick employees to stay home**

- Employees who have [symptoms](#) should notify their supervisor and stay home. CDC recommends [testing](#) for people with any signs or [symptoms of COVID-19](#) and for [all close contacts](#) of persons with COVID-19.
- Employees who are sick with COVID-19 should [isolate](#) and follow [CDC-recommended steps](#). Employees who are asymptomatic (have no symptoms) or pre-symptomatic (not yet showing symptoms) but have tested positive for SARS-CoV-2 infection should also [isolate](#) and follow [CDC-recommended steps](#). Employees should not return to work until the criteria to [discontinue home isolation](#) are met, in consultation with healthcare providers.
- Employees who are well but who have a sick household member with COVID-19 should notify their supervisor and follow [CDC-recommended precautions](#).
- Employers are encouraged to implement flexible, non-punitive paid sick leave and supportive policies and practices as part of a comprehensive approach to prevent and reduce transmission among employees. Some employees may be eligible to take leave under the [Family Medical Leave Act \(FMLA\)](#) [↗](#) or the [Families First Coronavirus Response Act](#) [↗](#).

# CDC Guidance: Cleaning Recommendations

## Separate sick employees:

- Employees who appear to have [symptoms](#) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors, and sent home.
- Have a procedure in place for the safe transport of an employee who becomes sick while at work. The employee may need to be transported home or to a healthcare provider.

## Take action if an employee is suspected or confirmed to have COVID-19 infection:

In most cases, you do not need to shut down your facility. If it has been less than 7 days since the sick employee has been in the facility, close off any areas used for prolonged periods of time by the sick person:

- Wait 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets. If waiting 24 hours is not feasible, wait as long as possible.
- During this waiting period, open outside doors and windows to increase air circulation in these areas.

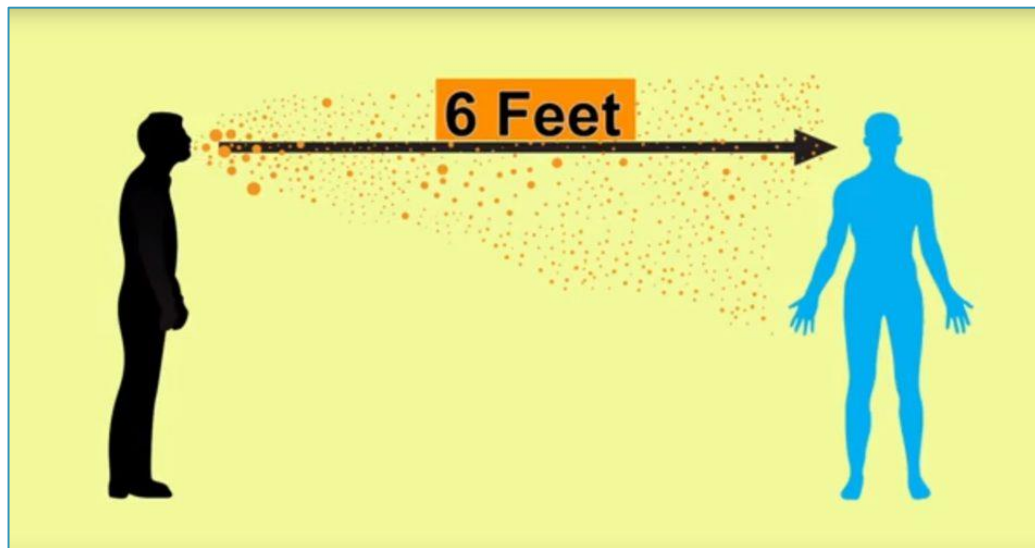
If it has been 7 days or more since the sick employee used the facility, additional cleaning and disinfection is not necessary. Continue routinely cleaning and disinfecting all high-touch surfaces in the facility.

## Follow the CDC [cleaning and disinfection recommendations](#)

- Clean dirty surfaces with soap and water before disinfecting them.
- To [disinfect surfaces](#) [↗](#), use [products that meet EPA criteria for use against SARS-Cov-2](#) [↗](#), the virus that causes COVID-19, and are appropriate for the surface.
- Always wear gloves and gowns appropriate for the chemicals being used when you are cleaning and disinfecting
- Ensure there is adequate ventilation when using cleaning and disinfection products to prevent from inhaling toxic vapors.
- You may need to wear additional PPE depending on the setting and disinfectant product you are using. For each product you use, consult and follow the manufacturer's instructions for use.

