

ALERT

CDC Issues Guidance on Potentially Exposed Critical Infrastructure Workers

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Late last week, the Centers for Disease Control and Prevention (CDC) issued guidance regarding when “critical infrastructure” workers may be allowed to continue working after potentially being exposed to SARS-CoV-2. This would include workers who had close contact with someone with a confirmed or suspected case of COVID-19 at home or at work. The CDC’s document complements guidance first issued last month (and frequently updated) by the Cyber and Infrastructure Security Agency (CISA) concerning what industries are “critical infrastructure.” Wiley’s most recent coverage of CISA’s evolving guidance is located [here](#) and [here](#) – but, in short, a significant number of workers may qualify as “critical”: law enforcement, janitorial staff, food and agriculture, transportation workers, telecommunication workers, and of course healthcare workers, are several of the broader categories.

It is important to remember that the CDC and CISA documents are advisory only – but, the CDC and CISA guidance has shaped state-level orders, such as those concerning which businesses may remain open and what procedures to follow for self-isolating. Several states have directly incorporated CISA’s guidance into their binding stay-at-home orders. Critical infrastructure employers should be prepared for local authorities to incorporate some or all of the CDC’s guidance as well. And even where the guidance is not made directly binding, it could later be asserted that it established industry-standard practices for purposes of tort liability.

Though only a single page long, the CDC guidance imposes requirements that may be challenging to meet, depending on the type of facility. It suggests that any potentially exposed workers should:

Authors

Tracy Heinzman
Partner
202.719.7106
theinzman@wiley.law
Hume M. Ross
Associate
202.719.7296
hross@wiley.law

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- be screened prior to entering the facility (CDC separately established 100.4 as the temperature over which a potentially exposed person should self-isolate);
- wear masks at all times (either employer or self-supplied);
- practice social distancing “as work duties permit”; and
- be sent home immediately if they become ill.

If an employee becomes ill, the guidance says that a list of persons they came within six (6) feet of earlier in the day (and two days prior) should be compiled and these persons should also be considered exposed.

With regard to the facility itself, the guidance suggests that offices, bathrooms, common areas, and shared electronics should be cleaned and disinfected routinely. Disinfection of some areas (using U.S. Environmental Protection Agency (EPA) “List N” disinfectant, or one approved by a local authority) may be prohibitively time-consuming or require work stoppages to accomplish in an effective manner.

It is easy to see how all workers at some facilities would be considered exposed under the guidance after a short period of time, and how compliance with the disinfection and contact-tracking requirements will require a substantial investment of resources to accomplish.

Notably absent from the CDC’s guidance is any discussion of COVID-19 testing. The CDC has yet to issue any guidance to employers on when employees (outside of the health care setting) should be tested, or how testing might be used when considering who can remain at, or return to, work. CDC’s separate “Priorities for Testing” lists “critical infrastructure workers with symptoms” as Priority 3, above only “individuals without symptoms.”

Employers thinking about testing for their employees would need to navigate several practical and regulatory challenges. First, an employer would have to locate a laboratory capable of supplying and running tests authorized by the Food and Drug Administration (FDA) under its current guidance. (FDA has been issuing Emergency Use Authorizations for diagnostic tests developed by laboratories and test kit manufacturers.) Second, the employer would have to confirm that, from a clinical perspective, the employees they wanted to test were within the scope of FDA’s Emergency Use Authorization for the test the lab could supply, and would have to work with a physician or clinician who could prescribe the tests. Third, the employer would have to ensure that no local authority had placed further restrictions on the categories of people who can be tested (e.g., only those higher on an equivalent of the CDC’s “Priorities” list). Finally, employers should also monitor for orders affirmatively requiring that employees in certain positions be tested, or imposing requirements for handling of tests or disclosure of test results.

Wiley is available and able to advise and assist on any employment law or related regulatory compliance matter associated with these issues.

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