



4 Common COVID-19 Misunderstandings That Could Place Your Company At Legal Risk

Insights

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Throughout the COVID-19 pandemic, the Centers for Disease Control and Prevention has issued constantly changing guidance for employers that many view as complex, confusing, and impractical. In its perplexing web of guidelines, the CDC recommends that your company take several actions to protect workers from contracting COVID-19, like self-isolating sick employees, quarantining exposed employees, screening employees for symptoms prior to work, and installing partitions to protect public-facing employees.

Given their complexity, some of these directives are often not fully understood by companies. Further complicating matters, many of the recommendations have never been previously undertaken by employers, leading to misapplication. Worst of all, other guidelines are simply not feasible for some employers, leaving them with the tough decision of not following the CDC directive in order to stay in business.

Unfortunately, ignoring or misunderstanding these confusing guidelines, like the four commonly misinterpreted guidance listed below, could lead to legal risks for your company.

1. Returning Exposed Employees To Work Too Early After A Negative Test

Of the innumerable companies that have sought our assistance during the COVID-19 pandemic, the most common misunderstanding of CDC guidance we see involves returning to work employees who have been directly exposed to COVID-19 too early following a negative test. As noted in our previous article concerning contact tracing in the workplace, employers falling under the CDC's general business guidance (not critical infrastructure employers) should quarantine employees for 14 days since their last direct exposure to a confirmed or suspected COVID-19 case, defined as being within 6 feet of the infected person, for 15 minutes or more, within the 48 hours prior to the sick individual showing symptoms, until the infected person is released from self-isolation ("6-15-48").

Critically, the 14-day quarantine period **cannot** be cut short by a negative test due to the lengthy incubation period of COVID-19. This is an often-misunderstood CDC guideline, which even the agency has recognized:

Note that recommendations for discontinuing isolation in persons known to be infected with SARS-CoV-2 could, in some circumstances, appear to conflict with recommendations on when to discontinue quarantine for persons known to have been **exposed** to SARS-CoV-2. **CDC recommends**

14 days of quarantine after exposure based on the time it takes to develop illness if infected. Thus, it is possible that a person known to be infected could leave isolation earlier than a person who is quarantined because of the possibility they are infected.

Thus, an exposed employee cannot return to work during the 14-day quarantine period following a negative COVID-19 test received on, for example, day three, seven, or 12 of that period. Returning exposed employees too early due to a negative test could lead to preventable COVID-19 infections if co-workers are exposed to individuals who should be quarantined and develop the virus after a negative test.

2. Miscalculating The Appropriate Quarantine Period For Those Exposed To An Infected Household Member

Along those same lines, employers often misunderstand CDC guidance when calculating the length of the quarantine period for a worker who has been exposed to an infected spouse or household member. The key here is that the 14-day quarantine period does not ***begin until the last day*** the employee was directly exposed, using the 6-15-48 analysis above, to the spouse or household member prior to the infected person being released from self-isolation. Thus, if the employee is directly exposed to the spouse or household member on days one through 10, the quarantine period does not begin until day 10.

Accordingly, the worker may ultimately miss 24 days of work, instead of 14, if directly exposed to the spouse or household member every day until the spouse is released from self-isolation. The CDC addresses this confusing guidance here, noting that the exposed employee should stay home until 14 days have elapsed after the last exposure.

3. Not Notifying Employees Of A Confirmed COVID-19 Case In Your Workplace

The Fisher Phillips COVID-19 litigation tracker has been following closely the number of lawsuits filed with COVID-19-related claims. The prevalence of claims relating to an employer's failure to notify employees of a confirmed case of COVID-19 in the workplace is a troubling trend. Throughout the pandemic, transparency by employers has been a critical tool in maintaining positive employee morale. Failure to do so can lead to negative consequences, including not only lawsuits, but Occupational Safety and Health Administration (OSHA) complaints and employees refusing to work, as well.

Although it may not be clear to some employers, the CDC recommends not only informing directly exposed employees (6-15-48) of a confirmed COVID-19 case in the workplace, but also to inform other "employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA)." The CDC defines "possible exposure" to COVID-19 as those who do not meet the 6-15-48 parameters. Thus, when a confirmed COVID-19 case occurs in your workplace, remember to inform those employees who worked near the infected worker (e.g., the same hallway, area, or corridor), even though they weren't directly exposed.

4. Incorrectly Believing That Wearing Face Coverings Trumps The 6-15-48 Analysis

When analyzing whether an employee has been exposed to an infected co-worker, employers often misconstrue the impact of wearing face coverings to prevent the spread of the virus. Although the CDC recommends wearing masks to slow the spread of COVID-19, whether employees are wearing masks while directly exposed (6-15-48) to an infected person does not change that analysis. The determination of whether someone should be quarantined for 14 days does not change if the individuals at issue are wearing masks, another point of confusion specifically clarified by the CDC:

Note: This is irrespective of whether the person with COVID-19 or the contact was wearing a mask or whether the contact was wearing respiratory personal protective equipment (PPE).

To ensure the safety of your workers, remember to quarantine all employees who meet the 6-15-48 analysis, even if they were wearing a face covering while exposed.

Legal Risks For Not Following CDC Guidelines

Although CDC guidance is not a law or regulation, such guidelines can be construed by OSHA and the courts as the legal standard that defines what actions a company should take to protect its workers during this unprecedented time. In fact, the Assistant Secretary for the U.S. Department of Labor has already indicated that OSHA could rely upon the general duty clause, which the agency can enforce in the absence of a standard on point, to enforce the CDC's guidelines for employers on COVID-19.

If your company fails to follow a CDC guideline, it could receive a citation under OSHA's general duty clause and, if classified as willful (e.g., reckless disregard for, or deliberate indifference towards, employee safety), the maximum penalty for each citation would be \$134,937. Keep in mind that state OSHA plans, not regulated by the federal government, can adopt emergency COVID-19 regulations, which have the same impact as any other OSHA regulation, and enforce those against employers who fail to comply with them. Virginia recently became the first state adopt such a regulation, which includes notification requirements that vary from those of the CDC.

Although it is an evolving area of the law, claimants' counsel will argue to courts that the violation of a CDC guideline is evidence of negligence, willfulness, or intent on behalf of the employer. Plaintiffs' counsel will assert that the CDC guideline has established the level of care or duty owed to an employee or other claimant, and that the duty was breached by the company.

This argument will be made regardless of the jurisdiction, venue, or type of claim, including workers' compensation claims, claims filed directly by an employee seeking recovery above and beyond workers' compensation benefits, and those filed by third-parties (e.g. visitors, employee spouses) against companies. To protect your company from such claims, remember to follow these steps to minimize your exposure.

Conclusion

This is a constantly evolving area, with new guidance being issued nearly every day. Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate.

Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, or any member of [our Post-Pandemic Strategy Group Roster](#). You can also review the [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

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