

COVID-19 AND OCCUPATIONAL HEALTH: LAW, ETHICS, AND SCIENCE

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Coverage of this talk

1. Physician – Employee Relationship
2. Testing for COVID-19
3. Contact Tracing

1. PHYSICIAN – EMPLOYEE RELATIONSHIP

A physician-patient relationship is based on the following conditions:

- Physician is selected by the patient
- Physician is paid by the patient or another party on behalf of the patient
- Physician acts for the benefit of the patient
- Treatment may result

- Workplace exams generally lack these conditions, regardless of whether the physician is a co-employee or an independent contractor.
- The physician-employee relationship is generally NOT a physician-patient relationship, because it is for the benefit of a third-party.

Employer-mandated Medical Evaluation vs. Individual-obtained Medical Care

	Workplace Evaluation	Clinical Care
Purpose	Evaluate	Examine and treat
Legal standard of care	Do not injure	Reasonable care
For whose benefit	Employer	Individual
Duty to inform individual of findings	No	Yes
Duty of confidentiality	No	Yes
Physician-patient relationship	No	Yes
Fiduciary relationship	No	Yes

Source: M.A. Rothstein et al., Limiting Occupational Medical Evaluations Under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, *Am. J. Law & Med.* 41 (2015): 523-567, 537.

The benefits to employees of limited medical examinations:

- Autonomy
- Privacy
- Nondiscrimination

The risk of limited medical examinations:

- “No news is good news”

Bill of Rights of Examinees (1996)

Each individual subjected to a medical examination at the direction of his or her employer has a right:

1. To be told the purpose and scope of the examination.
2. To be told for whom the physician works.
3. To provide informed consent for all procedures.
4. To be told how examination results will be conveyed to management.
5. To be told about confidentiality protections.
6. To be told how to obtain access to medical information in the employee's file.
7. To be referred for medical follow-up if necessary.

Source: Rothstein, Legal and Ethical Aspects of Medical Screening, *Occup. Med.: State of the Art Revs.* 11(1) (1996): 31-39.

Law of Occupational Medical Examinations and Inquiries

Americans with Disabilities Act (1990)

1. Preemployment – *prohibited*
2. Post-offer (preplacement) – *permitted* regardless of job requirements
3. *Current employee – *limited* to job-related or voluntary exams or inquiries

Preemployment

- Online or in-person, employer may NOT ask about medical history or disability
- Employer may NOT require medical exam
- Employer MAY ask whether the individual can perform job-related functions (e.g., drive a car, climb ladders)

Preplacement (“Employment Entrance Examination”) – after Conditional Offer

- Medical exam is LAWFUL, if: (1) all employees get exam, regardless of disability; (2) may be of UNLIMITED scope; (3) info kept on separate forms and confidential; (4) supervisors and managers may be informed about work restrictions and accommodations
- Employer MAY require authorization for medical records, but no genetic information
- If offer revoked, may not be based on medical info that is not job-related, but employer not required to give reason (!)

Employment (including periodic or “for cause”)

- Employer may require job-related medical exam (e.g., OSHA)
- Employer may OFFER comprehensive exams and wellness programs, but they must be VOLUNTARY
- Employers may require that employee not constitute a DIRECT THREAT to self or others – COVID-19

