



# THE HOSPITALITY LAW CONFERENCE

April 24 - 26, 2017 • Houston, Texas

EMPLOYMENT GUIDELINES:  
EMPLOYEES EXPOSED TO  
AN INFECTIOUS OR  
CONTAGIOUS DISEASE

2017 HOSPITALITY  
LAW CONFERENCE

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APRIL 24 - 26



# Arthur Chinski

## Buchalter

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1000 Wilshire Boulevard, Suite 1500  
Los Angeles, California 90017  
Direct Dial: (213) 891-5060  
Email: [achinski@buchalter.com](mailto:achinski@buchalter.com)



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# I. What Are the Issues?

- A. Employee Rights v. Public Safety.
- B. Employee Rights v. Other Employee's Safety.
- C. Employee Rights v. Impact on Business.
- D. Major Legal Principals.
  - 1. The **Occupational Safety and Health Act's General Duty Clause** requires employers to keep their workplace free of recognized hazards that can cause death or serious harm to workers.

- 2. If an individual with a disability **poses a direct threat** despite reasonable accommodation, he or she is **not protected** by the nondiscrimination provisions of the **ADA**.

29 CFR 1630.3(r): **Direct Threat** means 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**. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.



# I. What Are the Issues?

## 3. 29 CFR 1630.3(p): **Undue hardship:**

- 1) In general, **undue hardship** means, with respect to the provision of an accommodation, **significant difficulty or expense incurred by a covered entity**, when considered in light of the factors set forth in paragraph (p)(2) of this section;
- 2) **Factors to be considered.** In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

- i. The **nature and net cost of the accommodation** needed;
- ii. The **overall financial resources of the facility** or facilities involved, the **number of persons employed** at such facility, and the effect on expenses and resources;
- iii. The **overall financial resources of the covered entity**, the overall size of the business with respect to the number of its employees, and the **number, type and location** of its facilities;



# I. What Are the Issues?

- iv. The **type of operation or operations** of the covered entity, including the **composition, structure and functions of the workforce** of such entity, the **geographic separateness** and administrative or fiscal **relationship** to the covered entity; and
- v. The **impact of the accommodation** upon the operation of the facility, the **impact on the ability of other employees to perform their duties** and the **impact on the facility's ability to conduct business**.

## 4. Privacy Laws:

- a. Health Insurance Portability and Accountability Act (**HIPAA**) –**PHI**; and
- b. State **Privacy** Laws.



## II. Employees Should be Educated On Various Type of Diseases Which Impact Their Particular Work Place.

### A. Common Infectious/Contagious Diseases.

1. **Airborne Diseases** - TB (Tuberculosis), SARS (Severe Acute Respiratory Syndrome), Meningitis, Chickenpox, Measles, Smallpox, Influenza (flu), Avian Flu.

**Controls and Prevention:** Effective hand washing; covering mouth and nose when coughing or sneezing; no sharing of food, drink, eating utensils, makeup; ensuring vaccines are up to date.

2. **Contact Diseases** - Hepatitis A virus (HAV), Dysentery, Salmonellosis, E. Coli, Typhoid Fever and Methicillin – Resistant Staphylococcus Aureus (MRSA).

**Controls and Prevention:** Hand washing and personal hygiene are critical.

3. **Bloodborne Diseases** – Direct and Indirect Contact: Hepatitis B (HBV), Hepatitis C (HCV), Hepatitis D (HDV), and Human Immunodeficiency Virus (HIV).

**Controls and Prevention:** Effective hand washing, engaging in safe behaviors; assuring equipment, instruments and supplies are sterile; assuring open wounds and cuts are properly covered.



