

THE CDC REVAMPS ITS RECOMMENDATIONS FOR SYMPTOMATIC EMPLOYEES, BUT EMPLOYERS MAY CONTINUE TO REQUIRE COVID-19 TESTING

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Throughout the COVID-19 pandemic, the Centers for Disease Control and Prevention (“CDC”) has maintained guidance on which employers were instructed to rely when permitting employees symptomatic of and/or diagnosed with COVID-19 to return to in-person work (“Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings”). Previously outlined were the symptom-based and test-based strategies. To satisfy the symptom-based strategy, an employee needed to evidence a resolution of symptoms and could only return if 10 days had passed since the onset of symptoms. To satisfy the test-based strategy, an employee needed to evidence a resolution of symptoms and could only return upon receipt of two negative COVID-19 tests, undergone at least 24 hours apart.

In a sudden shift, the CDC announced last week that it no longer recommends utilization of the test-based strategy unless it would allow a symptomatic/diagnosed individual to “discontinue isolation or other precautions earlier than would occur under the symptom-based strategy.” The CDC also edited the components of the symptom-based strategy.

The Option of COVID-19 Testing

The CDC refers to a “Decision Memo” to explain its new guidance. In short, the Decision Memo suggests that there are instances in which individuals will test positive well beyond their contagiousness, and, “These findings strengthen the justification for relying on a symptom-based, rather than test-based strategy for ending isolation of these patients, so that persons who are by current evidence no longer infectious are not kept unnecessarily isolated and excluded from work or other responsibilities.”

This justification does not prohibit the test-based strategy, and it insinuates that testing remains a more conservative approach to discontinuing isolation. Importantly, the Equal Employment Opportunity Commission continues to recognize COVID-19 testing as a medical examination employers are empowered to require.

Also at play is Executive Order 2020-145, which mandates that employers return symptomatic/diagnosed employees to work “after they are no longer infectious according to the latest guidelines from the [CDC,] and they are released from any quarantine or isolation by the local public health department.”

The CDC specifically permits the utilization of the test-based strategy if it returns an employee *earlier*, and, if otherwise utilized, the test-based strategy is *more restrictive* than the symptom-based strategy. This supports the conclusion that an employer who necessitates satisfaction of the test-based strategy is complying with Executive Order 2020-145.

Employers, therefore, still have the options of implementing the symptom-based and/or test-based strategies, but both need an update.

The New Strategy Components

In addition to its finding of general ineffectiveness of the test-based strategy, the CDC redefined the terms of the symptom-based strategy.

Now, employees who satisfy the symptom-based strategy must achieve the following conditions:

- At least 24 hours have passed since resolution of fever without the use of fever-reducing medications;
- Improvement in symptoms; **and**
- Sufficient time has passed since symptoms first appeared:
 - For moderate cases, at least 10 days have passed since symptoms first appeared;
 - For severe cases, at least 20 days have passed since symptoms first appeared.

The distinction between “moderate” and “severe” is unclear and implicates a medical assessment. Employees should present documentation from a health care provider, designating their COVID-19 symptoms as moderate or severe, thereby determining whether employees must wait 10 or 20 days after the onset of symptoms before returning to work.

Employees who satisfy the test-based strategy must achieve the following conditions:

- Resolution of fever without the use of fever-reducing medications;
- Improvement in symptoms; **and**
- Two consecutive negative results from COVID-19 tests conducted at least 24 hours apart and in accordance with a form of testing approved by the FDA and CDC.

The CDC’s new guidance creates much more nuance in the determination of employers’ return-to-work requirements. Contact any member of **Bodman’s Workplace Law Group** to discuss the implementation and/or modification of your requirements. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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