2. TESTING FOR COVID-19

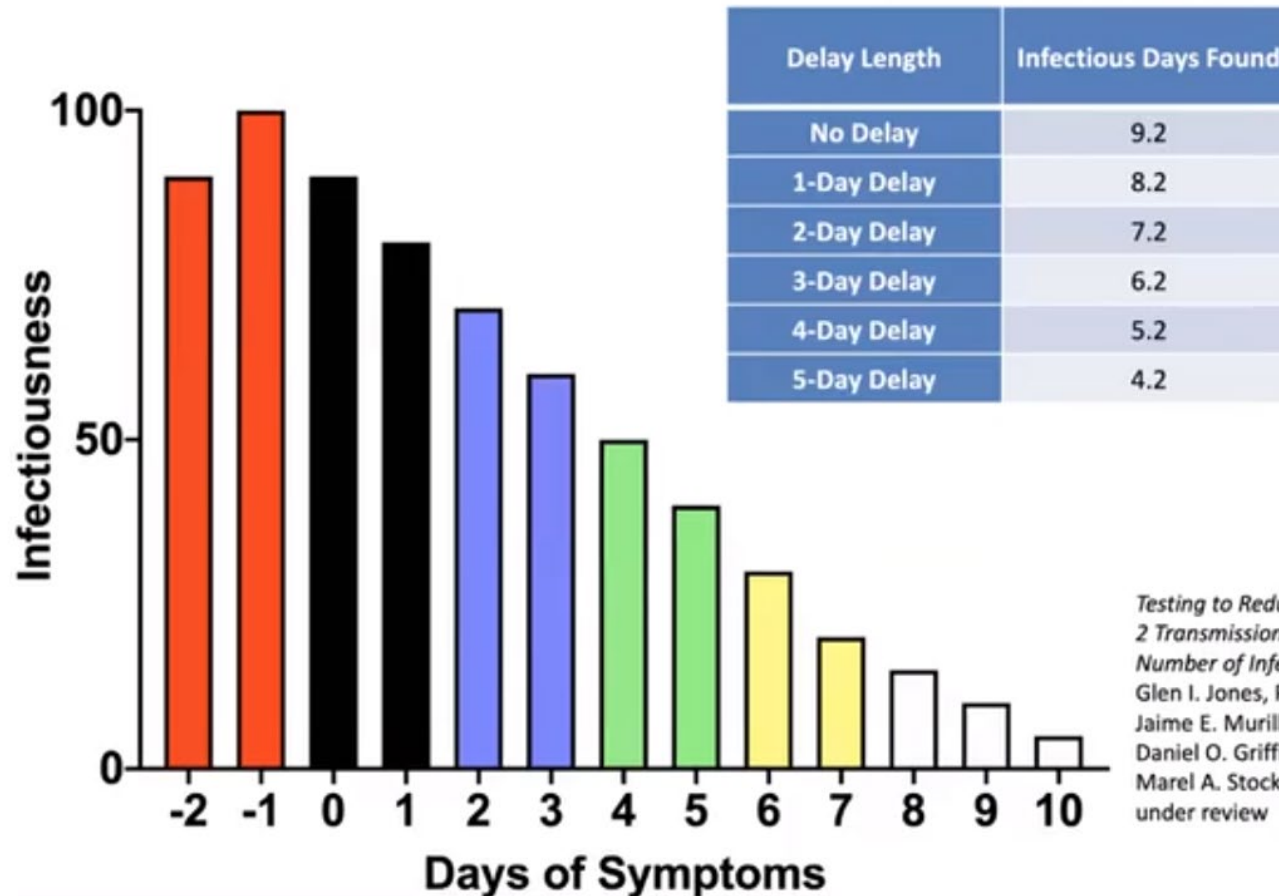
According to guidance from the EEOC, which enforces the ADA:

- Employers may ask employees about symptoms, e.g., fever, chills, shortness of breath, or sore throat. Because this is medical information, it must be treated as a confidential medical record.
- Employers may take the temperatures of employees entering the workplace.

- Employers may mandate testing because an individual with the virus poses a direct threat to others.
- Employers may NOT require antibody testing, because it is not recommended by CDC and therefore is not job-related.

Impact of Result Delays

Assuming a 12-day infectious period



Return of Test Results

5 million tests per week

Within 3 days 59%

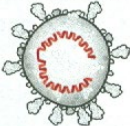
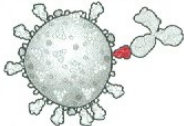
Within 5 days 76%

Implications of this Figure

1. Frequency of testing
2. Turnaround time for reporting results
3. Type and cost of testing
 - a. Diagnostic (PCR)
 - b. Surveillance (Antigen)

