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## Coates' Canons Blog: What to Do When an Employee Is Infected with or Reports Exposure to COVID-19

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Article: <https://canons.sog.unc.edu/what-to-do-when-an-employee-is-infected-with-or-reports-exposure-to-covid-19/>

This entry was posted on April 15, 2020 and is filed under Employment, Featured Posts Related To COVID-19, General Local Government (Miscellaneous), Medical Inquiries & Medical Testing, Miscellaneous

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Mona tells the city's human resources director that she has been diagnosed with COVID-19. The next day Sam, an employee in a different department who doesn't know or have contact with Mona, says that his roommate has been diagnosed with COVID-19. Now what? As the COVID-19 pandemic continues, employers will likely experience more and more employees reporting either a diagnosis of COVID-19 or exposure to someone with COVID-19. As health care providers and public health officials have learned more about the virus that causes COVID-19, their recommendations about how to respond to employees ill with or exposed to this disease have changed and are likely to continue to change. Here's the latest thinking about how an employer should respond to employee like Mona and Sam.

### EMPLOYEES DIAGNOSED WITH COVID-19

How should an employer handle an employee like Mona who has been diagnosed with COVID-19? As of the date of publication of this blog post, COVID-19 testing is still not available in North Carolina on a widespread basis. Yes, an employee may report a positive COVID-19 test result, but it is much more likely that the diagnosis was made by a health care provider's evaluation of the employee's symptoms. The health care provider may examine the employee in person and include an x-ray as part of the evaluation or the diagnosis may be made remotely (telehealth or telemedicine). Employers should consider a health care provider's diagnosis of COVID-19 made on symptoms alone to be as valid as a diagnosis made with confirmed test. The most recent health care provider guidance from the North Carolina Department of Health and Human Services (NC DHHS) emphasizes that health care providers should consider only patients with severe symptoms — shortness of breath, difficulty breathing, chest discomfort, altered thinking or a blueish cast to the skin — for in-person examination and possible COVID-19 testing. The guidance encourages health care providers to use telehealth to evaluate patients with mild symptoms — fever and cough — and to counsel them to stay at home to recover. This North Carolina advice is consistent with the most recent guidance from the CDC on how providers should treat patients with COVID-19 symptoms. **Employers should not, therefore, require employees reporting COVID-19 infection to present a COVID-19 positive test result before excusing them from work.** Employers may, however, ask for the name of the physician providing the diagnosis.

Expect employees who have been diagnosed with COVID-19 to be out of work for at least one week, if not longer. Any full-time, 40-hour employee who is diagnosed with COVID-19 by a health care provider, or who has symptoms consistent with COVID-19 and is seeking a diagnosis, must be offered the 80 hours of emergency paid sick leave provided by the Families First Coronavirus Response Act (FFCRA). Employees who work fewer than 40 hours per week are entitled to emergency paid sick leave on a pro-rata basis. For more information on the FFCRA, see my blog posts [here](#) and [here](#). Employees whose COVID-19 illness is severe may qualify for unpaid leave because of their own serious health condition under the Family and Medical Leave Act if they remain incapacitated after using their emergency paid sick leave.

### Disclosure of Information About the Infected Employee Is Generally Prohibited

Now the employer knows that an employee is infected. The first step is to consult with the local health department. The employer must ask their local health department how to track and advise other employees who may have been exposed to the employee who has COVID-19. It is important that employers not go ahead and take this step without consulting the local health department because the rules governing the confidentiality of a COVID-19 diagnosis are tricky and do not give authority to employers to tell others. Readers can find the phone number for each of North Carolina's county health departments [here](#).

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Information about an employee who has COVID-19 is protected by several federal and state statutes. Under the Americans with Disabilities Act (the ADA), information about an employee's health and medical history is considered confidential medical information that must be maintained separately from other portions of the employee's personnel file and may not be disclosed except to the extent necessary to accommodate an employee with a disability. The ADA's confidentiality provisions are more restrictive than those found in the North Carolina General Statutes personnel privacy provisions for local and state government employees (see [here](#), [here](#), [here](#), [here](#), [here](#), [here](#) and [here](#)) and therefore take precedence over them.

In interpreting the provisions of the ADA in the context of the COVID-19 crisis, the Equal Employment Opportunity Commission (the federal agency charged with enforcing the ADA) has said,

Employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public. The ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace.

In other words, the need of state and local public health authorities to obtain information about infected and exposed persons will trump the ADA's confidentiality provisions in this situation. The employer may tell the local health department and then may follow the health department's instructions.

Under N.C.G.S. 130A-143, information and records that identify a person who has or may have COVID-19 are strictly confidential and are **not** public records. ***This means that ordinarily, this information may not be disclosed to the media or general public.*** Disclosures of information are allowed, however, when they are necessary to protect the public health and are made in accordance with state communicable disease rules. For example, it will likely be necessary to disclose limited information *within a workplace* to assure that potentially affected persons are identified. State communicable disease rules provide for the local health department, not the employer, to make the determination about when such disclosures are permitted and exactly how to protect the privacy of the person with COVID-19 while making the necessary disclosures.

