

MANAGING EMPLOYEES DURING THE COVID-19 PANDEMIC



Answers to top questions related to practice, patient, and staff safety.

WITH JOSHUA F. ALLOY, JD

"Can I require staff to get a vaccine in order to continue working?"

In many cases, vaccines can be required, says Joshua F. Alloy, JD, Counsel at Arnold & Porter in Washington, DC, "although there are potential exceptions, and businesses should also consider other ways of incentivizing staff to be vaccinated short of a mandate."

Mr. Alloy points out, "Federal law generally allows employers to institute requirements and qualifications that employees not pose a direct threat to the health or safety of individuals in the workplace. As a result, employers may require employees to be vaccinated before returning to the physical workplace (or to continue working after a specific date), particularly where employees will interact with each other and/or patients, because COVID-19 poses a direct threat to health and safety."

Certain employees may not be able to receive the vaccine for medical reasons or may object to receiving it because of a sincerely held religious belief. In such cases, "Employers will be required to explore whether there is a reasonable accommodation that can be provided before excluding the employees from the workplace," Mr. Alloy says. "Employers should consult with legal counsel before implementing a vaccine

mandate or denying any request for a reasonable accommodation."

"Can I enforce mask requirements among in-office staff?"

"Medical practices can and should implement various safety protocols and screening procedures, including wearing a mask or some sort of face covering," says Mr. Alloy. "There aren't really that many limitations on what they can require." At a minimum, he urges practices to follow current CDC guidelines as well as relevant state or local guidelines regarding the use of face coverings and other personal protective equipment.

Practices may make reasonable accommodations for some employees that have a legitimate disability or medical condition that makes it impossible for them to wear a standard face mask. In such cases, alternative face coverings may be offered. If a suitable alternative is not available and the medical practice reasonably determines that there would be a risk to employees and patients, the practice is not legally required to continue to let that individual work and interact with patients without a mask, Mr. Alloy says.

Offering the staff member the opportunity to work from home, if feasible, "might be a reasonable accommodation, but if the person is a doctor,

a nurse, or a technician whose job requires them to be in the room with the patient, the practice is not going to be legally forced to let them work and interact with patients without a mask."

"Do I need to create space for staff breaks and provide other amenities for employees?"

Many practices have scrambled to redesign their waiting and exam rooms, common walkways, and employee workspaces and break rooms to allow for social distancing. The law generally says little to nothing about required employee amenities such as break rooms, but Mr. Alloy urges practice administrators to weigh safety and staff morale as they contemplate the handling of these spaces.

"The law does not say you must provide a dedicated break room for people or you have to put up plexiglass barriers to allow people to eat at their desks. But I think most practices are erring rightly on the side of caution," Mr. Alloy observes. In some cases, break rooms and pantries have been shut down entirely or staff must sign up for timed use of the space. If it is possible to modify safe spaces, then practices may do so. Otherwise, they can make accommodations for staff to take breaks in their cars or in an outdoor area.

"What COVID-19 exposures do I need to report?"

A practice is not legally required to report isolated positive COVID-19 cases among staff or patients; however, the CDC and local health authorities encourage such reporting, Mr. Alloy says. Legal requirements could differ, however, if an outbreak occurs in a medical practice, in which case notifying local health authorities may be required and is recommended regardless.

A patient who tests positive for COVID-19 and has been inside the practice during the expected contagious period is not legally required to alert the practice. Mr. Alloy says that practices can increase the likelihood of learning about exposures by including the need for disclosure in the practice safety protocols.

"Most practices are requiring patients to go through a screening procedure before they can even come in to be seen in person, requiring the patient to sign off on various screening measures to certify that they do not have any symptoms, that they haven't traveled anywhere, and that they haven't been in close contact with anyone with any symptoms. Then, upon arrival, they must undergo a temperature check," he says. "Within this protocol, practices can also require patients to notify the practice if, within X days (5 to 7 days after being seen at the practice, for example), they end up coming down with symptoms or testing positive."

"How do I inform staff or other patients of a potential exposure?"

When it comes to informing staff or other patients of a potential COVID-19 exposure, "there is, once again, not much in terms of the law," Mr. Alloy

asserts. "There is guidance, there is best practice, and there is understandable concern about negligence or the threat that a lawsuit could be brought" if a workplace fails to take reasonable steps.

To be sure, lawsuits have been brought against businesses and employers. "But they are all working their way slowly through the judicial systems, which are themselves backlogged and on delay," he says. "So it is unclear how much liability there can be to an employer or a business where someone gets COVID-19."

That should not cause practices to be complacent. "I think general principles of negligence are a good rule of thumb here. If the employer is acting with reasonable diligence and following (and ideally exceeding) best practices as laid out by the CDC and local and state authorities, it seems to me unlikely that a court is going to find the employer liable for someone catching COVID-19, absent evidence that they were acting recklessly or with gross negligence," Mr. Alloy says.

Promptly informing medical practice employees of potential exposure from patients may increase employees' level of comfort and could benefit morale, Mr. Alloy suggests, in addition to creating a safer workplace.

Of course, medical practices must also protect patient privacy when disclosing exposures. "The advice I give to all of my clients is, if an employee or a visitor to your office tests positive, you should be letting folks know that someone—name withheld—who was in the office or at the facility on a particular date or during a particular time period has tested positive for COVID-19. That is a minimum step one." This allows employees to take the necessary precautions to get tested, closely monitor their own symptoms, and/or self-quarantine as appropriate.