Speed counts

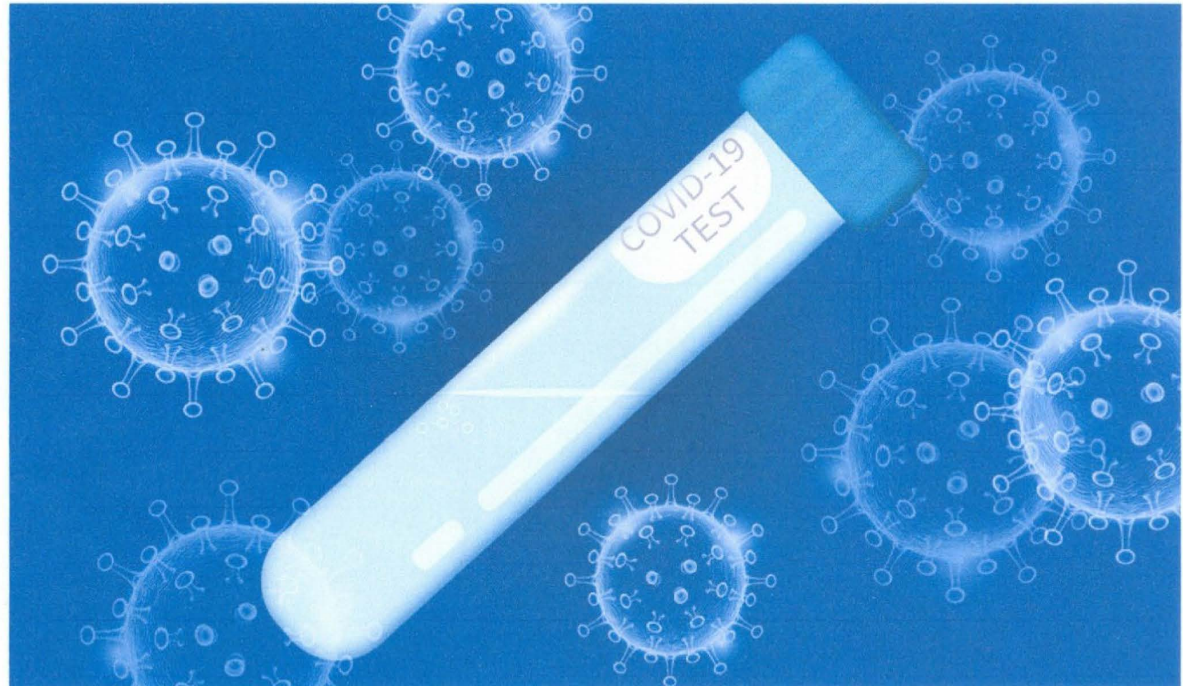
Standard COVID-19 tests sacrifice speed and low cost for accurate diagnosis. Faster, cheaper screening tests could catch and isolate infected people more quickly.

	Diagnostic	Screening
	RNA amplification	Antigen testing
Predominant type of test		
Sample collection	Swab	Swab or saliva
Turnaround time	Days	Minutes
Cost	\$\$\$	\$
Accuracy	High	Moderate
Frequency	Single tests	Multiple tests every week

YaleNews

Quick and affordable saliva-based COVID-19 test developed by Yale scientists receives FDA Emergency Use Authorization

By Michael Greenwood | AUGUST 15, 2020



3. CONTACT TRACING

- Purpose is to identify people exposed to virus, get them tested, and quarantined before they can spread it to others.
- For COVID-19, tracers usually try to identify contacts who have been within 6 feet of the individual for 15+ minutes.

- If contact tracing does not begin within a few days of the first person exposed, then it is a waste of time.
- If the community exposure rate is too high, it is a waste of time.
- If people called by the tracers refuse to provide information, it is a waste of time.

What, if any, role should employers play in the contact tracing of employees?

- Contact tracing is performed by trained employees of the state or local health department.
- These individuals are duty-bound to maintain the confidentiality of health information.
- Health departments have excellent records of maintaining confidentiality.

- But employers have valuable and unique expertise regarding individuals possibly exposed to the index case employee, including coworkers and customers.

My recommendation:

- Employers should work with the contact tracers of the Health Department and provide information about possible workplace exposures.
- Health Department contact tracers should make all the calls, including to family members and social contacts.

- Contact tracers should work with employers to provide exposed employees with timely, accurate, and discreet information, as well as information about testing and possible quarantine.

Notification of a Co-Worker's Positive Test?

- HIPAA does not apply
- OSHA does not require
- ADA prohibits ID of worker

Contact Tracing Is Not the End of the Road

- Logistical issues of quarantine
- Safe harbor protections
- Special needs populations
- Income replacement
- Healthcare issues

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