

The New Normal: Employment and Privacy Issues for Healthcare Providers During the COVID-19 Crisis

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[A Preliminary Question]

How many COVID-19-infected patients do you estimate your RHC has seen?

[Relevant Law]

- **Families First Coronavirus Response Act** : Paid sick leave and expanded FMLA leave
- **OSHA**: There are various laws that relate to providing a safe working environment for your employees.
 - OSHA generally requires that employers provide “a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm to employees.”
 - As you will hear in more detail later, violations of OSHA are subject to enforcement actions and civil penalties, including additional fines for willful and repeated violations.
- **NLRA**: The NLRA protects an employee from adverse employment actions for engaging protected concerted activity such as refusing to work based upon a “good faith” belief that the work environment is unsafe.
 - Employees do not lose the protection of the Act if their good faith belief is wrong.

[Relevant Law]

- **ADA:** Obligation to make reasonable accommodations for employees who have a disability that puts them at a greater risk if they contract COVID-19
- **HIPAA:** Protects privacy of patient health information, but largely limited to healthcare entities and their business associates
- **Federal and state wage and hour laws**

[Question 1]

As a healthcare provider, am I mandated to provide paid leave to employees under quarantine or who have children at home due to Covid-19-related closures of schools and daycare facilities?

[The Families First Coronavirus Response Act]

The Families First Coronavirus Response Act ("FFCRA") was enacted by Congress in response to the COVID-19 Pandemic.

The FFCRA requires that employers provide paid sick leave and emergency family leave to those unable to work because of the pandemic.

To further that goal, the FFCRA contains two major provisions:

- The Emergency Family and Medical Leave Expansion Act ("EFMLEA")
- The Emergency Paid Sick Leave Act ("EPSLA").

The Families First Coronavirus Response Act

- The EFMLEA entitles employees to additional paid leave.
- Under traditional FMLA, employees are entitled to 12 weeks of unpaid leave.
- With the EFMLEA, employees are entitled to up to ten weeks paid and two weeks unpaid leave for to care for the employee's child under 18 years of age whose school or place of care has been closed or the child's care provider is unavailable.
- Applies to Employers with 500 or fewer employees



The Families First Coronavirus Response Act

- The EPSLA entitles employees to eighty (80) hours of leave if one of six COVID-19 conditions are present:

The employee:

1. Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
2. Has been advised by a health care provider to self quarantine due to concerns related to COVID-19
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis
4. Is caring for an individual subject to a quarantine or isolation order by the government or a healthcare provider
5. Is caring for a child whose school or place of care is closed, or whose childcare provider is unavailable, because of COVID-19; or
6. Is experiencing another similar condition.

[The Families First Coronavirus Response Act]

“Health care providers” may be excluded by their employer from paid sick leave and/or expanded FMLA leave. These include:

Anyone employed at any:

- Doctor’s office
- Hospital
- Health care center
- Clinic
- Post-secondary educational institution offering health care instruction
- Medical school
- Local health department or agency
- Nursing facility

[The Families First Coronavirus Response Act]

“Health care providers” that may be excluded (Continued):

Anyone employed at any:

- Retirement facility
- Nursing home
- Home health care provider
- Any facility that performs laboratory or medical testing
- Pharmacy
- Any similar institution, employer, or entity - this includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions
- Any entity that contracts with any of the above institutions, employers or entities to provide services or to maintain the operation of the facility.

[The Families First Coronavirus Response Act]

Emergency responders may also be excluded from paid sick leave and expanded FMLA.

An emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to:

- Military or national guard
- Law enforcement officers, Fire fighters, Correctional institution personnel
- Emergency medical services personnel, emergency medical technicians, paramedics
- Physicians, Nurses
- Public health personnel, emergency management personnel, public works personnel
- 911 operators
- Persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency and individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
- Any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

[Question 2]

Can employees refuse requests from employers to take their temperatures or submit to questioning about their COVID-19 exposure?

[Question 3]

As a rural health clinic, can you require your employees to undergo COVID testing and report the results to you?

[Daily Health Checks]

From the Equal Employment Opportunity Commission (“EEOC”):

- Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19.

[Daily Health Checks]

Businesses must conduct daily screenings to ensure that employees don't have COVID-19 symptoms and can choose between:

- In-person, on site screenings at the beginning of the day
- Employees self-screenings every 24 hours and reported to employer

Screenings are to identify:

- If employees have had any CDC-recognized COVID-19 symptoms
- If anyone in their home has a COVID-19 diagnosis or symptoms
- If employees have been in close contact with anyone who may have symptoms or is awaiting testing

[Daily Health Checks]

- Daily screenings should check for fevers (over 100.4).
- Employees with fevers should not report to work.
- If businesses opt for on-site screenings:
 - Maintain social distancing
 - Use no-touch thermometers
 - Set up a temperature check station to self-checks
 - Sanitize any traditional oral/aural thermometers after each use



[Create a Testing Plan]



- Employees with COVID-19 symptoms should be tested within 36 hours.
- Entities must ensure that staff is trained to isolate individuals with COVID-19 symptoms/diagnosis.