# Workplace Social Distancing Considerations

- ▶ Consider **staggering shifts** or normal arrival and departure times to limit the number of employees entering and leaving the workplace at the same time.
- ▶ **Increase physical space** between employee workstations as much as possible.
- ▶ Implement **one-way paths** in larger workplaces to reduce the number of employees coming into contact with each other during the day.
- ▶ **Use signs, tape marks, or other visual cues** such as decals or colored tape on the floor, placed at least six feet apart, to indicate where employees (and customers) should stand when physical barriers are not possible.



# Workplace Social Distancing Considerations

*(continued)*

- ▶ **Close or restrict access** to employee common areas where employees usually like to congregate and interact (e.g. remove tables and seats in employee breakrooms).
  
- ▶ For meetings and other employee gatherings:
  - ▶ Use **videoconferencing** or **teleconferencing** whenever possible.
  - ▶ Cancel, adjust, or postpone large work-related meetings or gatherings that can only occur in-person in accordance with state and local regulations and guidance.
  - ▶ When videoconferencing or teleconferencing is not possible, hold meetings in open, well-ventilated spaces, maintaining at least six feet between each person, and require that face coverings be worn.
  
- ▶ **Prohibit handshaking.**

# CDC Guidance: When to Quarantine

Who needs to quarantine?	<p>People who have been in <a href="#">close contact</a> with someone who has COVID-19—excluding people who have had COVID-19 within the past 3 months.</p> <p>People who have tested positive for COVID-19 within the past 3 months and recovered do not have to quarantine or get tested again as long as they do not develop new symptoms. People who develop symptoms again within 3 months of their first bout of COVID-19 may need to be tested again if there is no other cause identified for their symptoms.</p> <p>What counts as <a href="#">close contact</a>?</p> <ul style="list-style-type: none"><li>• You were within 6 feet of someone who has COVID-19 for a total of 15 minutes or more</li><li>• You provided care at home to someone who is sick with COVID-19</li><li>• You had direct physical contact with the person (hugged or kissed them)</li><li>• You shared eating or drinking utensils</li><li>• They sneezed, coughed, or somehow got respiratory droplets on you</li></ul>
Steps to take	<p><b>Stay home and monitor your health</b></p> <ul style="list-style-type: none"><li>• Stay home for 14 days after your last contact with a person who has COVID-19.</li><li>• Watch for fever (100.4°F), cough, shortness of breath, or <a href="#">other symptoms</a> of COVID-19</li><li>• If possible, stay away from others, especially people who are at <a href="#">higher risk</a> for getting very sick from COVID-19</li></ul>



# Can employees quarantine for fewer than 14 days?

- ▶ The CDC still recommends a quarantine period of **14 days**. However, the following options to shorten quarantine are acceptable alternatives, per the CDC:
  - ▶ Quarantine can end **after Day 10** without testing and **if** no symptoms have been reported during daily monitoring.
  - ▶ Quarantine can end **after Day 7** if employee tests negative and **if** no symptoms were reported during daily monitoring.



# CDC Guidance on Testing for COVID-19

## Incubation Period

- ▶ The CDC states: “the incubation period for COVID-19 is thought to extend to 14 days, with a median time of 4-5 days from exposure to symptoms onset.”
- ▶ This means that an employee could have COVID-19 and not test positive for up to two weeks.

## Testing individuals with signs or symptoms consistent with COVID-19

Employers may consider conducting daily in-person or virtual health checks (e.g., symptom and/or temperature screening) to identify employees with signs or symptoms consistent with COVID-19 before they enter a facility, in accordance with CDC's [General Business FAQs](#). Employers should follow guidance from the [Equal Employment Opportunity Commission](#) [↗](#) regarding confidentiality of medical records from health checks.

Workers with [COVID-19 symptoms](#) should be immediately separated from other employees, customers, and visitors, and sent home or to a healthcare facility, depending on how severe their symptoms are, and follow [CDC guidance for caring for oneself](#). To prevent stigma and discrimination in the workplace, make employee health screenings as private as possible. Consistent with [CDC's recommendations](#), workers with COVID-19 symptoms should be referred to a healthcare provider for evaluation and potential testing. Waiting for test results prior to returning to work is preferred to keep potentially infected workers out of the workplace.

# Any other questions?



# THANK YOU!



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