An employer should therefore assure an employee sick with COVID-19 that their medical information is confidential and that the employer will consult with the local health department to determine whether co-workers must be advised that they have been exposed to the COVID-19 virus.

### **Cleaning and Disinfecting the Workplace**

The local health department can also advise employers about how to clean and disinfect those areas of the workplace in which the infected employee worked or had contact with. The most recent CDC guidance on cleaning and disinfecting worksites and businesses advise employers to:

- close off areas any areas in which that the infected employee been;
- open outside doors and windows and use ventilating fans to increase air circulation in those areas;
- wait 24 hours or as long as practical before beginning cleaning and disinfection; and
- have cleaning staff clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment (like tablets, touch screens, keyboards, remote controls, and ATM machines) used by the infected employee, and instruct them to focus on frequently touched surfaces.

The CDC's Cleaning and Disinfection for Community Facilities guidance has additional advice on what cleaning and disinfecting agents are effective on which types of surfaces.

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In their focus on making sure the worksite is disinfected, employers should not forget to provide the cleaning staff with personal protective equipment (PPE) appropriate for cleaning an area that may be contaminated with the virus that causes COVID-19 and to give them advice on monitoring themselves for signs that they may have become infected. The Cleaning and Disinfection for Community Facilities guidance has detailed recommendations on PPE and on what to advise cleaning staff.

### **Return to Work for an Employee with COVID-19**

Employers may not require employees to provide a negative test for COVID-19 before returning to work. COVID-19 tests in North Carolina are still prioritized for people with more severe respiratory symptoms, patients who are hospitalized, patients in high-risk settings such as long-term care facilities, as well as to health care workers and first responders. *Based on the most recent clinical guidance from NC DHHS, employees who have had only mild symptoms consistent with COVID-19 may discontinue self-isolation and return to work after:*

- at least seven days have passed since symptoms first appeared, **and**
- at least three days (72 hours) have passed since they have been fever-free without the use of fever-reducing medications such as acetaminophen (Tylenol), aspirin, ibuprofen (Advil), naproxen sodium (Aleve) or other NSAIDS (non-steroidal anti-inflammatory drugs); **and**
- they have had an improvement in respiratory symptoms (e.g., cough, shortness of breath).

These factors are consistent with current CDC guidance. NC DHHS emphasizes that people who have been diagnosed with COVID-19 based on their symptoms do NOT need a negative COVID-19 test result to discontinue isolation if they satisfy these factors. Because public health authorities expressly advise against testing in these circumstances, to insist that an employee provide a negative test result would likely violate the ADA's prohibition on medical examinations and inquiries.

Even patients who have been hospitalized with COVID-19 may generally discontinue their isolation after they have been discharged to home, meet the same criteria set forth above for those with mild symptoms, and follow their doctor's advice about when to return to work.

What about employees who have tested positive but have not had symptoms? According to the CDC, positive but non-symptomatic people may discontinue isolation when at least seven days have passed since the date of their first positive COVID-19 test, they have had no subsequent symptoms, and they continue to be asymptomatic. These employees may return to work upon discontinuing isolation, but for the first three days after the isolation period ends, they should continue to stay 6 feet away from others and wear a covering for their nose and mouth whenever they are in settings where other persons are present. The covering does not have to be a medical mask or respirator, but may be a bandana, scarf, or cloth mask. *An employer may require employees in this category to remain at home until the three-days period after the end of isolation has passed.*

### **EMPLOYEES EXPOSED TO SOMEONE DIAGNOSED WITH COVID-19**

How should employers handle people like Sam who have not been diagnosed with COVID-19 but have been exposed to it? According to the CDC, a person is likely to have been exposed to COVID-19 if someone in their household has been diagnosed with the disease or if they have been within 6 feet of an individual with confirmed or suspected COVID-19 while that person is symptomatic or within 48 hours before they became symptomatic.

Whether an employee who has been exposed to COVID-19 must remain out of work for a period of time depends on whether that employee is a "critical infrastructure worker." "Critical infrastructure" is a term used by the U.S. Department of Homeland Security to identify workers in 16 different sectors whose continuity of functions are considered critical to public health and safety, as well as economic and national security. In the context of local government services, "critical infrastructure" is similar, but not identical, to the term "essential services" as used by Governor Cooper in Executive Order 121 (the stay-at-home order) and to the term "emergency responder" as used in the FFCRA. Critical infrastructure workers include all employees working in public health, all first responders, including 911 dispatchers, emergency management personnel, all employees of municipal utilities, all employees involved in water and wastewater services, social services employees involved in food assistance programs, child protective services and elder and dependent adult abuse

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prevention, public transportation workers, public works personnel, elections personnel, information technology employees and registers of deeds, as well as those employees whose work supports the provision of services in these areas. Most local government employees will fall into the category of “critical infrastructure” workers. For a complete list of critical infrastructure workers, see here.

