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# SWICA

## Legal Protection from Jobsite Related Infections – August 25, 2020

Presented by  
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# Employer Liability for COVID-19 Infection Workers' Compensation

- The Texas Department of Insurance has decided that COVID-19 may be an occupational disease as defined by the Texas Workers' Compensation Act if it is contracted as a result of employment.
- Workplace COVID-19 infection is covered by Workers' Compensation.

# Employer Liability for COVID-19 Infection Workers' Compensation

Workers' compensation subscribers in Texas cannot be sued for COVID-19 work-related exposure even if such exposure is caused by the employer's own negligence.



# Employer Liability for COVID-19 Infection Workers' Compensation

- The only exception would be in the case of an employer's gross negligence which results in employee death
- Injured employee's estate would need to prove:
  - Workplace exposure and the likelihood of serious injury; and
  - That the employer knew of such likelihood but did not care

# Employer Liability for COVID-19 Infection

- For non-subscribers (or who have employees who have opted out of the workers' compensation system), the potential for liability is substantial. Employees who can establish any non-subscriber employer negligence can achieve a full recovery of damages.
- COVID-19 is another justification for becoming a workers' compensation subscriber.



# Employer Liability for COVID-19 Infection

- Workers' compensation does not insulate contractors from lawsuits by employees of other contractors on the same project (except under CCIP and OCIP plans).
- Contractors should likely brace for COVID-19 related negligence actions of this type.
- Such suits will likely target contractors on projects with large COVID-19 infection clusters who do not take substantial steps to protect against the spread of COVID-19 among workers.

# Company's Can Require Waivers from Clients & Office Visitors Relating to COVID-19 Infection



# Protecting Employees on Site

- Check-in questionnaire: Only provides information on known contacts/symptoms
- Temperature check: Only provides information on symptoms
- Social distancing in office/directional pathways
- Barriers/hand sanitizer
- COVID-19 positive/possible exposure protocol
- Actively encourage sick employees to stay home

# Workplace Safety Controls

- Stagger work hour/days
- Policy for employees feeling sick during days
- Avoidance of in-person meetings
  - Google now limits those to 30 minutes
- No congregating in breakrooms, etc.

**COVID-19** Coronavirus Disease

**KEEP THE WORKPLACE SAFE**

**PRACTICE GOOD HYGIENE**

- Stop handshakes**  
Use other noncontact methods of greeting
- Clean hands**  
Use alcohol-based sanitizers at regular intervals, and wash hands with soap and water for 20 seconds
- Cover coughs and sneezes**
- Disinfect**  
Surfaces like doorknobs, tables, desks, and handrails regularly. Increase ventilation by opening windows or adjust air systems

**BE CAREFUL WITH MEETINGS**

- Use videoconferencing or calls for meetings when possible
- Where possible, hold meetings in open, well-ventilated spaces
- Consider adjusting or postponing large meetings or gatherings

**HANDLE FOOD CAREFULLY**

- Limit the sharing of food**
- Ensure cafeteria staff and their close contacts practice strict hygiene**
- Wash hands, utensils, and containers**

**STAY OR GO HOME IF...**

- You feel sick
- You have a sick family member in the home

**HELP PREVENT THE SPREAD OF GERMS!**

Source Information: Centers for Disease Control and Prevention 2019, 20

# Employee for Lying on Questions or Failure to Report Positive/Potential Positives

- Subject to discipline/dismissal.
- Put “subject to discipline” language in initial back to work notice or daily questionnaire.
- Also – what do to when employees lie to stay home?

# Employees Generally Cannot Refuse to Report to Work

- Can refuse to perform in unsafe work conditions
- ADA, FMLA and FFCRA Considerations



# Testing Employees for COVID-19

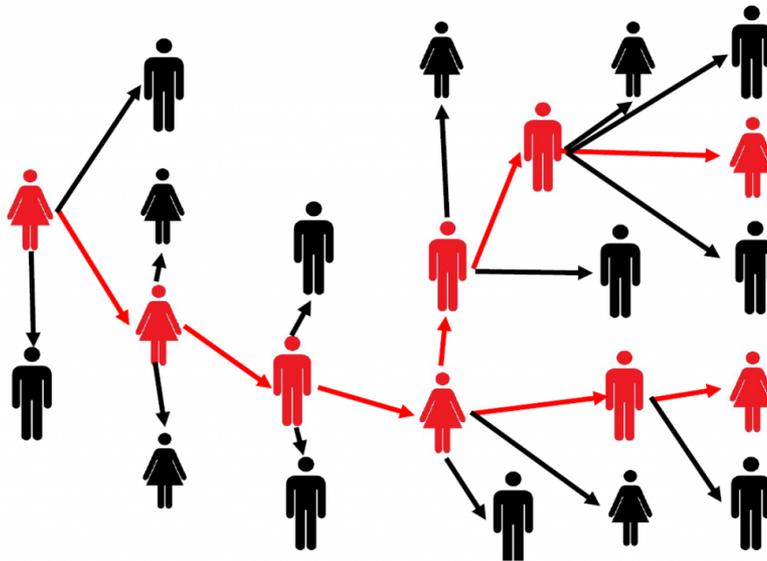
- Temperature check and COVID-19 virus testing allowed. Relaxation of ADA.
- If testing too time consuming (more than de minimis), must pay employees for testing time/waiting to test.
- Do not discriminate in testing protocol.
- Notify employees of positive or presumptive positive exposure from test results.
- Maintain employee confidentiality/or get consent.
- Testing must be reliable and accurate or it is violative of ADA.

