SAFER

Safe Actions For Employee Returns

Workplace contact tracing for COVID-19

Background on contact tracing

In the case of infectious disease or viruses, contact tracing is a process to identify potentially exposed (and therefore potentially infected) individuals, inform them of their potential exposure, and help them take appropriate action to protect their health and prevent further transmission. Contact tracing is a core disease control measure that has been employed by local and state health department personnel for decades. Contact tracing has been used to control outbreaks of other communicable diseases like tuberculosis, measles, and Ebola.[1]

From what we know of COVID-19 and its incubation period, the main course of action for potentially exposed individuals identified through contact tracing is to self-quarantine for 14 days after the date of last known exposure to COVID-19. Contact tracing is a key tool in reducing transmission seeing as both pre-symptomatic (infection detected before symptoms begin) and asymptomatic (infection detected but symptoms never develop) individuals are able to transmit the virus to others.[2]

[1] https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/principles-contact-tracing-booklet.pdf

[2] Furukawa NW, Brooks JT, Sobel J. Evidence supporting transmission of severe acute respiratory syndrome coronavirus 2 while presymptomatic or asymptomatic. Emerg Infect Dis. 2020 Jul. https://doi.org/10.3201/eid2607.201595

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The Centers for Disease Control and Prevention (CDC) outlines certain core principles of contact tracing must always be adhered to:[3]

- Public health staff work with a patient to help them recall everyone with whom they have had close contact during the timeframe while they may have been infectious.
- Public health staff then warn these exposed individuals (contacts) of their potential exposure as rapidly and sensitively as possible.
- Contacts are only informed that they may have been exposed to a patient with the infection. To protect patient privacy, they are not told the identity of the patient who may have exposed them.
- Contacts are provided with education, information, and support to understand their risk, including what they should do to separate themselves from others who are not exposed, how to monitor themselves for illness, and the possibility that they could spread the infection to others even if they themselves do not feel ill.
- Contacts are encouraged to stay home and maintain physical distance from others (at least 6 feet) until 14 days after their last exposure, in case they also become ill. They should monitor themselves by checking their temperature twice daily and watching for cough or shortness of breath. To the extent possible, public health staff should check in with contacts to make sure they are self-monitoring and have not developed symptoms. Contacts who develop symptoms should promptly isolate themselves and notify public health staff. They should be promptly evaluated for infection and for the need for medical care.

Contact tracing cases of COVID-19 is particularly challenging because it is spreading widely in the U.S. and around the world. A report by Johns Hopkins and the Association of State and Territorial Health Officials (ASHTO) estimates the U.S. will need to add approximately 100,000 (paid or volunteer) contact tracers to assist with this unprecedented, large-scale effort.[4]

Contact tracing technology

To enable widespread contact tracing, several apps are currently in development or have already been launched. For example, Google and Apple are partnering on COVID-19 contact tracing technology.[5] In the United Kingdom, the National Health Service is developing a contact tracing app.[6] Some of these apps use the GPS location data from a smartphone or require a worker to wear a device that tracks movements while on the employer's premises, allowing employers to know where employees are at all times while at work. If a worker becomes sick, the employer can quickly identify with whom the worker came in contact, and which physical locations need to be sanitized.[7]

[3] https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/principles-contact-tracing-booklet.pdf
[4] https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/200410-national-plan-to-contact-tracing.pdf
[5] https://www.blog.google/inside-google/company-announcements/apple-and-google-partner-covid-19-contact-tracing-technology/
[6] https://www.hsj.co.uk/free-for-non-subscribers/nhs-developing-coronavirus-contact-tracking-app/7027163.article, quoted in: https://preprints.jmir.org/preprint/19359
[7] https://www.bytebacklaw.com/2020/04/u-s-privacy-law-implications-for-employers-considering-employee-contact-tracing-apps/

A review from the Johns Hopkins Bloomberg School of Public Health Center for Health Security in April 2020 identified three additional efforts to develop mobile applications to assist with contact tracing:[8]

- COVID-19 Watch[9] from Stanford University uses Bluetooth signaling to detect other users in the area and will alert users anonymously if they were in contact with someone who was confirmed to be infected with COVID-19.
- CoEpi: Community Epidemiology in Action,[10] a voluntary, Bluetooth-based contact tracing application that includes self-reported symptom sharing to support exposure notification even before confirmation of test results.
- Private Kit: Safe Paths,[11] developed by the Massachusetts Institute of Technology. This app can be integrated into Safe Places, which collects time-stamped location data using Private Kit: Safe Paths data, Google locator history, and individual interviews conducted by health departments.

