





Staying Ahead of the COVID-19 Pandemic Presented Unique Challenges to Employers

By Peter Gillespie

Employers who have grappled with the uncertainty surrounding COVID-19 and the steps to be taken to protect their employees may recall that it was not all that long ago that the conventional wisdom was that face coverings were unnecessary and that a good hand-washing technique (twenty seconds) would be effective to control the spread of the virus.¹ Since then, information about the virus has included revised theories about whether the virus can be spread based on surface contacts, whether the virus is airborne, and, most recently, whether the use of a mask protects both the wearer and those around them. Employers (and the lawyers who advise them) have needed to grapple with significant uncertainty, considerable anxiety, and changing guidelines on how to reduce the risk of widespread illness in the workplace. Policies and practices implemented in response to the virus had to address that the virus can be spread by asymptomatic individuals and that individuals with mild cases might not be able to distinguish their symptoms from other influenza viruses, seasonal allergies, or the common cold. An employer's response to COVID-19 risks also needed to account for varying perceptions of risk within an employee population, as well as concerns about preexisting medical conditions or other factors that place certain individuals at a greater risk from the virus.

Under federal law, an employer's obligations to respond to COVID-19 were deceptively simple: "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."² As discussed below, to satisfy this duty, employers needed to filter out extraneous or inaccurate information and develop a consistent plan that would provide a reasonable assurance to their workforces that it would be safe to come into work each day, even in the midst of the pandemic. Some of these issues, such as cleaning surfaces frequently, were fairly straightforward. Critically, employers also needed to implement policies that encouraged employees to be candid about their medical condition, in terms of both whether the employee had symptoms (and, therefore, needed to be excluded from the workplace) and whether the employee contracted the illness in the workplace. Similarly, during periods when certain areas of the country had higher levels of community spread, employers needed to be able to obtain accurate information about whether employees had traveled to high-risk areas for nonbusiness reasons. Employers that struggled with their response to the pandemic commonly faced issues with absenteeism, poor morale, and complaints to health departments or the U.S. Occupational

Safety and Health Administration (OSHA).³ Two of the most common practical concerns for employers have involved employee screening protocols, as well as face coverings and other protections.

PROTECTING EMPLOYEES REQUIRED EMPLOYERS TO DEVELOP EFFECTIVE SCREENING TECHNIQUES

Businesses that remained open during the pandemic frequently relied on screening techniques to help reduce the chance that an employee would arrive for work and unknowingly spread the virus in the workplace. Typically, these screenings would include questions about symptoms, recent travel, and contacts with others who may have either tested positive or experienced symptoms. Responses to these questionnaires can be used to limit access to facilities or workplaces and reduce the risk of spread. In addition, businesses have implemented temperature checks and have also considered testing.

Among other considerations, employers considering these options have needed to stay on top of the effectiveness of these practices. Generally speaking, screening techniques (especially temperature checks and testing) are subject to a prohibition under the Americans with Disabilities Act (ADA) (and, presumably, state-law equivalents) that prevents employers from requiring employees to undergo medical examinations that are not job-related and consistent with a business necessity.⁴ Based on ADA restrictions, an employer cannot normally or routinely ask employees to take their temperatures or report whether their temperatures are normal. Fortunately, many ADA issues relating to the pandemic had been assessed by the U.S. Equal Employment Opportunity Commission in 2009 guidance provided in response to the H1N1 virus, which provided a framework for employers responding to COVID-19.⁵

Based on ADA restrictions, employers must be mindful of the effectiveness of various testing or screening options that could be used with employees. After all, ineffective or unnecessary testing, by

its very nature, would not be consistent with an employer's business necessities. For example, in connection with COVID-19, two basic forms of testing are available to employers: viral testing (PCR or antigen) and antibody testing. Viral testing is intended to determine whether an individual has an active case of COVID-19. By contrast, a positive antibody test indicates that the individual encountered the virus at some point in the past and successfully fought off the infection. However, based on Center for Disease Control (CDC) recommendations, tests for the presence of coronavirus antibodies are not permissible under the ADA as a screening tool to determine whether employees are allowed to enter the workplace.⁶ Employers that are considering COVID-19 testing need to understand the difference between these types of tests and not rely on testing procedures, such as antibody testing, that has not been recommended by the CDC.

Even viral testing has presented challenges for employers in certain situations. In particular, under CDC guidance, when an employee has been in "close contact" with an individual who has exhibited symptoms of COVID-19 or who has tested positive for COVID-19, if the employee is not a critical infrastructure worker, the employee generally should stay out of the workplace for a period of fourteen days, while monitoring for symptoms. In workplaces where employees cannot work from home, this fourteen-day period can be burdensome. Similarly, employees who do not have paid sick leave available and who cannot work from home may face the prospect of losing at least two weeks of pay while quarantining. In response to these pressures, some employers have likely considered whether COVID-19 testing may be used as a substitute for quarantining. Putting aside for the moment that the CDC has not endorsed this approach, a significant concern with relying on viral testing is the risk that the employee would receive a false negative result. An employee who is asymptomatic and who receives a false negative COVID-19 test could create a significant risk of spread within a work

environment. For these reasons, human resources professionals need to stay on top of and appreciate these considerations in order to avoid the temptation of substituting an unproven and likely unreliable practice for the more stringent guidelines that have been set by the CDC.

THE INS AND OUTS OF FACE MASKS AND FACE COVERINGS

A significant issue that employers of essential workers confronted early involved the use of face coverings. Initial recommendations from the CDC and the World Health Organization (WHO) did not recommend the use of face masks for the general public. Nevertheless, employers in the retail sector and in other businesses where social distancing would not have been immediately feasible necessarily assessed whether to require the use of masks in the workplace.