## II. Employees Should be Educated On Various Type of Diseases Which Impact Their Particular Work Place.

### B. There are **Four Major Types of Pathogens** or Microbes that can cause disease:

- 1. Bacteria** – Illnesses caused by bacteria are sore throats, ear infections, cavities, and pneumonia. Some examples of bacteria:
  - a. E. Coli from under cooked hamburger;
  - b. Streptococcus causes strep throat from touch or through the air; and
  - c. Lyme disease from the bite of an infected tick.
- 2. Viruses** – Viruses depend upon a host to survive, grow, and reproduce. Viruses cannot live outside of other living cells. Viruses cause chicken pox, measles, flu, and many other diseases such as Zika and West Nile virus from mosquito bites.
- 3. Fungi** – Fungi are multi-celled plant-like organisms. Fungi cannot produce their own food from soil, water and air. Instead, fungi get their nutrition from plants, food and animals. Fungi thrive in warm, damp environments. An example is athlete's foot caused by fungi. Note: Take precautions if you have employee locker rooms or change rooms.





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4. **Protozoa** – Protozoa are one-celled organisms like bacteria. Protozoa love moisture and often spread diseases through contaminated water. Some protozoa cause intestinal infections.

**C. How Germs or Pathogens are Spread –**  
There are several main routes of transmission of germ spread from an infected person's body to others: airborne, contact and vector-borne:

1. **Airborne** – Are transmitted primarily from airborne droplets from an infected person's cough, sneeze, or spit, which can then be inhaled by others. Airborne routes include coughing, sneezing, talking, and spitting release small and large-particle droplets containing germs or dust particles containing pathogen agent. The particle remains suspended in the air for a long period of time. The germs may become inhaled by or deposited on a susceptible host within the same room or over a longer distance from the source, depending on environmental factors (ventilation system, fan use).



## II. Employees Should be Educated On Various Type of Diseases Which Impact Their Particular Work Place.

2. **Contact** – Are spread primarily by person-to-person contact, generally from an infected person’s feces, urine, nasal discharge or infected skin, directly or indirectly from contaminated food, drinking water, someone else’s hands or objects. An infected worker can spread infection through direct or indirect contact.
  - a. Direct contact transmission involves skin-to-skin contact and contact with body fluids, including blood. With skin-to-skin contact, the transfer of some pathogens can occur through touch or by sharing personal items, clothing or objects. Contact with body fluids is through pathogens in saliva, urine, feces. Since the diseases can be passed to another person’s body via cuts, abrasions or through the mucus membranes of the mouth and eyes, avoid activity which increases such contact with blood and other bodily fluids. Use gloves and make sure cuts and wounds are completely covered. Note: Gloves and other covers such as bandages can also be source of contact – assure proper disposal.



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b. **Indirect contact** transmission comes from contaminated objects, food or water supplies by the pathogens such as in a person's feces or urine.

**Note: Gloves and other covers such as bandages can also be source of contact – assure proper disposal.**

c. **Bloodborne disease** are acquired from close contact with an infected person's **body fluids**, such as through administering first aid, sharing needles, unprotected sexual contact, blood transfusions, tattooing or piercing. **Note: Gloves and other covers such as bandages can also be source of contact – assure proper disposal.**

3. **Vector-borne** – Germs can spread through the bites of mosquitoes, ticks or animals (e.g., West Nile, Zika, Encephalitis, Malaria, and Lyme disease).



# III. Food Handling

A. U.S. Department of Health and Human Services, Public Health Service, FDA Food Code (2013) – 2-2 Employee Health:

## 1. Four Levels of Illness:

a. Level One:

i. Specific symptoms:

- 1) Vomiting
- 2) Diarrhea
- 3) Jaundice

b. Diagnosed with specific concerning agents **but not exhibiting symptoms of disease.**

c. Diagnosed with specific agents but **never develop any gastrointestinal symptoms.**

d. **Clinical well** but may have been exported to a listed pathogen within the normal incubation period of disease.

## 1. Responsibility of the Person In Charge.

a. Ensure employees understand responsibility to report symptoms, diagnosis with an illness from a **listed pathogen**, or exposure to the listed pathogen.