Additional efforts to produce app-based symptom tracking and contact tracing include:

- How We Feel,[12] an app which lets users self-report age, gender, zip code, and any health symptoms they're experiencing. The app is designed to allow scientists and doctors to use the data to better understand how the virus is spreading.
- COVID Symptom Study,[13] an app in which users report their current health conditions and status to help researchers conduct a model able to predict COVID-19 cases based solely on symptoms.

Some safety software companies like Scatterling® have added contact tracing features to their existing software solutions and do not require external devices. Employees can use their GPS-enabled smartphones to keep track of others they come into contact with during the course of the day and alert them if they come within 6 feet of distance of each other. Because of the way data is generated in the apps, employers may be able to track compliance with physical distancing guidelines in real time, which poses questions and issues of privacy for how user consent is obtained and data is used and stored.[14] These issues and others are addressed in the next section.

[8] List retrieved from: https://www.centerforhealthsecurity.org/resources/COVID-19/COVID-19-fact-sheets/200408-contact-tracing-factsheet.pdf
[9] https://www.covid-watch.org/article
[10] https://www.coepi.org/
[11] https://www.media.mit.edu/projects/safepaths/overview/
[12] https://howwefeel.org/
[13] https://covid.joinzoe.com/us
[14] https://ohsonline.com/Articles/2020/05/28/Is-Contact-Tracing-the-Right-Tool-for-Your-Company-to-Help-Combat-COVID19-Spread.aspx?m=1&Page=1#gsc.tab=0

Potential challenges of employer role in contact tracing

For most Americans, the workplace is where they have the most social interaction, and therefore the most potential exposure to the coronavirus. While employers should take recommended action to prevent transmission of the virus as much as possible, they can also play a productive role in stopping the spread by identifying infected employees and tracking any contacts they may have had while on the job and sharing this information with public health officials, who are primarily responsible for tracing contacts in the community. In so doing, employers can help stop the spread of coronavirus in their workplaces and communities. In line with the White House Guidelines for Reopening America, "employers should develop and implement policies and procedures for workforce contact tracing."[15]

There are, however, many potential challenges in involving employers in contact tracing, regardless of the method used. For one, many Americans have concerns about using mobile phone-based contact tracking. A poll conducted from May 8-11 found that "only about a third of Americans say they are likely to opt-in to cell phone based contact tracing systems established by the federal government (31%), major tech companies (33%), or cell phone companies (35%). A bare majority (51%) would join a CDC sponsored cell phone-based system."[16] Additionally, there are concerns that contact tracing apps could violate privacy and civil liberties, be illegally used to harvest data, and have data held for longer than needed, even after the pandemic is over.

Employers also need to navigate regulatory challenges and should be free to choose from a variety of technology based and non-technology based alternatives. Some workplace settings may not allow the use of technology. For example, secure rooms do not allow transmitting devices to be used within these rooms, and employees who spend time in these types of facilities need non-technology options.

Governments around the world have issued more than 60 directives regarding protecting data privacy while responding to the COVID-19 pandemic.[17] Any data collection methodology can be hacked, and employers must also be aware that contact-tracing apps could be collecting personal information that is potentially subject to state breach notification laws.[18] Although these laws differ, they generally require entities to notify individuals if there is unauthorized acquisition of personal information. Some of these laws cover medical information and/or biometric information.[19]

CDC, in its guidance in suspected or confirmed COVID-19 cases says: "employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA)." Contact tracing apps, collecting only the data required to know which other employees were exposed to the infected employee, can help employers ensure they inform everyone who may have been exposed.

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[15] https://www.whitehouse.gov/openingamerica/ Guidelines for All Phases – Employers
[16] Axios-Ipsos Coronavirus Index, May 12, 2020. https://www.ipsos.com/en-us/news-polls/axios-ipsos-coronavirus-index. With CDC part of the federal government, it is unknown why a majority of people would support a CDC sponsored system when only 31% supported a system enacted by the federal government.
[17] https://www.pwc.com/us/en/library/covid-19/global-privacy-impact-assessment.html
[18] https://www.bytebacklaw.com/2020/04/u-s-privacy-law-implications-for-employers-considering-employee-contact-tracing-apps/
[19] Ibid

Employers face a number of legal questions to consider when using contact-tracing apps, including:

