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Disclosure of COVID-19 Testing Results and Medical Privacy

As the number of confirmed COVID-19 cases increase each day, public safety employees are understandably concerned about exposure to the virus at work. Employers also want to ensure that employees who contract the virus are isolated or quarantined in order to minimize the risk of exposing co-workers to the virus. Prompt identification of employees with symptoms of COVID-19 often leads to assertions that employees showing symptoms of COVID-19 should be tested; both to document a work-related illness and to identify employees who should be removed from the workplace to protect other employees from exposure.

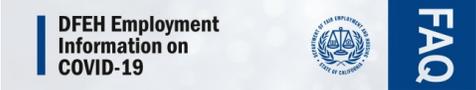
The extent to which public employers can require their employees to undergo COVID-19 testing and whether those employers are entitled to know the results of such a test are increasingly being asked by employees. As a general matter, we assume employees who strongly believe they have been exposed to COVID-19 or are exhibiting signs of the virus would want to be tested in order to take appropriate action to address the situation and treat any actual infection. But what about an employee who does not believe he or she has been exposed or is infected? Can the employer force the employee to submit to a coronavirus test?

The Equal Employment Opportunity Commission has advised that employers may ask employees if they are experiencing symptoms of COVID-19, measure an employee's body temperature, and send employees home if they exhibit symptoms of COVID-19. But what about requiring employees to be tested for COVID-19? Generally speaking, employers can only require existing employees to undergo medical examinations when there are objective indications an employee is unfit to perform the essential functions of their jobs or would pose a significant health and safety risk to co-workers and the public. Currently, the Center for Disease Control does not recommend testing anyone for COVID-19 unless there is reason to suspect the employee has come in contact with an infected individual. If the employer does believe an employee has been exposed to COVID-19 or an employee otherwise showing symptoms of the virus, an employer could require the employee to be tested for COVID-19 and the employer would be responsible for the cost of the test.

The result of a COVID-19 test is protected health information covered by the Health Insurance Portability and Accountability Act (HIPAA) and similar California laws. Those laws generally prohibit disclosure of a person's protected health information. However, HIPAA permits disclosure of otherwise confidential health information under certain circumstances, including the national health risk created by the spread of COVID-19. Additional exceptions apply to first responders.

The U.S. Department of Health and Human Services Office of Civil Rights and the California Department of Fair Employment and Housing recently published information on the applicability of HIPAA to protected health information relating to COVID-19 for law enforcement, paramedics, other first responders and public health authorities (downloadable PDF's below). The publications indicate that COVID-19 test results for public safety employees can be disclosed under certain conditions, by health care providers and received by employers during the current health emergency. Before disclosing otherwise protected health information, however, the entity in possession of the information must make reasonable efforts to limit the disclosure solely to information that is necessary to accomplish the purpose of the disclosure. Therefore, even when disclosure is permitted, the amount and types of information disclosed should be limited to the particular need for the information. Links to the publications can be found below.

Please contact our office for further clarification on this developing situation.

 <p>COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities</p> <p>Does the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule allow a covered entity to share the name or other identifying information of an individual who has been infected with, or exposed to, the virus SARS-CoV-2, or the disease caused by the virus, Coronavirus Disease 2019 (COVID-19), with law enforcement, paramedics, other first responders, and public health authorities without an individual's authorization?</p> <p>Yes, the HIPAA Privacy Rule permits a covered entity to disclose the protected health information (PHI) of an individual who has been infected with, or exposed to, COVID-19, with law enforcement, paramedics, other first responders, and public health authorities¹ without the individual's HIPAA authorization, in certain circumstances, including the following²:</p> <ul style="list-style-type: none">• When the disclosure is needed to provide treatment. For example, HIPAA permits a covered skilled nursing facility to disclose PHI about an individual who has COVID-19 to emergency medical transport personnel who will provide treatment while transporting the individual to a hospital's emergency department. 45 CFR 164.502(a)(1)(ii); 45 CFR 164.506(c)(2).• When such notification is required by law. For example, HIPAA permits a covered entity, such as a hospital, to disclose PHI about an individual who tests positive for COVID-19 in accordance with a state law requiring the reporting of confirmed or suspected cases of infectious disease to public health officials. 45 CFR 164.512(a).• To notify a public health authority in order to prevent or control spread of disease. For example, HIPAA permits a covered entity to disclose PHI to a public health authority³. <p><small>¹ Under HIPAA, "public health authority" means an agency or authority of the United States, a state, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate. 45 CFR 164.501 (definition of "public health authority").</small></p> <p><small>² The HIPAA Privacy Rule limitations only apply if the entity or individual that is disclosing protected health information meets the definition of a HIPAA covered entity or business associate. This guidance provides examples of disclosures from certain types of entities, some of which are covered by HIPAA, and others that may not be. While the entities in the examples are covered under HIPAA, the examples are not intended to imply that all public health authorities, 911 call centers, or prison doctors, for example, are covered by HIPAA and are required to comply with the HIPAA Rules.</small></p> <p>1</p>	 <p>A pandemic of respiratory illness caused by a new coronavirus (COVID-19) has been identified in California and the United States. A state of emergency has been declared by Governor Newsom in California.</p> <p>Workers and employers should review their own health and safety procedures (including Cal/OSHA workplace safety guidance) to help prevent exposure to the virus and also to uphold civil rights protections to ensure discrimination does not occur in the workplace. California civil rights laws prohibit discrimination and harassment in employment, including during a pandemic.</p> <p>During a pandemic, employers should rely on the latest public health recommendations from the Centers for Disease Control and Prevention (CDC), as well as state and local public health authorities. DFEH recognizes that public health recommendations may change during a crisis and differ between jurisdictions. Employers are expected to make their best efforts to obtain public health advice that is current and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.</p> <p>Employers must comply with public health orders issued under the authority of a federal, state, or local entity. Such orders may place restrictions on a person's or group's activities, including movement restrictions or a requirement for monitoring by a public health authority. Federal, state, or local public health orders may be issued to enforce isolation, quarantine, or conditional release.</p> <p>PAGE 1 OF 5</p> <p>MARCH 20, 2020 / DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING</p>
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