# EEOC Says Employers Cannot Require COVID-19 Antibody Tests

- The EEOC issued new guidance which established that businesses cannot make employees take COVID-19 antibody tests.
- The EEOC has previously stated that employers can require employees to submit to tests that detect the active presence of the virus itself. The new guidance does not affect the EEOC's stance on COVID-19 virus tests, and such tests are still permitted.
- Based upon this guidance, employers cannot use COVID-19 antibody test results to make decisions about returning employees to the workplace. ADA violation.

# When an Employee Tests Positive or is Potentially Positive

- Tell potential close contacts.
- Send notice identifying work unit and shift/day on site.
- Do not identify employee by name unless you have written consent.



# Consents: Either Pre- or Post-Exposure

- Should:
  - Be in writing
  - Be signed
  - Specify who can be told
  - Specify how consent can be revoked

**PRE-AUTHORIZATION FOR RELEASE OF INFORMATION  
REGARDING COVID-19 SYMPTOMS, DIAGNOSIS, AND/OR TREATMENT**

\_\_\_\_\_  
Employee's Full Name

\_\_\_\_\_  
Employee's Telephone Number

\_\_\_\_\_  
Address

\_\_\_\_\_  
City, State, Zip Code

In the event that I:

- Test positive for COVID-19;
- Receive a potential diagnosis for COVID-19;
- Experience symptoms consistent with COVID-19; or
- Receive treatment for COVID-19,

I authorize Andrews Myers (the "Firm") to disclose such information, including my identity, to the following individuals:

- Firm personnel and associates who worked on the same floor or at the same office as me five (5) days before the onset of symptoms of COVID-19 or my receipt of a positive test for, or potential diagnosis of, COVID-19; and
- Any other individual who may have come into close contact with me during that time period.

I understand that the information disclosed will be subject to further disclosure by the person or class of persons receiving it.

This authorization expires automatically one (1) year from the date signed. I understand that I may revoke this authorization in writing by emailing Veronica Aguirre at any time before its expiration. I understand that such revocation would not apply to any disclosures already made as a result of this authorization.

I have read and understand the information in this authorization form. I agree to the disclosure described.

\_\_\_\_\_  
Signature of Employee

\_\_\_\_\_  
Date

# Testing Once-Infected Employees Before they Return to Work

- Employers can choose to have recovered employees tested before they return to work.
- But tests may continue to find traces of the virus even after the person has recovered and is no longer contagious.
- Can also allow employee to return to work without testing per CDC guidelines.

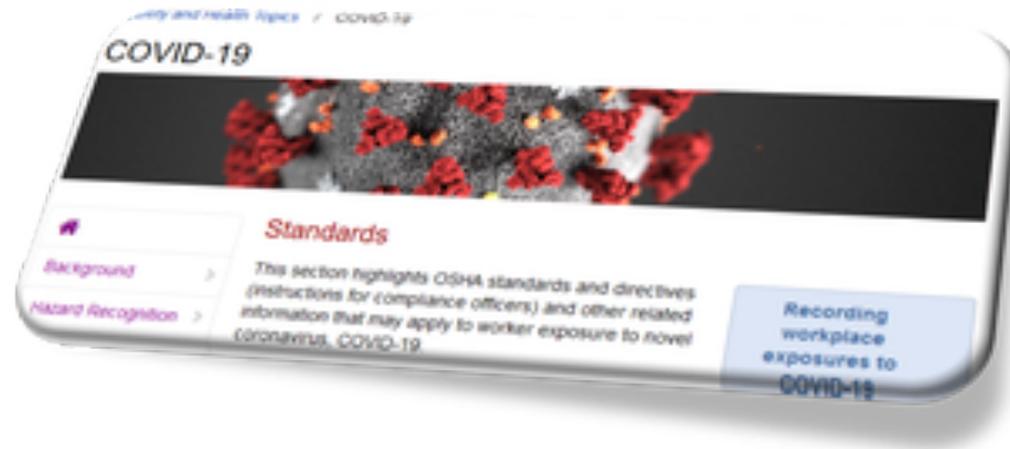
# CDC Return to Work Guidance

- If employee had symptoms isolate for:
  - 10 days after symptoms first appear; and
  - 24 hours pass without fever without medications; and
  - other symptoms improve.
- If employee was without symptoms isolate for:
  - 10 days after first positive test; or
  - Employee receives two negative tests at least 24 hours apart.



