

NYS DEPARTMENT OF HEALTH ISSUES TEMPERATURE MONITORING AND RETURN TO WORK PROTOCOLS AFTER A COVID-19 EXPOSURE OR INFECTION

Hodgson Russ Labor & Employment and OSHA Alert
April 2, 2020

As essential business functions and operations continue in New York, employers will inevitably grapple with questions about how, when, and under what circumstances essential employees—in a *non-health care setting*—may be permitted to work following a suspect exposure or after recovering from the disease.

In a March 28, 2020 publication, the New York State Department of Health (DOH) issued “Protocols for Essential Personnel to Return to Work Following COVID-19 Exposure or Infection.”

In considering this new guidance, employers must be mindful of existing rules regarding medical inquiries and examinations under the Americans with Disabilities Act, which generally prohibits employers from making medical inquiries or conducting examinations unless doing so is job-related and consistent with business necessity – as demonstrated by the employer’s reasonable belief based on objective evidence that: (1) the employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. The Equal Employment Opportunity Commission previously issued guidance indicating that COVID-10 pandemic meets the “direct threat” standard.

This new DOH guidance may be helpful for many purposes, including to support an employer’s “reasonable belief” of a direct threat, but the guidance does not replace or supersede the existing statutory constraints on employers regarding disability accommodation, non-discrimination, and the like.

The NYS DOH guidance document sets forth different return-to-work criteria for employees who have been exposed to a confirmed case, versus personnel with confirmed or suspected COVID-19.

Essential personnel who have **been exposed to a confirmed case of COVID-19** can be permitted to work in the required workplace setting if all of the following conditions are met:

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1. Working from home would not be feasible for job duties;
2. Personnel are **asymptomatic**;
3. Personnel quarantine themselves when not at work;
4. Personnel undergo temperature monitoring and symptom checks upon arrival to work and at least every 12 hours while at work, and self-monitor (i.e. take temperature, assess for symptoms) twice a day when at home;
5. Personnel required to interact with individuals within 6 feet should wear a face mask while working for 14 days following the last exposure;
6. Personnel whose job duties permit a separation of greater than 6 feet should have environmental controls in place to ensure adequate separation is maintained, and do not need to wear a face mask;
7. If personnel develop symptoms consistent with COVID-19 (e.g., fever, cough, or shortness of breath) while working, they should immediately stop work and isolate at home; and
8. Testing will be arranged for any personnel with symptoms.

Essential personnel with **confirmed or suspected COVID-19** can be permitted to work in the required workplace setting if all of the following conditions are met:

1. Working from home would adversely impact essential services or functions, including critical public health and public works infrastructure in New York or the response to the COVID-19 public health emergency;
2. Personnel have maintained isolation for at least 7 days after illness onset (i.e. symptoms first appeared) and have not had a fever for at least 72 hours, without the use of fever-reducing medications, and with other symptoms improving;
3. Personnel who are recovering from COVID-19, according to the above condition, must wear a face mask for 14 days following onset of illness.

As noted above, employers who engage in temperature monitoring and symptom checks of their employees need to ensure that they do so in accordance with other applicable laws. The Centers for Disease Control and Prevention, and the Equal Employment Opportunity Commission have also issued guidance with respect to testing and sending employees home in suspected exposure cases. The United States Department of Labor also issued guidance relative to the employer's obligations when an employer requires an employee to go home or stay home based on COVID-19 symptoms or exposures.

We recommend that employers develop a policy and set of procedures for any temperature testing, incorporating the continuing obligations under the Americans with Disabilities Act, including privacy and security over employee medical information and limitations as to disability inquiries and medical examinations; OSHA and safety implications to workers, including appropriate personal protective equipment, training, protocols for disinfecting equipment and disposal of COVID-19 contaminated materials; obligations that may exist under collective bargaining agreements or employment contracts; and requirements under other employment-related laws and regulations that may be applicable to your place of employment.

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See our related alert regarding work protocols in the healthcare setting after a COVID-19 exposure or infection.

Please contact Jason Markel if you have further questions about temperature monitoring or the OSHA or other legal implications of your COVID-19 response.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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