Medical Privacy in the Workplace: Does It Exist in the Post-COVID-19 World?

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As businesses in Tennessee prepare for return to work, employers are wondering just where the lines are with respect to sharing health information in the workplace. Agency guidance continues to rapidly evolve in response to the pandemic while public concerns with surveillance and contact tracing to combat the virus stoke fears about individual privacy rights.

As with most privacy issues, the right to privacy (and to be free from surveillance) is not absolute and is often balanced against other rights, including the public health and safety in the workplace. The legal landscape is a patchwork of state and federal laws lacking unequivocal standards for all employers or all locations. An assortment of informal guidelines across federal and state agencies such as the U.S. Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA), and the Equal Employment Opportunity Commission (EEOC) have arisen in response to COVID-19. These informal materials provide some guideposts and reminders to help employers navigate and balance privacy and safety issues that arise as employees return to the workplace.

Workplace Medical Surveillance and Screening Guidelines

When it comes to public health, the CDC has compiled numerous resources for employers and in most cases, employers will follow CDC guidelines to maintain a safe workplace in the post-COVID-19 world. The CDC prepared guidelines for both healthcare settings, where essential operations have been ongoing and elective care may be reopening, and non-healthcare settings, where businesses whose functions were not deemed essential return to work (collectively, "the CDC Guidelines"). Under the CDC Guidelines, employers must make clear to employees not to arrive at the workplace with symptoms such as fever, cough, or shortness of breath. Employers should put a system in place for employees with these symptoms to call in, even at the last minute and even if that would not otherwise pass muster under the company's absenteeism policy.

The CDC notes that screening employees is optional but suggests screening via temperature checks on arrival or self-declaration forms in which employees respond to questions about symptoms such as a fever. Screening at the workplace is recommended by certain city guidelines, such as Mayor John Cooper's Roadmap for Reopening Nashville. Apps and texting solutions are springing up to help manage screening programs, including those that send emails to the employer with the employee medical declarations and to the HR department if an employee fails to declare. Employers need to properly vet the security features of any app and restrict how the vendor maintains and shares that information with third parties. Remember that just because you collect the information on an app does not mean you have no obligation to protect it.

Especially in high-risk settings, employers need to have employees report a positive diagnosis (or exposure to someone testing positive) to contain the spread of the virus. Employers may inquire as to who the employee was in "close contact" with pursuant to the CDC Guidelines. The CDC Guidelines also state that employees should inform their supervisor if they or their colleagues develop symptoms at work. Note that even OSHA requires its investigators who believe they may have been exposed to the coronavirus during an inspection to report the potential exposure to their supervisor. CDC does not go

further to regulate the uses and disclosures of medical information once the employer has the information. So, employers need to be sure they are not using the information in a way that could be cast as discriminatory on the basis of someone's medical condition (which may be a disability under various laws).

Protections Against Inquiries About Disabilities

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against applicants or employees based on a disability. Does someone who has COVID-19 have a disability? That will depend on whether the COVID-19 caused the person to have a physical or mental impairment that substantially limits one or more major life activities. It will not constitute a disability for some but may for others.

Regardless of whether COVID-19 is or is not a disability, can an employer ask questions about an employee's health to determine if he or she has or may have COVID-19? The ADA permits employers to make medical inquiries in limited circumstances. Generally, an employer can perform medical exams after it has made a job offer but before the person has begun work (as long as you treat all candidates for the same job consistently). With current employees, employers may only make medical inquiries that are job-related and consistent with business necessity. If you have a reasonable belief that the medical condition about which you are asking will pose a direct threat to your workforce, the inquiry is permissible. At this point in the pandemic, it is generally accepted that COVID-19 poses a direct threat.

Recent EEOC Guidance on "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" states that the ADA and the Rehabilitation Act, including the rules about medical examinations and inquiries, still apply during the COVID-19 pandemic. But the EEOC is also clear that these rules do not interfere with or prevent employers from taking steps under the CDC Guidelines in response to the pandemic, including daily screening and conducting health checks as necessary.

Keep an eye on the current guidance from both the CDC and the EEOC. While the guidance is fairly clear now that COVID-19 poses a direct threat, that assessment could change as medical information grows (or not).

Also, as you obtain information from these medical inquiries, remember to keep it confidential.

Logging Positive Cases

Generally, employers must log any employees confirmed with COVID-19 under the CDC Guidelines if the case is work related and meets one or more of the OSHA general recording criteria.[1] An illness is recordable if it results in death, days away from work, restricted work or job transfer, or medical treatment beyond first aid or loss of consciousness. Significant illness diagnosed by a physician or other licensed healthcare professional is also recordable, even if it does not result in one of those recording criteria. Under the OSHA Enforcement Guidance for Recording Cases of Coronavirus Disease 2019, OSHA will focus its enforcement during the COVID-19 pandemic on high-risk settings such as healthcare providers and emergency responders. OSHA will use informal investigations for lower risk settings even if a formal complaint is lodged, though an onsite inspection is possible if the response is unsatisfactory.

[1] See e.g., 29 CFR Part 1904 (OSHA) and TDLWD Rule 0800-01-03 (Tenn. OSHA).

