

# Common COVID-19 Misunderstandings That Could Place Your Company at Legal Risk

**Andria L. Ryan, Fisher Phillips LLP**

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.

The directives are often complex and many of the recommendations have never been previously undertaken by employers, leading to misapplication. Unfortunately, ignoring or misunderstanding these confusing guidelines could lead to legal risks for your company.

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

One of the most common misunderstandings of CDC guidance involves returning to work employees who have been directly exposed to COVID-19 too early following a negative test. 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.

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.

## 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.

## 3. Mishandling EPSL and EFMLA Situations

The Families First COVID-19 Response Act (FFCRA) became effective on April 1 and is in effect until December 31, 2020. The law covers employers with less than 500 employees and provides for Emergency Family and Medical Leave (EFMLA) and Emergency Paid Sick Leave (EPSL).

EFMLA leave is available only if the employee cannot work or telework due to the need for leave to care for his or her child under age 18 because the child's school or place of care has been

closed, or the child's care provider is unavailable, due to a public health emergency. EPSL is available if the employee is unable to work or telework due to a need for leave because the employee: (1) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; or (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) is experiencing COVID-19 symptoms and seeking a medical diagnosis; or (4) is caring for an individual who is subject to a federal, state, or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (5) is caring for the employee's child if the child's school or place of care is closed, or the child's care provider is unavailable, due to COVID-19 precautions; or (6) is experiencing any other substantially similar condition specified by the Sec. of Health and Human Services.

There are specific rules related to the amount of pay available to employees, the employer's eligibility for tax credits for paid leave given to employees and providing notice to employees of the availability of these benefits.

#### **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**. 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.

#### **5. Mishandling Guests Who Refuse to Wear Masks**

As an increasing number of businesses require guests to wear face coverings there has been an increase in the number of well-publicized reports of customers reacting in a belligerent or even violent manner. Follow a plan to address this unfortunate part of our new reality.

While many jurisdictions already require businesses have their employees and customers wear masks, as a private business, you can decide whether you allow guests onto your property if they are not wearing a mask.

Provide notice to customers/guests of your mask requirement prior to their arrival. Post notices on your website, apps, and social media platforms, post conspicuous notices at your entrance, with a statement that you will refuse entry to anyone not complying with the requirement. Many jurisdictions require such signage.

Train your employees on all your health and safety measures including your mask policy and the reasons you are implementing them. Educate employees about state/local government requirements.

Even if you have a policy or are subject to a state/local requirement on masks, you may also have an obligation to accommodate a customer with a medical condition. Consider alternatives that you can offer as an accommodation that would allow them to access your property, goods or services.

A clear policy and training is key. If your employee is unable to coax your customer to comply, a designated manager should handle the removal of a customer. Your manager should immediately document the incident in objective, non-emotional terms and provide the documentation to key personnel (human resources, legal, etc.). Retain the report in the event you are required to later demonstrate what happened.

### **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.

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.