# III. Food Handling

i. **Pathogens identified by CDC's** transmissible through food by infected food employees:

- 1) **Noroviruses**
- 2) **Hepatitis A virus**
- 3) **SalmonellaTyphi**
- 4) **Shigella species**
- 5) **Staphylococcus aureus**
- 6) **Streptococcus pyogenes**

ii. Symptoms: vomiting diarrhea, jaundice, sore throat with fever, lesions with pus on hands:

- 1) Infected cuts that are bandaged do not need to be reported.

## 3. Employee Exclusion.

a. **Upon learning the employee has** salmonella typhi or listed gastrointestinal **symptoms.**

i. **Employee may request an ADA reasonable accommodation** instead of exclusion; and

ii. **Establishment of Disability.**

- Not all illnesses are a disability.



# III. Food Handling

## A. Compliance with the Food Code and Title I – **American with Disabilities Act (1990).**

1. **Prior to extending a conditional offer** of employment, employers may not ask any disability-related questions or require medical examinations, even if related to the job. This means that employers may not ask job applicants about the existence, nature, or severity of a disability.
2. **Once a conditional offer** of employment is made, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as the employer does so for all entering employees in the same job category.
3. **After employment begins**, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.
4. **Reasonable Accommodations.**
  - a. **Diseases listed in the Food Code may not be ADA disabilities:**
    - i. Gastrointestinal symptoms are not usually long term, but could be serious to be an ADA disability (e.g. cancer, Crohn's disease).



# IV. OSHA

- General Duty: General Duty Clause of the Occupational Safety and Health Act (OSHA), which entitles an employee to "a place of employment which is free from recognized hazards that cause or are likely to cause death or serious physical harm":
  1. **Influenza Guidelines.**
    - a. Encourage sick employees to stay at home.
    - b. Encourage your employees to wash their hands frequently with soap and water or with hand sanitizer if there is no soap or water available. Also, encourage your employees to avoid touching their noses, mouths, and eyes.
    - c. Encourage your employees to cover their coughs and sneezes with a tissue, or to cough and sneeze into their upper sleeves if tissues are not available. All employees should wash their hands or use a hand sanitizer after they cough, sneeze or blow their noses.



# V. Communicable Disease – Obligations and Rights May Vary in Different Jurisdictions.

- Public v. Personal Rights May Vary from Jurisdiction to Jurisdiction.
  1. Forced quarantine – Ebola.
  2. Impact private property rights – go on property to spray or look for infected mosquitos (Zika) or infected animals (Avian – Bird Flu: kill birds, chickens; Swine Flu: kill pigs, livestock).
  3. Duty to Report.
  4. Duty to Warn.
  5. Workers' Compensation.
  6. Leave Laws.
  7. Exclude Employee.





# VI. Prevention

## A. The Obvious:

### 1. Educate.

### 2. Sanitize hard surface.

- a. Not all surfaces can be sanitized with commercial disinfectant cleaner. But most hard surfaces such as doors and drawers (to include knobs, pulls, locks and latches), telephone receivers, television remote controls, light switches, elevator call buttons, toilet handles, faucets, in-room directories, and menus and guest check folders can be disinfected on a daily basis. Returned guestroom card keys should be separated for disinfecting before being recycled for use. All glassware, china and eating utensils should be thoroughly washed with hot water and detergent before being reused or placed back into service.

### 3. Hand and other washing.

- a. Train employees to **frequently** wash their hands to eliminate contamination. Wash guestroom and dining linens, sheets, towels, napkins and other soft surfaces before any other guests use them.

### 4. Hand sanitizer.

- a. In addition to washing hands, supplement hand sanitizer. Supply hand sanitizer whenever practical.