Based on close contact information, it may be necessary to notify other employees (or patients) that an employee has tested positive so that appropriate precautions may be taken, but *without identifying the name of the employee testing positive*. An employee may consent to being identified. In that case, document the consent and the extent of the consent. An employee may agree that you can release his or her name to coworkers but not to the general public. If the employee does not consent, the employer can provide de-identified data that lets people know they have or may have been exposed and what protective measures to take, including current quarantine policies. Employers also can send employees home if they had close contact with a confirmed employee.

When an employee is referred to a healthcare provider as part of an occupational health and safety program, HIPAA permits the healthcare provider to share their findings regarding medical surveillance or work-related illness to the extent the employer needs that information to comply with occupational health laws. The healthcare provider must notify the employee in writing that the information will be disclosed to the employer or, if the evaluation is performed at the worksite, post a notice there.

Providers and Public Health Authorities

HIPAA-covered entities are permitted and often required to report positive COVID-19 cases to federal, state, and local public health authorities and their registries, subject to the need to disclose only the minimum necessary required for the public health report. Typically, it would be these public health authorities that compile information on a confirmed case and the close contacts of that person. HIPAA permits public health authorities authorized by law to share health information with people exposed to COVID-19 or at risk of contracting or spreading the disease. The CDC contact-tracing protocols state that contacts are only informed of exposure, not the identity of the confirmed case. Likewise, under the Tennessee public health protocol for contact tracing, the confirmed case identity and the explicit location of contact are not shared with the close contacts of confirmed cases.

Otherwise, when acting in their capacity as a healthcare provider, employers who are also HIPAA-covered entities should not share information on COVID-19 diagnosis and treatment with other workforce members acting in the employment capacity without a valid HIPAA authorization.[2] Other licensure laws may protect medical privacy depending on the type of provider, but generally do not authorize disclosures to employers. Covered entities under HIPAA should maintain employment records that contain employee health information separate from the medical records maintained on employees who are also patients. This separation helps ensure that the employment record is not considered protected health information regulated by HIPAA.

Sharing a COVID-19 Diagnosis and Privacy Practices with Your Employees

Under the EEOC Confidentiality Rules at 29 C.F.R. at §1630.14(c), employers may make medical inquiries and medical examinations of an employee when it is job-related and consistent with business necessity. Information regarding the employee's medical condition and medical history must be maintained in separate medical files and treated as a confidential medical record. The employer may give supervisors and managers medical information regarding necessary restrictions on the employee's work duties and

[2] In limited circumstances, providers could disclose information to an employer if in the provider's professional judgment, a serious and imminent threat to the health and safety of anyone existed and the employer was in a position to prevent or lessen the harm or threat.

the need for reasonable accommodation but should only give the amount of information needed to consider or provide the accommodation.

OSHA and TOSHA have no requirement that an employer share a diagnosis with other employees who worked around a COVID-19 positive employee, although TOSHA rules neither require nor prohibit employers from informing other workers. Likewise, the CDC simply recommends protecting workers by disinfecting the areas where infected employees worked and emphasizing basic infection prevention measures.

Respect your staff's privacy interest when and to the extent you can, and be transparent about your policies. If employees see medical information being misused, they may avoid reporting medical conditions or potential exposure. Employers should be transparent with employees about their data collection and activities both for purposes of employee relations and to abide by any applicable state laws governing employee data collection.

Moving Forward

The state of privacy laws and regulations is constantly evolving. Four Republican U.S. senators, including Tennessee's Marsha Blackburn, recently introduced federal consumer protection legislation to require companies to describe their data collection activities and allow individuals to opt out of COVID-19 contact tracing. That legislation specifically excludes employee screening data but may be further amended as bipartisan support gathers for its passage.

So, what is an employer to do moving forward?

- Keep good documentation on the status of the public health threat and the steps being taken to promote employee health and safety. Hindsight is 2020, no pun intended. Although CDC Guidelines do not create legal obligations, Americans and their policymakers at all levels have expressed overwhelming confidence in the CDC since the pandemic began. Expect regulators, judges, and juries to give credence to those guidelines or at least consider them reasonable courses of conduct amidst rapidly changing standards of care.

- Keep all the various screening questionnaires and temperature checks confidential. Make sure no one has access to those records that does not need to see them. If you keep them electronically, make sure they are secure.

- Even if the employee consents to sharing his or her identity, share that identity only with others having a need to know and a responsibility to keep confidential. Remind those with confidentiality obligations that telling a spouse or family members the name of the person with COVID-19, while a natural, human reaction, may breach that confidentiality.

- Employee consent should be voluntary and documented. Remind other workers that an employee who is positive for COVID-19 allowed the sharing of his or her name to help protect coworkers but the information is still confidential and should not be shared without permission.

- Absent an affirmative legal duty to disclose specific medical information, maintain privacy around information that an employee shares with you. Let employees know that you will not

release information unless the employee authorizes it or if the law requires you to make a report, such as to public health and occupational health agencies that may need that information. Reiterate that the company's general policy is not to share the identity of an employee who has a positive diagnosis without that employee's consent, unless there is a legal basis for the disclosure.