What Employers Need to Know about COVID-19 Workplace Requirements

A COVID-19 Update from Questco – November 19th, 2020

As the U.S. faces a resurgence of COVID-19 cases and the possibility of more state and local shelter-in-place orders becomes a reality, employers who have been operating during the pandemic should know what the federal government requires in terms of workplace compliance and whether you will be able to continue to operate. The information below provides some insight into what employers need to know about federal "critical infrastructure" guidance and what you need to consider as you continue to operate your business.
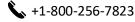
What is Critical Infrastructure?

The Centers for Disease Control and Prevention (CDC) defers to the Cybersecurity and Infrastructure Security Agency (CISA), which bills itself as the nation's risk advisor, to define critical infrastructure sectors. These are organizations whose assets, systems, and networks – whether physical or virtual – are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on national public health or safety. These businesses are generally exempt from certain restrictions if an **employee becomes exposed to COVID-19.**

To determine whether your business is considered part of the critical infrastructure for the CDC's purposes, you should look to the March 28, 2020 CISA 3.0 Memo as the agency currently relies on the categories outlined in the memo. CISA 3.0 and the CDC define a critical infrastructure worker as a worker employed in the following sectors:

- Healthcare and Public Health
- Law Enforcement, Public Safety, and Other First Responders
- Food and Agriculture
- Energy
- Water and Wastewater
- Transportation and Logistics
- Public Works and Infrastructure Support Services
- Communications and Information Technology
- Other Essential Functions
- Critical Manufacturing
- Hazardous Materials
- Financial Services
- Chemical
- Defense Industrial Base
- Commercial Facilities
- Residential Shelter Facilities and Services
- Hygiene Products and Services

CISA's latest guidance issued on August 18, 2020 adds **education workers** as critical infrastructure workers and includes all organizations that provide **transportation, operational, and administrative support** for education facilities.

Information provided herein is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney or accountant.

The CDC's Critical Infrastructure-Specific Guidance

In conjunction with issuing revised regulations, the DOL updated and added to its FAQs to reflect the new guidance in the following ways:

The CDC advises that critical infrastructure workers **may be permitted to continue work** following potential exposure to COVID-19, provided they **remain asymptomatic** and the employee and their employer **adhere to the following practices** prior to and during their work shift:

- **Pre-Screen:** You should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility.
- **Regular Monitoring:** As long as the employee doesn't have a fever or symptoms, they should self-monitor under the supervision of health program.
- **Wear a Mask:** The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. You can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.
- **Social Distance:** The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
- **Disinfect and Clean Work Spaces:** Clean and disinfect all areas such as offices, bathrooms, common areas, and shared equipment of all types routinely.

If these critical infrastructure employees become sick during the day, however, they should be sent home immediately. As with any exposure at a workplace, surfaces in their workspace should be cleaned and disinfected. Sick employees should not be allowed to return to work until they have met the CDC's criteria to discontinue home isolation. Taking these steps and documenting your efforts to mitigate COVID-19 will be key for any employer defending against potential OSHA investigations or citations related to COVID-19.
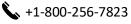
Additional Guidance for All Businesses When an Employee Contracts the Coronavirus

Regardless of your business' status as critical infrastructure, you must take certain steps when an employee becomes ill. First, you should instruct the sick employee to remain at home until released by a physician or public health official. If a doctor's note releasing the employee is unavailable, follow the CDC guidelines on when an employee may discontinue self-isolation, which contains specific requirements dependent upon whether the employee tested positive for COVID-19 or exhibited COVID-19 symptoms.

Second, after a confirmed COVID-19 case, follow the CDC guidelines for cleaning and disinfecting the workplace. The cleaning staff or a third-party sanitation contractor should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill person, focusing especially on frequently touched surfaces.

Third, after learning that one or more employees has been diagnosed with COVID-19, act quickly to have the infected employee identify all other employees or third parties who might have been exposed during the infectious period. For months during the ongoing pandemic, employers have been applying a "6-15-48" analysis when encountering a suspected or confirmed COVID-19 case at their workplace to identify employees who worked directly with / were exposed to the infected worker and thus had to be quarantined. The CDC recently updated the definition of the term

Information provided herein is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney or accountant.

"close contact". The latest definition now provides the following definition to identify someone who should be considered at risk of being infected:

> Someone who was within six feet of an infected person for a *cumulative total of 15 minutes or more over a 24-hour period starting from* two days before illness onset (or, for asymptomatic patients, two days prior to test specimen collection) until the time the patient is isolated.

Fourth, you should notify all workers who worked in close proximity to the infected employee that they may have been exposed to COVID-19 and follow the critical infrastructure-specific steps above for allowing your employees without symptoms to continue working. Also notify all employees or third parties who work in the location or area where the employee works of the situation without revealing any confidential medical information such as the name of the employee. Just as it is important to take the preventative steps above, the failure to notify employees at your location of a confirmed case may be a violation of OSHA's general duty clause, which requires all employers to provide employees with a safe work environment.

Fifth, determine if the employee is eligible for paid time off under company policy, local, state, or federal guidelines. If you are a covered employer under the Families First Coronavirus Response Act (FFCRA), the infected and potentially exposed employees may be eligible for emergency paid sick leave. Completion of the *Questco Emergency Paid Sick Leave and Emergency FMLA Request* form is required to ensure FFCRA paid leave is processed correctly.

Can Your Business Continue to Operate Despite State and Local Shut Down Orders?

That will depend on the state where your business is located. Some states defer to CISA's evolving definition of workers who perform critical infrastructure functions in creating exceptions to broad requirements for businesses and travel quarantine mandates. Other states use terms like "essential businesses" and define them by a different set of criteria listed in those states' orders. Therefore, businesses in states that do not defer to CISA or the CDC for their definition of what is critical infrastructure or an essential business will have to consult their state and local orders to determine if their business may continue to operate.

A list of statewide return to work protocols can be found at
https://www.littler.com/publication-press/publication/bouncing-back-list-statewide-return-work-protocols

In Conclusion

Addressing confirmed COVID-19 cases in your workplace and assessing whether critical infrastructure restrictions apply to your business environment will most likely be an issue for the foreseeable future. We recommend that you review and update your COVID-19 mitigation and contact tracing policies to comply with the latest CDC guidelines. To ensure your response is consistent with current guidance, if you have any doubt as to whether your business is classified as critical infrastructure by CISA, or before continuing to operate in one of these states that do not defer to CISA's guidance, you may want to seek the advice of counsel.

Please reach out to your Client Success Manager if Questco can assist with any of your COVID-19 compliance needs. As always, our team is here to serve you.