Employers who considered mask use in advance of clear guidance faced a number of competing issues. As an initial matter, face masks and coverings come in a variety of forms. Face coverings can range from a bandana, to a surgical mask, the now semi-famous N95 mask, to full-face self-contained breathing apparatus. Employers requiring the use of face coverings in the workplace needed to understand that masks intended to create a seal around the employee's face, which include the N95 mask, but not, for example, a surgical mask or any handmade cloth mask, are subject to respiratory protection standards issued by OSHA.⁷ For these reasons, decisions surrounding whether to provide masks to employees, as well as the selection of the mask, required an understanding of both the potential risks to employees and the nature of what employees would be required to wear while at work.

In particular, OSHA standards governing respiratory protection require that respirators be provided when an employer determines that employees will be exposed to hazardous levels of contamination. However, before an employer requires the use of respirators, the employer must first attempt

to reduce possible employee exposure through engineering or administrative controls. OSHA's guidance states: "You need to supply employees with respirators when all preferred methods of protecting them from breathing contaminated air have been determined to be insufficient to reduce the contamination to nonhazardous levels."⁸ With respect to COVID-19, engineering controls might include increasing air exchanges, "sneeze guard" barriers, or increased cleaning of "high contact" surfaces. Administrative controls could include staggered shifts, telework, or the previously discussed screening tools. Based on these considerations, an employer that decided to hand out N95 masks to its employees in response to the COVID-19 pandemic conceivably would be tacitly suggesting that the employer had determined that its employees were being exposed to hazardous levels of the SARS-CoV-2 virus in the workplace and that engineering or administrative controls had failed to offer sufficient protection. Although that may not have been the message that an employer intended, from the perspective of OSHA, the employer must have reached these conclusions before requiring that employees wear N95 masks in the workplace.

In the spring of 2020, employers also needed to bear in mind that N95 masks were in short supply. Again, if an employer is in full compliance with the respiratory protection standard, requiring the use of a respirator mask suggests that the employer concluded that its employees were at a risk of exposure to an airborne hazard. Understandably then, once an employer rolls out a respiratory protection program, the employer cannot reasonably require employees to continue working if the employer has no masks to provide to employees. For these reasons, employers needed to account for how employees might react if they had been provided face coverings, but those coverings were no longer available due to supply chain issues or availability.

In addition, employers that required masks in the workplace needed to consider that not all employees would

be able to tolerate wearing masks for extended periods of time. As OSHA has pointed out, medical conditions known to compromise an employee's ability to tolerate respirators include cardiovascular and respiratory diseases, reduced pulmonary function, neurological or musculoskeletal disorders, impaired sensory function, and psychological disorders (e.g., claustrophobia and severe anxiety).⁹ In addition, certain medications may interfere with the use of a respirator. For these reasons, employers are required to obtain medical clearance from a licensed health care professional before requiring an employee to don a respirator.

Depending on the nature of the work environment, an employee experiencing difficulty with a mask may be interacting with a customer or, for a variety of reasons, may be in close proximity to co-workers. It is not unreasonable to assume that individuals near someone who suddenly removes a mask (and possibly coughs or gasps for breath) would react in a negative manner. Employers do have an obligation to make reasonable accommodations to employees who cannot tolerate masks for reasons protected by the ADA, unless the request creates an undue burden or would cause the employer to violate legal requirements, such as OSHA. In order to properly respond to requests relating to mask use, employers need to understand their reasons for requiring masks, as well as the risks if masks are not worn, because a knee-jerk refusal to consider the request could create liability under the ADA.

In short, decisions surrounding the use of face masks in the workplace required an understanding of the regulatory requirements applicable to respirators, as well as an assessment of the risks that employees faced from COVID-19. In many instances, erring on the side of caution or attempting to be "overly protective" of workers could create additional headaches or concerns for employers.

For many employers, COVID-19 presented unique challenges for which there was no playbook. In order to fulfill their basic legal requirement to protect against

"recognized hazards," human resources professionals and counsel were thrust into decisions requiring them to develop an understanding of the virus and the efficacy of potential measures to prevent the spread of the virus within the workplace. Employers needed to rapidly assess and digest evolving guidance and new information about the virus in order to make real-time decisions about protecting their workforces and, if possible, maintaining operations.

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ENDNOTES

1. Elena Renken, *Coronavirus FAQs: Do Masks Help? Is the Disease Really So Mysterious?*, NPR (Jan. 25, 2020), <https://www.npr.org/sections/goatsandsoda/2020/01/25/799007842/coronavirus-faqs-do-masks-help-is-the-disease-really-so-mysterious>.
2. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590, § 5(a) (codified at 29 U.S.C. § 654(a)(1)).
3. As of November 12, 2020, OSHA reported that it had received 10,295 complaints related to COVID-19. *COVID-19 Response Summary: Detailed Data for Federal Program*, U.S. DEP'T OF LAB., https://www.osha.gov/enforcement/covid-19-data#detailed_data.
4. 29 C.F.R. § 1630.14(c).
5. *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. Equal Emp't Opportunity Comm'n (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.
6. *Interim Guidelines for COVID-19 Antibody Testing*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html>.
7. 29 C.F.R. § 1910.134 (respiratory protection standard applicable to general industry).
8. Small Entity Compliance Guide for the Respiratory Protection Standard, OSHA 3384-09 (2011).
9. *Id.* at 27.