

COVID-19 Reporting and Privacy Issues

The COVID-19 pandemic has raised new and important questions for employers, including those about balancing employee privacy with the need to warn employees about possible exposure to the novel coronavirus. Here are some considerations to keep in mind.

The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor has issued [guidance](#) encouraging employers to take steps to reduce the transmission of COVID-19 in the workplace. This guidance stems from OSHA's determination that COVID-19 is a "hazard" implicating the Occupational Safety and Health Act's General Duty Clause, which requires employers to furnish "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1).

As part of its guidance, OSHA urges employers to promote hygiene and social distancing, and to encourage employees who are sick to stay home. OSHA also encourages employers to promptly "identif[y] and isolat[e] potentially infectious individuals" and to "inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure." The EEOC, which updated its [Pandemic Preparedness guidance](#) this week, similarly encourages employers to send home employees who display COVID-19 symptoms, and notes that employers may inquire about symptoms without violating the Americans with Disabilities Act (ADA). Moreover, the EEOC notes that COVID-19 poses a "direct threat" to the workplace (defined as "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") such that employers may inquire as to employees' medical condition related to the virus and may conduct tailored medical examinations such as taking employees' temperatures before admitting them to the worksite. (But keep in mind that the results of temperature screenings must be kept confidential under the ADA.) Ultimately, employers must take steps to reduce the possibility of transmission by employees who may be sick but not symptomatic, to identify and isolate from the workplace employees who are likely infected, and to ensure that an employee with a known case of COVID-19 does not expose other employees to the virus.

Once an employer is made aware that an employee has a confirmed case of COVID-19, the employer may have to report it to OSHA under OSHA recordkeeping and reporting requirements. 29 C.F.R. 1904. Under OSHA requirements, employers must record (1) a serious injury or illness that was (2) likely caused by an event or exposure in the work environment and that (3) resulted in the employee's absence from work, need to seek medical treatment, or death. COVID-19, unlike the common cold and flu, is not exempt from these requirements; however, state and local officials have acknowledged widespread community exposure to the novel coronavirus, making it difficult to determine whether an employee's diagnosis is job-related. While on the one hand there may be a technical OSHA reporting obligation, that obligation may not practically exist in the current circumstances given the fact it is likely impossible to know where any person may have been exposed to the coronavirus.

In accordance with OSHA's guidance to "inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure" and with the CDC's similar [recommendations](#), employers should report the fact of a known COVID-19 infection to their workforces, regardless of whether they report it to OSHA. But employers must be careful not to identify the infected employee when doing so. Employers should provide enough information to communicate the extent of the possible exposure without naming the infected employee because the fact of a diagnosis is confidential medical information protected under the ADA and New York law. For example, an

employer may want to send a message that an employee who works on a certain floor and who last reported to work on a certain date has tested positive for COVID-19, and that employees should self-monitor for signs of infection and seek medical advice if they have any questions or concerns. Such a message will likely satisfy an employer's obligation to inform employees without violating the rights of the infected employee. To ensure compliance with New York state law, employers should also treat as confidential the health information of independent contractors.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

<u>Lisa E. Cleary</u>	212.336.2159	<u>lecleary@pbwt.com</u>
<u>Catherine A. Williams</u>	212.336.2207	<u>cawilliams@pbwt.com</u>
<u>Douglas L. Tang</u>	212.336.2844	<u>dtang@pbwt.com</u>
<u>Sara A. Arrow</u>	212.336.2031	<u>sarrow@pbwt.com</u>
<u>Jessica S. Carter</u>	212.336.2885	<u>jcarter@pbwt.com</u>
<u>Emma Ellman-Golan</u>	212.336.2214	<u>eellmangolan@pbwt.com</u>
<u>Ryan J. Kurtz</u>	212.336.2405	<u>rkurtz@pbwt.com</u>

To subscribe to any of our publications, call us at 212.336.2813, email info@pbwt.com or sign up on our website, <https://www.pbwt.com/subscribe/>.

This publication may constitute attorney advertising in some jurisdictions.

© 2020 Patterson Belknap Webb & Tyler LLP