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MEMORANDUM

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Re: COVID-19 Update: CDC Issues Testing Strategy for COVID-19 in High-Density Critical Infrastructure Workplaces after a COVID-19 Case is Identified

The Centers for Disease Control and Prevention (CDC) has issued a guidance document titled *Testing Strategy for COVID-19 in High-Density Critical Infrastructure Workplaces after a COVID-19 Case is Identified* (the Guidance), which describes different testing strategy options for exposed employees when companies determine testing is needed to help support existing disease control measures.¹ As part of the Guidance, CDC issued a decision tree to assist with determining optional testing strategies.² CDC specifically notes that outbreaks of illness among workers in food-producing facilities and surrounding communities have raised “unique questions that identified the need for testing” to supplement existing CDC recommendations. CDC explains the Guidance is intended to supplement and augment existing guidance with the goal of reducing transmission of SARS-COV-2 in the workplace.³

The Guidance notes that workers in high-density settings in which workers are in the workplace for long time periods (e.g., for 8-12 hours per shift), and have prolonged close contact (within 6 feet for 15 minutes or more) may be at increased risk for exposure to COVID-19. There are other distinctive factors that CDC believes may increase risk for transmission among these workers.⁴ Based on the risks of these settings, employers and public health organizations may choose to conduct testing of

¹ Testing Strategy for Coronavirus (COVID-19) in High-Density Critical Infrastructure Workplaces after a COVID-19 Case Is Identified (last reviewed June 13, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/worker-safety-support/hd-testing.html>.

² CDC Guidance Decision Tree Tool, available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/Testing-Strat-flow-diagram.pdf>; see also Appendix 1.

³ This memorandum is offered for general information and educational purposes. It is not offered as, intended as, and does not constitute legal advice. It is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

⁴ Examples include: sharing transportation such as ride-share vans or shuttle vehicles, car-pools, and public transportation; frequent contact with fellow workers in community settings in areas where there is ongoing community transmission; and shared or congregate housing such as dormitories.

the greater worker population. The Guidance is intended to provide strategies and approaches to testing schemes for different tiers of workers depending on risk of potential exposure. Importantly, it does not identify specific scenarios in which CDC necessarily recommends that testing be used.

CDC indicates that viral (nucleic acid or antigen) testing should be used to diagnose acute infection. While two kinds of tests are currently available for COVID-19 (viral tests to detect current infections, and antibody tests to identify previous infections), CDC notes that antibody test results should not be used to diagnose someone with an active infection.

Considerations for Use of a Testing Strategy for COVID-19 Infection

CDC identifies six key considerations for testing strategies, summarized below. These strategies are also presented by CDC as a decision tree tool in Appendix 1.

1. **Specific Action Plan.** Testing strategies should only be implemented if results will lead to specific actions, e.g., when a confirmed case of COVID-19 is identified, interviewing and testing potentially exposed co-workers should occur as soon as possible to reduce the risk of further workplace transmission.
2. **Develop Comprehensive Approaches.** Employees that test positive should be excluded from work and isolated at home, and CDC's recommendations extend beyond the workplace. For example, CDC recommends considering exposure and complications of living in close quarters or in households with larger or extended families, and CDC raises the possibility of directing some individuals to alternative housing in coordination with local or state public health authorities. Decisions to allow employees to return to work may follow either symptom-based or testing-based strategies in accordance with existing CDC recommendations for discontinuing isolation.
3. **Tiered Testing Approach.** CDC recommends a risk-based approach if testing employees in response to a confirmed positive employee, taking into consideration the likelihood of exposure based on the specific facility, operations, layout, and contact (among other factors). CDC divides employees into three tiers based on the likelihood of exposure to the confirmed positive employee. CDC also notes that high rates of transmission in the facility or community may prompt companies to test more broadly. If test results from any tiers indicate infection among workers, testing may need to be expanded accordingly. CDC uses this same tiered approach for recommendations for managing workers' return to the workplace (discussed in the next section). CDC recommends using this same tiered approach if contact tracing identifies other positive workers.
 - **Tier 1 (highest priority for testing of exposed workers).** Tier 1 workers are those workers determined to have had close contacts with the sick employee, and workers on the same or overlapping shift or working in the same area as the sick employee, based on the company's assessment of risk factors such as room size and layout and other controls in place. CDC recommends considering exposures beginning 2 days before the individual with COVID-19 became symptomatic (or, for asymptomatic workers, 2 days prior to specimen collection) up through the time the sick employee is isolated.
 - **Tier 2 (next highest priority for testing).** This testing cohort includes workers on the same shift, but in a different area of the facility or operation who may have had exposure to a confirmed positive worker. CDC notes that it may be appropriate to simultaneously implement Tier 1 and Tier 2 depending on the nature of the facility, e.g., testing all exposed workers on the same shift as the worker(s) with confirmed COVID-19 regardless of location in the facility.

- Tier 3 (testing of other workers). This includes workers who share a common space like a break room or rest room, or if there is overlap in work time from back-to-back shifts, and therefore exposure cannot be definitively ruled out.

