

Insights

WHAT DO I DO IF A PERSON SUSPECTED OR CONFIRMED TO HAVE COVID-19 HAS BEEN AT NY U.S. FACILITY?

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SUMMARY

If you have a confirmed or suspected COVID-19 case tied to your premises, what you should do depends on whether the person is an employee or an invitee, such as a customer or business guest. While the rules are similar, there are some distinctions.

Invitees

If the person is an invitee, follow the evolving guidelines published online by the CDC and state and local health authorities and determine whether the applicable state or local health authorities require a non-employee case to be reported.

Employees

If the person is an employee, also follow the evolving CDC and state and local health authority guidance. The CDC guidance discusses at length measures businesses should take to reduce the transmission of the virus, to maintain a healthy business operation, and to maintain a healthy work environment.

Moreover, as an employer, you must also comply with OSHA guidance. There is a significant question as to whether you must report a suspected or confirmed COVID-19 case on your OSHA 300 log, which [we analyzed recently](#). of this issue can be found [here](#). The scope of the work needed to disinfect a workplace, including the type of personal protective equipment (“PPE”) required by workers performing such work, is more stringent under OSHA than under CDC guidance applicable to invitees. If you are an employer, ensure you comply with both CDC and OSHA guidance.

CDC Guidance of Suspected and Confirmed COVID-19 Cases at Your Premises

In general, the CDC has published General Business Frequently Asked Questions, which includes an answer to the question “What should I do if an employee comes to work with COVID-19

symptoms”? The CDC has also published Environmental Cleaning and Disinfection Recommendations for US Community Facilities with “Suspected/Confirmed Coronavirus Disease.” If an employee comes to work with COVID-19 symptoms or you learn that someone who was infected visited your premises, the following steps should be taken:

- If an employee, the person should be immediately separated from other employees, customers, and visitors and sent home.
- If the person is an employee and is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). The employer should instruct fellow employees about how to proceed based on the CDC Public Health Recommendations for Community-Related Exposure. If you learn that an infected invitee has been present, it would be prudent to instruct employees on where that person visited the premises and to engage in disinfection as set forth below.
- According to the CDC, in most cases when an employee or invitee with COVID-19 has been on your premises, you do not need to shut down your facility. But you do need to close off any areas used for prolonged periods of time by the sick person and do the following:
 - Wait 24 hours before cleaning and disinfecting the area used by such person to minimize potential for other employees being exposed to respiratory droplets. If waiting 24 hours is not feasible, wait as long as possible.
 - During this waiting period, open outside doors and windows to increase air circulation in these areas.
 - Clean and disinfect all areas used by the person who is sick. Follow the CDC cleaning and disinfection recommendations, which include: (1) cleaning dirty surfaces with soap and water before disinfecting them; (2) using disinfection products that meet EPA criteria for use against SARS-Cov-2 (the virus that causes COVID-19) and are appropriate for the surface; (3) wearing gloves and gowns appropriate for the chemicals being used when cleaning and disinfecting; and (4) possibly wearing additional PPE depending on the setting and disinfectant product you are using.
- Once an area has been appropriately disinfected, it can be opened for use. Workers without close contact with the person who is sick can return to work immediately after disinfection.
- If more than 7 days since the person who is sick visited or used the facility, additional cleaning and disinfection is not necessary. Continue routine cleaning and disinfection.

OSHA Guidance of Suspected and Confirmed COVID-19 Cases at Your Premises

OSHA has provided guidance to employers for the types of control measures that an employer can take in cases where exposure to COVID-19 may occur. Additionally, OSHA and the U.S. Department of Health and Human Services have published joint guidance for all employers on preparing workplaces for COVID-19. The joint guidance provides general steps that every employer can do to reduce the risk of worker exposure to SARS-CoV-2. The below list is not exhaustive, and an employer should carefully review all OSHA guidelines to ensure they are in compliance.

[OSHA guidance](#)

[Joint guidance](#)

General Steps

- Develop an infectious disease preparedness and response plan, which should consider and address the level of risk associated with various worksites and workers' job tasks at these sites.
- Implement good hygiene and infection control practices (including, among other things, hand washing, encouraging workers to stay home if they are sick, and maintaining regular housekeeping, such as routine cleaning and disinfecting of surfaces.)
- Follow federal and state, local, tribal, and/or territorial recommendations regarding development of contingency plans for situations that may arise as a result of outbreaks (*g.*, increased rates for worker's absenteeism, need for social distancing, options for conducting essential operations with a reduced workforce, and interrupted supply chains or delayed deliveries)
- Develop policies and procedures for identifying and isolating potentially infectious individuals and for employees to report when they are sick or experiencing symptoms of COVID-19.
- Move potentially infectious workers to locations away from workers, customers, and other visitors. (Designated areas with closeable doors may serve as isolation rooms until potentially sick people can be removed from the premises.)
- Take steps to limit the spread, such as providing a face mask (if feasible and available), and ask the person to wear it, if tolerated.
- If possible, isolate people suspected of having COVID-19 separately from those with confirmed cases of the virus.
- Restrict the number of workers entering isolation areas to prevent further transmission.
- Protect workers in close contact (*e.*, 6 feet) with a sick person or who have prolonged/repeated contact with such persons by implementing engineering or administrative controls and safe

work practices (*e.g.*, installing high-efficiency air filters, increasing ventilation, installing physical barriers, encouraging sick people to stay home, minimizing contact among workers, establishing alternating days or extra shifts to limit total number of employees in a facility at a given time, and encouraging safe work practices that promote hygiene).