[In Event of a Positive COVID-19 Test]

If an employee tests positive for COVID-19, employers must help health officials by providing the following:

- Employee's work schedule
- Where the employee was working
- The last day the employee was on site
- Who could have come into close contact with the employee
- Contact info for the employee and anyone they came into contact with

[In Event of a Positive COVID-19 Test]

If an employee tests positive, the employer should:

- Send the employee home to quarantine,
- Vacate (if possible) and clean areas recently used by the employee,
- Notify potentially-exposed coworkers without divulging the employee's identity,
- Determine when the employee may return, and
- Record the infection if it is work-related and report it to OSHA if required.

Returning to Work After Positive COVID-19 Test

Employers may require a negative COVID-19 test before employees return to work, according to the EEOC, but the CDC advises instead to follow these guidelines:

- Those who never develop symptoms can end isolation 10 days after testing positive.
- Those with moderate to mild symptoms can end isolation after 10 days if at least 24 hours have passed without a fever and other symptoms have improved.
- Those with severe symptoms may need to continue isolation for a full 20 days or longer.

[Contact notification responsibilities]

If an employee tests positive, the employer must provide the health department with the following information:

- Employee's work schedule
- Where the employee was working
- The last day the employee was on site
- Who could have come into close contact with the employee
- Contact info for the employee and anyone they came into contact with

[Question 4]

Can healthcare providers disclose protected health information without a patient's consent to conduct contact tracing and other forms of managing COVID-19?

[Question 5]

As rural health clinic, if a patient tests positive for COVID or is diagnosed with an active care, should you report this information to the patient's employer?

[Question 6]

One of your rural health clinic employees has tested positive for COVID or even has it. Your workers are apprehensive and nervous about their individual exposure. Can a co-worker look at another co-worker's health record to determine if the co-worker had exposed her/him?

HIPAA's Privacy Rule Exceptions in Light of COVID-19



While the HIPAA Privacy Rule protects the privacy of patients' health information (PHI), it is balanced to ensure that appropriate uses and disclosures of the information may be made when necessary to treat a patient, to protect the nation's public health, or for other critical purposes.

[HIPAA permitted disclosures]

Treatment

- Covered Entities may disclose patient's health information (PHI) without a patient's authorization if it's necessary to treat the patient or to treat a different patient.
- Treatment includes the coordination or management of health and related services by one or more healthcare providers and others, consultation between providers, and the referral of patients for treatment.

[HIPAA permitted disclosures]

Public Health Activities

- The Privacy Rule allows covered entities to disclose needed PHI without a patient's authorization:
 - **To a public health authority**, including the CDC, a state or local health departments.
 - **To monitor and prevent cases** of patients exposed to, suspected of, or confirmed to have COVID-19.
 - **At the direction of a public health authority.**
 - **To persons at risk of contracting or spreading a disease or condition** when necessary to prevent or control the spread of the disease or otherwise to carry out public health interventions or investigations

[HIPAA permitted disclosures]

Disclosures to Family, Friends, and Others Involved in an Individual's Care

- PHI may be shared with a patient's family members, relatives, friends, or other persons identified by the patient as involved in the patient's care.
- A covered entity may share PHI when necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the patient's care of the patient's location, general condition, or death.
- A covered entity may share PHI with disaster relief organizations, like the American Red Cross, that are authorized to assist in disaster relief efforts for the purpose of coordinating the notification of family members or other persons involved in the patient's care of the patient's location, general condition, or death.

[HIPAA]

Disclosures to Prevent a Serious and Imminent Threat

- Healthcare providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law (such as state statutes, regulations, or case law) and the provider's standards of ethical conduct.
- Thus, providers may disclose a patient's health information to anyone who is in a position to prevent or lesson the serious and imminent threat, including family, friends, caregivers, and law enforcement without a patient's permission.
- HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health and safety.

[HIPAA]

Disclosures to the Media or Others Not Involved in the Care of the Patient/Notification

- Except in very limited circumstances, disclosure about a patient's PHI or COVID-19 status, is not permitted without specific written authorization.

[HIPAA]

Minimum Amount of Information Necessary

- Even when disclosure is permitted, HIPAA's Privacy Rule standards still apply and require that only the minimum amount of information necessary be disclosed.
- Covered entities may rely on representations from a public health authority or other public official that information requested is the minimum necessary for the purpose when that reliance is reasonable under the circumstances.
- Covered entities should continue to apply their role-based access policies to limit access to protected health information to only those employees or staff who need information to carry out their work.

[HIPAA]

Strong Policies and Training

- Because of the intense level of public interest and focus, healthcare providers should aggressively educate individual staff members about their duties to maintain patient health information confidentiality even when it concerns COVID-19.

[Question 7]

Is it mandated by law that I have someone in charge of compliance and ensuring a safe workplace during COVID-19?

[“Healthy at Work” officer]



- Designate a Healthy at Work officer who monitors compliance.
- Ideas for improvement or concerns about Healthy at Work implementation should be communicated to this officer.