- **Information sharing.** Employers should rely on data generated through testing conducted by their medical providers in response to entry screening and other testing scenarios, information from public health departments conducting their own contact tracing investigations, and employees self-reporting positive cases of COVID-19. Contact tracing apps should be used for the sole purpose of notifying other employees of possible exposure and to institute sanitation protocols.
- **Authority to mandate app use on personal smart phones:** Employers will also face challenges mandating the use of any app for contact tracing on employees' personal mobile devices without federal or state authority. This authority could be issued for the purpose of occupational safety, and would need to be confirmed by the Department of Health and Human Services (HHS) through HIPAA regulations to provide for employee consent to share medical information, if the app is collecting that. In addition, some state laws (i.e., California Consumer Privacy Act) may need review and adjusting. (If the app is not collecting medical information, this authority would not apply.) To mandate app use, employers would need federal or state authority that would allow an employer to remove from the workplace any employee who refuses to download a contact tracing app, and protect the employer from legal liability.
- **Authority to use information provided by the app:** Employers would need guidance from the Equal Opportunity Employment Commission (EEOC), consistent with the current EEOC guidance, to use the information provided by the app to remove employees from the workplace based on close contact reported by the app without the potential of liability from discrimination laws, including specifically the ADA. Currently, the EEOC states that:

  > EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.[20]

- **Labor Relations:** Under the National Labor Relations Act, employers are required to bargain with their unions regarding employee surveillance devices. There are other "conditions of employment" that arise regarding mandating use of contact tracing apps that will need negotiation absent specific guidance from the National Labor Relations Board.
- **Reimbursement of Cost:** Determining the cost of using the app will be difficult, at best, for employers when considering how to reimburse the employee for the cost of the app, if any, and the cost of using the app. Some states require that employees be reimbursed for required business use of their personal equipment, and employers in those states could be required to pay for a portion of the employee's mobile phone bill, for example.
- **Federal Authorization:** Employers currently must contend with differing requirements across state, county and city lines. This burden is significant for employers with multi-state operations. To implement successfully a contact tracing app across a multi-state workforce, employers will require any federal authority issued supersedes city, county and state laws, regulations and ordinances that would limit or prohibit the use of an employer mandated contact tracing app.

[20] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

- **Fair Credit Reporting Act (FCRA):** The FCRA requires employers meet certain notification requirements before taking action based on certain information collected, aggregated and reported by third-parties. If employers were required to comply with the FCRA notice requirements before taking action on information provided by the contract tracing app, it would defeat the purpose of the app. Federal guidance is needed to clarify the FCRA and similar state laws do not apply to the information collected and provided through third-party apps for the purpose of symptom checking and contact tracing.

NSC recommendations for employer contact tracing

Even with these hurdles to overcome, NSC still believes that there is opportunity for employers to help public health authorities to the extent possible with their contact tracing efforts.

If an employee is known to test positive for COVID-19, employers, usually through their medical providers, should immediately notify their local public health authorities of the positive COVID-19 diagnosis. Working with local public health authorities, employers should use contract tracing methods, which may include technology or non-technology related methods, to determine other employees, contractors, vendors, and customers that the employee came into contact with during their infection period while in the workplace. Working with public health authorities, employers should immediately notify other employees, vendors and/or customers that they may have come in contact with an individual who tests positive or is presumed to have COVID-19. Employers should also be flexible in allowing employees who were exposed to the sick individual (identified through contact tracing or other methods) to remove themselves from the workplace and self-quarantine for the recommended 14 day period.

To protect employee privacy, employers should utilize methods that provide the maximum amount of protection for employee data and should only use that data to share with public health officials and others who may have come in contact with the employee after a confirmed COVID-19 case. If utilizing technology for this purpose, employers should seek out apps that keep geolocation data anonymous and encrypted and should put in place systems and policies to assure data is automatically deleted after it is no longer relevant to the purpose for which it is gathered. Employer privacy policies will need to be updated to reflect both the types of data gathered, the employer's use of the data, how employees can expect it will be used and shared, and when it will be deleted.

If utilizing technology for tracing, employers should also seek employee buy-in for device-based contact tracing through communications and other strategies. According to a report by PwC, "Employers may not need to take a mandatory approach to achieve that objective if they can win over their employees with clear and frequent communications about how it all works, appealing to the worker's interest in helping to make the workplace safe and productive for everyone."[21] NSC recommends that public health agencies in the U.S. develop communication tools targeted for employers to support the need for contact tracing.

[21] https://www.pwc.com/us/en/library/covid-19/global-privacy-impact-assessment.html