### 5. Supply Protective Equipment; and

### 6. Put in Proper Injury and Illness Prevention Policy.



# VI. Prevention

## B. Check CDC, WHO, EEOC and OSHA, NOSHA and State OSHA for Guidance, Rules and Bulletins:

### 1. Example:

#### a. NIOSH: Interim Guidance for Protecting Occupational Exposure to Zika Virus:

##### i. Recommended employer actions:

- Inform workers about their risks of exposure to Zika virus through mosquito bites and train them how to protect themselves. Check the CDC Zika website to find Zika-affected areas;

- Provide insect repellents and encourage their use according to the guidance below;
- Provide workers with, and encourage them to wear, clothing that covers their hands, arms, legs, and other exposed skin. Consider providing workers with hats with mosquito netting to protect the face and neck;
- In warm weather, encourage workers to wear lightweight, loose-fitting clothing. This type of clothing protects workers against the sun's harmful rays and provides a barrier to mosquitoes. Always provide workers with adequate water, rest and shade, and monitor workers for signs and symptoms of heat illnesses;



# VI. Prevention

- Get rid of sources of standing water (e.g., tires, buckets, cans, bottles, barrels) whenever possible to reduce or eliminate mosquito breeding areas. Train workers about the importance of eliminating areas where mosquitos can breed at the worksite; and
  - If requested by a worker, consider reassigning anyone who indicates she is or may become pregnant, or who is male and has a sexual partner who is or may become pregnant, to indoor tasks to reduce their risk of mosquito bites.
- b. U.S. Equal Employment Opportunity Commission: **Pandemic Preparedness in the Work Place and the Americans with Disabilities Act:**
    - i. A “direct threat” is “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.” If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.



# VI. Prevention

Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, “not on subjective perceptions...[or] irrational fears” about a specific disability or disabilities. The EEOC’s regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) **the duration of the risk**; (2) **the nature and severity of the potential harm**; (3) **the likelihood that potential harm will occur**; and (4) **the imminence of the potential harm**.

ii. *Chevron USA Inc. v. Echazabal*, 122 S.Ct. 2045 (2002), the applicant, had hepatitis C and was denied employment at a Chevron oil refinery because the liver-toxic chemicals in the environment were perceived by Chevron to be a direct threat to Echazabal’s health.

The U.S. Supreme Court held that a direct threat means a significant risk of substantial harm and must be based on:

- A **reasonable medical judgment** that relies on the most current medical knowledge and/or the best available objective evidence; and
- An **individual assessment** of the individual’s **present ability to perform** the essential functions of the job.



# VI. Prevention

## OSHA – Infectious Disease Rulemaking

- **OSHA Bloodborne Pathogens Standard.**
  - Applies to all “occupational exposure” to blood or other potentially infectious materials:
    - “Occupational exposure” means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee’s duties (e.g. hospital workers).
- No Current OSHA Standard re Infectious Diseases Transmitted by Other Routes (e.g., contact, droplet and airborne).
  - Infectious Disease Request for Information – May 6, 2010.
  - Notice of Proposed Rulemaking.
    - Schedule for publication in October 2017



# VI. Prevention

## 2. State Laws Examples – Industry Specific.

- Cal OSHA – Guidelines on Ebola Virus (primarily healthcare workers);
- Cal OSHA – Interim Guidelines on Use of Personnel Protective Equipment in Settings Where Workers May be Exposed to Birds Infected with Zoonotic Avian Influenza (2007);
- California – Food Handler Certificate and Training Required; and
- California – Enactment and then Repeal of Glove Requirement for Food Handlers; and
- Cal. Health & Safety Code § 113949.1:
  - Immediate closing of facility (§ 113949.1).
  - Medical examination of employee – if employee refuses, the local enforcement agency may require the immediate exclusion of the refusing employee from that or any other food facility until an acceptable medical evaluation or laboratory test or procedure shows that the employee is not infectious (§ 113949.1).



# VI. Prevention

## 3. Do Other Laws Apply?

- NLRA – Concerted Activity; Union bargaining obligations and right to information; and
- Local Laws.



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