A medical practice may also be able to identify which employees may have had close contact with an infected person and therefore issue more targeted alerts. In this case, the messaging may also be more robust to indicate the level

of exposure. Moreover, if the infected patient or employee authorizes the practice to share their name (ideally documented in writing by the individual), then Mr. Alloy says administrators can confidentially share their identity, making sure to indicate that permission to do so has been received and that the information must be kept confidential.

"Can I require staff to get tested? Can I require them to not come to work?"

An employer can likely require that employees get tested for COVID-19 and can also require them to quarantine if they have been exposed. However, Mr. Alloy urges practices to consider their actions from both a business and legal perspective.

A reasonable, conservative approach is to ask anyone significantly exposed to an infected individual (generally significant exposure totals 15 minutes or longer with masking or less time in the absence of masks or social distancing) to quarantine for a set number of days. A less extreme but reasonable approach may be to direct the exposed employee(s) to get tested and, assuming a negative test, to very closely self-monitor; if they develop any symptoms, they obviously need to stay home.

Aside from general health concerns, from a business perspective, a practice should seek to mitigate spread, as an outbreak could lead to full office closure, Mr. Alloy emphasizes. Practices should review CDC and local guidance on health care practitioners who have had potential exposure. Of note, Mr. Alloy says, "The CDC recognizes that potential exposures are an inherent risk in the health care setting and that it is not feasible in most cases to shut down practices every time there is an exposure or infection. The necessity of certain medical services can outweigh the risk of spreading infection."

"Assuming that the employee was wearing a proper respirator or face mask, that they may have had other eye protection and gloves, and that it wasn't prolonged close contact, the CDC certainly recognizes that you do not have to require that person to self-quarantine. You can instead operate under close monitoring or close monitoring combined with testing."

"Can I ask staff to practice safety measures outside the office? Can I sanction those who do not?"

"For the most part, employees are at-will, which means their employment can be terminated at any time for any reason—as long as it is not an unlawful reason." Employees who flout practice guidelines to host or attend a large dance party with hundreds of maskless attendees could be deemed to show poor judgment and present a risk to existing staff and patients. This is also true if that employee is a partner or lead physician whose actions could impact the reputation and business of the practice.

"There are exceptions," Mr. Alloy notes. Some employees, including many physicians, may have an employment contract that has limitations on when their employment can be terminated. Some state laws make it illegal to discriminate or take employment actions against someone for engaging in lawful outside activities.

"At the end of the day, if employers learn that employees are engaging in high-risk and irresponsible behavior outside of work that has the potential to lead to either reputational risk for the practice or worse, or creates a health and safety risk for the practice, they can take action," Mr. Alloy offers. "I don't think that most employers want to be going out of their way to monitor or police outside personal activity for the most part, though."

"Am I liable if someone claims they contracted COVID-19 at my practice?"

"This is the \$10 million legal question winding its way through the courts. At what point does an employer or business have responsibility for people catching COVID-19 at the workplace or office, whether that is a patient, a visitor, or an employee?" Mr. Alloy says. "The best advice I have and that I have seen is: Don't put yourself in a situation where you can be accused of negligence, let alone gross negligence. Take all reasonable precautions. Follow all CDC and local guidelines. Be open and transparent about the steps you are taking to protect your employees and the public."

Cases against employers present numerous challenges, including the difficulty of "proving" where someone contracted COVID-19, Mr. Alloy says. Nonetheless, he says, "If an employer finds out that an employee has been engaging in reckless (unsafe) behavior or knows there has been an outbreak and looks the other way, I think that absolutely opens the door for someone who then catches COVID-19 to argue that the employer or that business should be held liable under a negligence theory."

When an employee is infected with COVID-19, there is also consideration of the workers' compensation process, Mr. Alloy points out. In some states, he says, if you contract COVID-19 while working, "It is presumed that you caught it at work as opposed to in the morning or the day before when you picked up coffee or at the grocery store."

"In the case of a patient who tries to sue a practice for negligence, they are going to have to prove first that they caught it from their visit to the office. And that is a challenging proposition because it is hard to rule out that you didn't catch it somewhere else."

"Then you'll still need to prove that the practice knew or should have known that one of its employees was likely exposed or infected and that the practice negligently permitted that employee to continue to work and failed to take other safety precautions to prevent transmission. I think that is a high cliff to climb," Mr. Alloy says. "But once an employer is on notice that an employee has been engaging in super risky behavior or has been exhibiting potential symptoms or was exposed, it is certainly best practice to take swift action to take every reasonable effort to prevent anything from happening."

Be Proactive

A medical practice that is diligently following safety protocols should "be publishing and trumpeting all of the safety measures and screening requirements it has put in place so that patients know and are comfortable that these are the 10 or 12 steps the practice is taking," Mr. Alloy says.

Patients should know that the practice is prioritizing their safety and be properly prepared for their visit. This entails understanding that they may need to sign paperwork acknowledging that there is some inherent risk to visiting the practice, that they have not recently tested positive for COVID-19, that they have no symptoms, and that they have not been in contact with anyone who has symptoms. Patients should also be informed that a temperature check will be performed on site and that they must agree to wearing a mask at all times (other than for necessary medical examinations where a mask must be removed), Mr. Alloy advises. ■

JOSHUA F. ALLOY, JD

- Counsel, Arnold & Porter, Washington, DC
- joshua.alloy@arnoldporter.com
- Financial disclosure: None