# Work Related COVID-19 Infections

COVID-19 infections contracted at work are recordable.



# OSHA Changes Stance on COVID-19 Infection Responsibilities

OSHA now directs that ALL employers, not just those with a high level of COVID-19 exposure, must conduct an investigation to determine if employee COVID-19 infections were contracted at work.

# Employer Investigation of COVID-19 Origin

Employers must make reasonable efforts to determine if the exposure might be work-related.

Those reasonable efforts include:

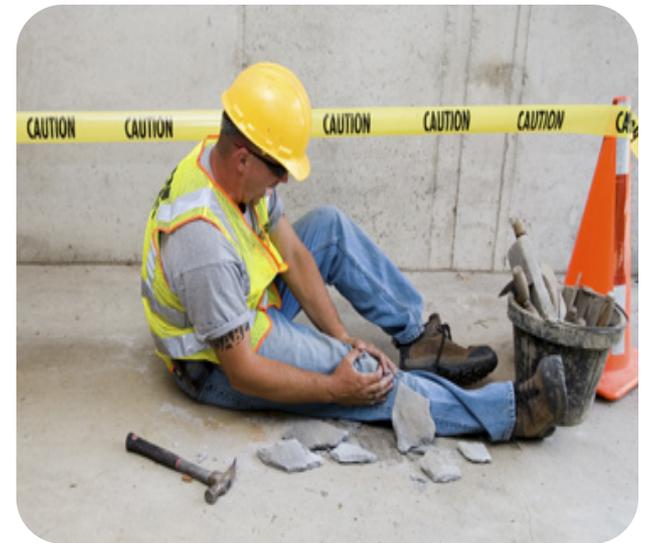
- Asking the employee limited questions about how he or she believes COVID-19 was contracted.
- Making inquiries about the employee's work and non-work activities, and possible exposure, leading up to the diagnosis.

# OSHA Employers must Take Measures to Keep Employees Safe or You Could be Cited

- General Duty Clause.
- Even if that employer did not create hazard:
  - Working alongside a sub that does not take precautions.
  - Potential citation if your employees are exposed to the hazard and employer knew or failed to use reasonable diligence to discover the hazard and abate it.

# Fatality/In-Patient Hospitalization for COVID-19

If a fatality in-patient hospitalization occurs within 30 days of work-related infection, ***you must report the event to OSHA.***



# FFCRA Leave

	<b>Emergency Paid Sick Leave</b> (10 days of paid leave total between reasons below)	<b>Emergency FMLA</b> (10 days of unpaid leave, then 10 weeks of paid leave)
<b>Parent caring for his or her child because of a school closure or child care unavailability due to COVID-19</b>	Paid at 2/3 the employee's regular rate. Capped at \$200 per day and \$2,000 in the aggregate.	Likewise paid at 2/3 the employee's regular rate. Capped at \$200 per day and \$10,000 in the aggregate.
<b>Care for quarantined individual or substantially similar care</b>	Paid at 2/3 the employee's regular rate. Capped at \$200 per day and \$2,000 in the aggregate.	<b>Not covered.</b>
<b>Employee quarantined by government order or on advice of health care provider, or out for diagnosis or treatment due to COVID-19</b>	Paid at full regular rate. Capped at \$511 per day and \$5,110 in aggregate.	<b>Not covered.</b>

***Only applies if employee is unable to work or telework.***

- Other leave?

# DOL Interpreting the FFCRA to Provide for

## Any COVID Related Leave

- Will IRS follow suit on tax credit?
- Cannot discriminate against employee who recovered from COVID-19 and returns:
  - FFCRA leave protection
  - Regarded as disabled



# Special Circumstances

- Ask employees if they do not believe they can resume in-person work. If so, discuss this with employee in more detail.
- Do not ask if employees have health conditions that prevent return to work.
  - This would violate the American with Disabilities Act.



## Disability & COVID-19

# Employees with Underlying Medical Conditions Who Do Not Want to Return to Work

- Must engage in the interactive process to determine if you can accommodate the person either:
  - Through continuation of telework;
  - Other means to mitigate risk of COVID-19 in light of medical condition; or
  - Leave: FFCRA/FMLA.



# Discussion

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