4. **Return to Work and Continued Testing.** CDC advises companies to anticipate that wide scale testing may identify infected employees, including potentially asymptomatic employees, and have plans to address potential staffing needs caused by isolating positive individuals. CDC identifies several potential strategies for handling exposed employees, with an emphasis on Tier 1 workers. CDC also reinforces its earlier guidance focused on critical infrastructure employees, which identifies situations in which CDC advises those employees may continue reporting to work provided they remain asymptomatic and follow certain protocols. For all strategies discussed, CDC indicates that waiting for test results prior to returning to work is preferred to keep infected workers out of the workplace.

- Tier 1 Workers. CDC identifies three different strategies for handling potentially exposed but asymptomatic Tier 1 workers, each of which entails differing levels of risk. In selecting a strategy, CDC recommends considering which one appropriately balances maintaining operations with worker safety. Under all strategies, workers testing positive or who become symptomatic during quarantine or after returning from work should be excluded from the workplace.

Strategy 1: This umbrella-approach strategy excludes all exposed workers from work and quarantines them for 14 days even if their baseline test results are negative. This strategy excludes all Tier 1 workers who are exposed and may become infected, limiting infection of others in the workplace.

Strategy 2: This provides a test-based option to allow Tier 1 employees to return to work earlier than 14 days after exposure. Workers who remain asymptomatic and have negative tests at baseline and Day 3 can return to work and should continue to be tested every 3 days after returning to work until there are no more new cases in the worker cohort.⁵

Strategy 3: CDC recommends this strategy be considered only during critical staffing shortages. To facilitate early return to work, asymptomatic workers may return to work after a negative baseline test is obtained, or while results are pending, provided other protections outlined in CDC's guidance for critical infrastructure workers are in place.⁶ Workers should continue to be tested every 3 days until there are no more new cases.

- Tier 2 and 3 Workers. For Tier 2 and 3 workers, screening for symptoms should continue, baseline testing can be considered based on risk and exposure, and workers can continue to work provided they remain asymptomatic and, if tested, receive a negative test result.

5. **Confidentiality and Privacy Considerations.** The organizations performing the testing may vary among jurisdictions and may include the public health department, an employee health

⁵ CDC notes that strategies involving serial testing are more likely to identify infected workers than testing at a single point in time.

⁶ CDC Coronavirus Disease 2019 (COVID-19), Interim Guidance: Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 (last reviewed April 20, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>.

clinic, a healthcare provider engaged by the employer, or local health care facilities. Privacy and confidentiality should be consistent with applicable laws and regulations. Contact tracing, testing, and symptom screening should be conducted in a manner that protects confidentiality and privacy of employees to the degree possible. The Guidance advises that because the Occupational Safety and Health Administration (OSHA) Access to Employee Exposure and Medical Records standard requires that covered employers retain medical records for the duration of employment plus 30 years, employers should consider the burdens and benefits of documenting individually identifiable results of entry screenings. In addition, the Guidance notes that healthcare providers who test workers for COVID-19 should notify employers of tested workers' fitness for duty, workplace restrictions (e.g., restrictions on ability to enter the worksite, limitation to telework, etc.), and the need for contact tracing of other workers deemed to be in close contact, even if this might allow employers to surmise that employees might have COVID-19. However, providers should not share employees' test results or diagnoses with employers without employees' permission, even though at entry screening, employers may ask all employees who will be physically entering the workplace if they have COVID-19, or symptoms associated with COVID-19, or ask if they have been tested for SARS-CoV-2. Providers should report and explain test results to workers and notify the state, territorial, tribal, or local health department of cases in a timely fashion. When employers become aware of cases, the Recording and Reporting Occupational Injuries and Illnesses standard⁷ may require certain employers to keep a record of serious work related injuries and illnesses including work related COVID-19.⁸

6. **Leave Policies.** CDC recommends that employers review their sick leave policies to ensure they are flexible and consistent with public health guidance and that employees are aware of and understand these policies. Employers may wish to draft flexible leave policies depending on scenarios presented, e.g., caring for sick family members, leave due to childcare and school closures.

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We will continue to monitor the federal government's response to COVID-19. Should you have any questions or if we can be of assistance with your COVID-19 response strategy, please do not hesitate to contact us.

⁷ See 29 CFR Part 1904.

⁸ See, *generally*, OSHA Injury and Illness Recordkeeping and Reporting Requirements, available at <https://www.osha.gov/recordkeeping/>.

Appendix 1 – CDC Guidance Decision Tree Tool

Testing Strategy for Coronavirus (COVID-19) in High-Density Critical Infrastructure Workplaces after a COVID-19 Case is Identified

The testing strategy outlined above is an optional one designed to augment existing guidance and measures to reduce transmission in the workplace

Testing and contact tracing should only be implemented if results will lead to specific actions. When symptom screening and subsequent testing identify a confirmed case of COVID-19, interviewing and testing potentially exposed co-workers should occur as soon as possible. Based on the likelihood of exposure, characteristics of the workplace, and results of contact investigations, a progressive tiered approach to testing these co-workers may be applied. In selecting a strategy, employers should consider which strategy appropriately balances maintaining operations with worker safety.