The joint guidance as well as the OSHA-specific guidance further categorizes workplaces as “very high,” “high,” “medium,” and “low” in terms of levels of risk of exposure to SARS-CoV-2. Both the joint guidance and the OSHA-specific guidance include additional control measures specific to these varying levels that an employer should consider implementing when an employee has a suspected or confirmed case of COVID-19. For example, in addition to implementing the isolation steps above, most workplaces categorized as having an increased risk (medium or higher), outside of healthcare, should ask isolated individuals to leave the workplace as soon as possible.

OSHA-specific guidance provides additional requirements for cleaning and disinfection that should be considered in parallel with CDC guidelines for cleaning and disinfection. The OSHA cleaning requirements for a workplace handling an exposure to COVID-19 largely track the CDC guidelines with some additional requirements.

- employers who need to clean and disinfect environments potentially contaminated with SARS-CoV-2 should use [EPA-registered disinfectants](#) with label claims to be effective against SARS-CoV-2.
- Workers who conduct cleaning tasks must be protected from exposure to hazardous chemicals used in these tasks. In these cases, the PPE (29 CFR 1910 Subpart I) and Hazard Communication (29 CFR 1910.1200) standards may apply.
- Do not use compressed air or water sprays to clean potentially contaminated surfaces, as these techniques may aerosolize infectious material.
- In addition, OSHA provides specific requirements to train workers on the hazards of cleaning chemicals used in the work accordance with OSHA’s Hazard Communication Standard (29 CFR 1910.1200) and to comply with OSHA’s standards on Bloodborne Pathogens (29 CFR 1910.1030), including proper disposal of regulated waste, and PPE (29 CFR 1910.132).

For additional [OSHA guidance](#) related to specific industry sectors (*e.g.*, healthcare, airlines, dentistry, meat and poultry processing, retail, correctional facilities, and others), see special OSHA guidance linked at the bottom of this page.

State and Local Guidance on Suspected and Confirmed COVID-19 Cases at Your Premises.

Many localities have announced additional guidelines, apart from CDC and OSHA, related to how to address suspected and confirmed cases of COVID-19 cases at a business premises, primarily in the

context of employee cases. For example, the state of Alaska has an entire [website](#) dedicated to providing guidance categorized by type of business (*e.g.*, non-public facing business, public facing business, restaurants, retail). These guidelines provide, among other things, that

- For non-public facing businesses, employers must establish a plan for employees getting ill and a return to work plan following CDC Guidance.
- For non-public facing businesses, employees may not return to work within 72 hours of exhibiting a fever.
- For businesses facing the public, no employee displaying symptoms of COVID-19 will provide services to customers, and symptomatic or ill employees may not report to work.
- For businesses facing the public, entryway signage must notify the public of the business's COVID-19 Mitigation Plan and clearly state that any person with symptoms consistent with COVID-19 may not enter the premises.
- For both non-public and public facing businesses, when an active employee is identified as being COVID-19 positive by testing, CDC cleaning and disinfecting must be performed as soon after the confirmation of a positive test as practical. In lieu of performing CDC cleaning and disinfecting, businesses may shut down for a period of at least 72 consecutive hours to allow for natural deactivation of the virus, followed by site personnel performing a comprehensive disinfection of all common surfaces.

State guidance may also be more general. For example, the State of Oklahoma has generally advised employers to consider monitoring their workforce for indicative symptoms, not allowing symptomatic people to physically return to work, and implementing appropriate policies regarding social distancing and PPE.

Certain states (such as [Oklahoma](#) and [Montana](#)), counties, and universities have implemented contact tracing considerations or requirements for employers, especially given that contact tracing has been deemed a major priority under the [White House's guidelines](#) to states for re-opening the country. Contact tracing refers to tracking down every person the infected person had been in contact with while the infected person was showing symptoms and informing these individuals that the infected person tested positive for COVID-19.

Other Liability Considerations

In the very least, if you learn or suspect that you have a COVID-19 case tied to your premises, you should provide adequate warnings to those who may have been exposed or may be exposed, to the extent possible. However, you should not identify the infected person by name and must follow confidentiality laws. You should consult legal counsel and/or the aforementioned regulators to determine the scope, the recipients, the duration and the content of such warnings.

Most cases that have emerged thus far are based upon negligence and assert that the premises owner or operator breached an applicable standard of care (such as not conducting appropriate cleaning), which caused the person to contract COVID-19. It is reasonable to assume that courts would look to the CDC, OSHA, and state and local guidelines to inform the applicable standard of care and to determine whether a premises owner/operator has been negligent. Thus, it is important to review and implement all relevant guidelines and continuously update that review as the standard of care will likely be evolving in real time.

In the employer setting, worker's compensation laws might come into place. However, they typically do not cover intentional conduct or injunctive relief. We have seen cases brought against employers for failing to provide a safe workplace and protect employees from contracting COVID-19. *See, e.g., Rural Community Worker's Alliance et al v. Smithfield Foods, Inc. et al*, Docket No. 5:20-cv-06063 (W.D. Mo. Apr 23, 2020) (injunction by plant workers against meat plant for breaching duty to keep the workplace safe when hundreds of employees at plant contracted COVID-19).

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