For those who are **not** critical infrastructure workers, the CDC recommends a self-quarantine at home for 14 days after the last exposure to someone with COVID-19. It also recommends that exposed persons practice social distancing by remaining at least 6 feet away from others, including household members, at all times. CDC also advises those who have been exposed to COVID-19 to monitor themselves for symptoms and to take their temperatures twice a day.

But in what may be a surprise to many, CDC has advised employers that *critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19*, provided they remain asymptomatic and additional precautions are implemented to protect them and the community. This recommendation applies whether exposure to COVID-19 has occurred in the workplace or at home. This exception to what would otherwise be a recommendation to self-quarantine is made to ensure continuity of operations of essential government functions.

***Critical infrastructure workers who have had an exposure to COVID-19 but remain asymptomatic may be, but do not have to be, allowed to work immediately following exposure.*** If they return to work, employers and exposed employees should adhere to the following practices both before and after the start of an employee’s shift:

- Temperature screening: Employers should measure the employee’s temperature and assess symptoms before allowing them to begin work and at the end of the day. Temperatures should be taken before the exposed employee enters the facility.
- Self-monitoring: The employee should self-monitor for COVID-19 symptoms during the workday and immediately report any symptoms, even mild symptoms, to human resources.
- Wearing a mask: While in the workplace, an exposed employee should wear a face mask *at all times* for 14 days after the last exposure. Employers can issue facemasks or can approve employees’ supplied face coverings.
- Social distancing: To the extent that an employee’s job duties permit, the employee should stay 6 feet away from other employees.
- Disinfecting and cleaning workspaces: An employer should ensure that all areas such as offices, bathrooms, common areas, shared electronic equipment that are used by the exposed employee are disinfected and cleaned once a day or more frequently where appropriate.

Nonessential employees who should not report to work after exposure to COVID-19, and essential or critical infrastructure employees who are directed to stay home after exposure to COVID-19, may qualify for FFCRA emergency paid sick leave (under qualifying reason #2) if they have also been directed to self-quarantine by a health care provider. Should exposed employees develop symptoms of COVID-19 and seek a diagnosis, they will qualify for emergency paid sick leave (under qualifying reason #3). On emergency paid sick leave, see here and here.

### ***Health Care Providers, including Emergency Medical Personnel***

The CDC protocol for health care providers who have been exposed to COVID-19 or to a patient exhibiting COVID-19 symptoms is more complex than that for other critical infrastructure employees because of their close contact with contagious and potentially contagious patients. The employer response turns on whether the exposure was high risk, medium risk, or low risk.

For example, when an EMS employee rides in an ambulance with a person diagnosed with COVID-19 or with COVID-19 symptoms and neither the patient nor the EMS worker wears a mask, the encounter is rated a high-risk exposure. Similarly, local health department employees who are in a room in which a nasal swab is taken from a patient as part of the COVID-19 test have had a high-risk exposure if the employees were not wearing masks at the time. *Health care employees who have had a high-risk exposure to COVID-19 should be excluded from the workplace for at least 14 days, even if they are showing no signs of infection themselves.*

EMS and local health department employees who have prolonged (10 minutes or more) contact with COVID-19 patients wearing a facemask *while the employee was not wearing a facemask* have had a medium-risk exposure. When a health care employee and a COVID-19 patient are both wearing a facemask or respirator, the exposure is low-risk. But when an

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aerosol-generating procedure is performed (such as the taking of a nasal swab for a COVID-19 test or an intubation), the exposure becomes medium risk even if an EMS or health department employee is wearing a facemask. *EMS and health department employees who have had medium-risk exposure to COVID-19 should be excluded from the workplace for at least 14 days, even if they are showing no signs of infection themselves.*

For any EMS or health department employee who is also directed to self-quarantine by a physician or nurse practitioner, they should be offered FFCRA emergency paid sick leave. If no health care provider is involved and it is only the employer directing exposed employees to self-quarantine, the employees will not be eligible for emergency paid sick leave. They will only be eligible to use accrued paid sick or vacation leave or FLSA accrued comp time during their time away from work.

## Links

- [files.nc.gov/ncdhhs/documents/files/covid-19/COVID-19-Provider-Guidance-Final.pdf](https://files.nc.gov/ncdhhs/documents/files/covid-19/COVID-19-Provider-Guidance-Final.pdf)
- [www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.htm](https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.htm)
- [www.ncdhhs.gov/divisions/public-health/county-health-departments](https://www.ncdhhs.gov/divisions/public-health/county-health-departments)
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- [www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html)
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