[Educate & train employees]

- Employees, contractors, vendors, customers, etc... must receive training and be educated in Healthy at Work protocols.
 - Must be completed during scheduled work times at no cost to the employee.
- Communicate policies relevant to return to work.
- Provide clear expectations regarding infection control procedures such as respiratory etiquette, including covering coughs and sneezes and washing hands:
- Require employees to remain at home if they feel sick.
- Train supervisors regarding discriminatory or retaliatory behavior.
- Outline PPE requirements and ensure all staff is appropriately and safety donning and doffing PPE.

Implement Flexible Attendance and Sick Leave Policies

- Emergency Paid Sick Leave Act policy and form
- Emergency Family Medical Leave Expansion Act policy and request form
- If 50 or less, Small Business Exemption form
- If 50 or more, adjust FMLA policy and request form to provide for EFMLEA
- Telecommuting/ work from home policies
- Update discrimination and harassment policies to include COVID-19 related issues

[Make special accommodations]

- Certain segments of the population are at greater risk for the effects of COVID-19 than others:
 - People aged 65 years and older
 - People who live in a nursing home or long-term care
 - Anyone with underlying medical conditions
- To the greatest extent possible, entities should make special accommodations for customers and employees in these categories.

[Question 8]

Will COVID-19 be considered a “disability” for purposes of the Americans with Disabilities Act?

[EEOC and ADA Issues]

- Employers will face requests for “reasonable accommodation” from employees for COVID-19 issues
 - If it is now shown that an employee can accomplish work through telehealth where an employer previously denied such accommodations, must the employer now do so?
 - Are employees with underlying health risks that make them more susceptible to COVID-19 able to ask for accommodations to work from home more successfully?

[Question 9]

Do employers have a duty to provide protective equipment to their employees?

OSHA Issues

- OSHA has a resource page with guidelines, guidance and enforcement issues related to COVID-19: <https://www.osha.gov/SLTC/covid-19/>
- The Occupational Safety and Health Act has two categories of employer duties:
 - The general duty clause - “(a) Each employer...shall furnish to each of his employees employment and a place of employment which are ***free from recognized hazards*** that are causing or are likely to cause death or serious physical harm to his employees;...” 29 U.S.C.A. § 654 (West)
 - Specific safety standards – these are industry-based into four categories – General Industry, Construction, Maritime, Agriculture (most inspection and enforcement takes place in the first two)

[Question 10]

Should employers be concerned that they are infringing on the employees' rights to engage in concerted activity under the National Labor Relations Act?

[NLRA Issues]

- The NLRA protects an employee when they act with one or more other employees to speak out of about their wages, hours and working conditions.
- If your employees come to you saying that they will not come to work for safety reasons, refuse to work without sanitation measures, or even refuse to work without wearing masks- do not discipline or terminate without considering the NLRA.
 - These employees are engaging in protected, concerted activity.
- Single employee action is generally not covered but be wary of an employee who claims to be acting on behalf of others or is attempting to initiate group action.
- **Employees need only a good faith belief, supported by objective evidence, that their working conditions are abnormally dangerous. (See *NLRB v. Washington Aluminum Company*, 370 U.S. 9 (1962); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974)).**

NLRA Issues



Employers will likely have to implement policies to:

- (a) isolate employees who have been exposed to the virus or those who are at higher risk for adverse health effects
- (b) Minimize contact between employees and with the public
- (c) Control who and what enters the workplace
- (d) Increase cleaning and decrease sharing of equipment/supplies
- (e) Increase flexible scheduling
- (f) Reduce employee gatherings

[NLRA Issues]

- These policies will invariably regulate employee workplace communications and conduct, and therefore potentially infringe Section 7 rights under the NLRA.
- It's important, then, to make sure that these policies:
 - Have clearly stated purposes and are neutral as to Section 7 activity
 - Clearly identify specific prohibited activities
 - Include specific disclaimers of activities that are NOT prohibited by the policy
 - Implement these policies quickly and consistently.

[Question 11]

Should employers be concerned about retaliation during the COVID-19 Pandemic?

[Retaliation Issues]

- Employers are forbidden from retaliating against employees for:
 - Taking paid sick leave and EFMLA under the FFCRA
 - Filing OSHA safety complaints
 - Requesting reasonable accommodations under the ADA
 - More
- It's important that all adverse employment actions come with thorough, clear documentation that can overcome any presumption of the actions being merely pretextual.



Retaliation Issues

Also...Retaliation against quality of care and safety reporting is forbidden:

216B.165 Duty to report quality of care and safety problems -- Investigation and report -- Prohibition against retaliation.

(1) Any agent or employee of a health care facility or service...who knows or has reasonable cause to believe that the quality of care of a patient, patient safety, or the health care facility's or service's safety is in jeopardy shall make an oral or written report of the problem to the health care facility or service, and may make it to any appropriate private, public, state, or federal agency.

...

(3) No health care facility or service licensed under this chapter shall by policy, contract, procedure, or other formal or informal means subject to reprisal, or directly or indirectly use, or threaten to use, any authority or influence, in any manner whatsoever, which tends to discourage, restrain, suppress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any agent or employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the health care facility or service the circumstances or facts to form the basis of a report under subsections (1) or (2) of this section. ...

[Any Questions?]



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