What if COVID-19 Strikes My Employees or Guests?

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Roadmap

1. Keeping Workplace / Public Accommodation Safe, and Proving you Took all Reasonable Steps to Do So
2. When Someone Contracts COVID-19
3. Enforcing the rules
4. When Employees Are Unable to Work for Illness and Other Reasons
5. Liability
Keeping Workplace / Public Accommodation Safe
Critical Steps for Hospitality Businesses

1. Create an Infectious Disease Preparedness & Response Plan
2. Populate plan with Maine’s specific eating or lodging establishment checklist requirements
3. Train (and retrain) your employees
4. Communicate expectations with guests
5. Document what you’ve done
Why You Need an Infectious Disease Preparedness and Response Plan

• Most important step employers can take to create workplace safe from COVID-19

• Create under OSHA’s framework (see recent Guidance on Preparing Workforces for COVID-19 - Publication 3990-03)

• Other resources:
  • Updated Guidance from OSHA – 4045-06
  • CDC guidelines for COVID-19
  • OSHA guidance for safety & health plans generally: https://www.osha.gov/shpguidelines/
  • Specific checklists on DECD website
OSHA’s Role

- Occupational Safety and Health Act regulates employee safety in most of the private sector.
- General Duty Clause governs the COVID-19 and other pandemic situations
- Compliance with OSHA’s Guidance on COVID-19 is key in managing legal risk
- OSHA is only agency with authority to investigate and seek penalties
- When employees complain, they call OSHA
Role of State Orders

- March 15 Emergency Declaration, followed by 40 Executive Orders
- EO 55 makes checklist compliance an condition of operation for ME businesses
- Highly detailed checklists for hospitality
- Go through checklist(s), flag ones you are doing or could be doing, include them in written Plan, by reference if not written out
Communication

• Minimize risk of infection
• Reduce liability risk
• Reinforce culture of compliance - management sets tone
• Tell employees what and why
• Locate simple summaries of protocols where they occur
• Multiple means of access for employees
• Communicate changed circumstances swiftly
• Build trust – Employees, Customers, Visitors
• Be transparent with customers/public
• Encourage reporting of concerns
• Make someone accountable for responding
When An Employee or Guest Contracts COVID-19
When Someone Contracts COVID-19 or Is Experiencing Symptoms

• Immediately separate employee or guest with COVID-19 symptoms, sending them home / to their room, or to healthcare facility if symptoms are severe.

• Close off and disinfect areas used by infected individual.
  • Repeat no sooner than 24 hours later.

• Ascertain the individuals with whom the infected individual had close contact at work.
When Can Employee Who Tests Positive or Has Symptoms Return?

(1) At least 10 days have passed since first began experiencing symptoms (or received positive test if no symptoms);
(2) no fever for 3 days (without meds); and
(3) if other symptoms, they have been improving for at least 3 days.

(1) No fever (without meds);
(2) other symptoms (if any) have improved; and
(3) two separate COVID-19 laboratory tests, administered at least 24 hours apart.
What About Others Who Had Contact?

Within 6 feet + For 15 minutes or more = Close contact
Tracing and Notifying in Event of Positive Test

- Maine CDC is notified of all positive results by lab.
- Maine CDC initiates contact tracing, instructing those who have had close contact to self quarantine.
- We recommend that employers also notify employees known to have close contact in the workplace, without disclosing infected individual’s identity.
- Consider a broader communication addressing additional steps (e.g. sanitation) undertaken, to alleviate concern.
CDC’s Recommended Steps for Close Contacts

• 2 week self-quarantine (from date of last close contact) for all who have had close contact with an individual who has tested positive.
  • Because of unknown lag time between exposure and positive test, it is Maine CDC’s position that a negative test result will not support forgoing or shortening the 2 week quarantine.

• No recommendations for close contacts of an individual who has been asked to self-isolate because experiencing symptoms, but who has not been tested.
Close Contact Outside the Workplace

- Workers who live together, car pool, socialize outside of work will likely have had close contact outside the workplace and be asked to quarantine.

- To the extent workforce is made up of people with these out-of-work relationships, preventing close contact is largely outside the employer’s knowledge or control.

- Vacations to hot spots?
Testing

• On Wednesday, Mills Administration announced 20 “swab and send” testing sites.
• Available to hospitality workers who “could have been exposed,” without the need for a physician test order.
• Reports are that timing of results is variable, from a couple of days to more than a week.
Required Notifications by Employees

Employees should be directed to notify employer within 24 hours if:

• They are experiencing symptoms;
• They test positive;
• They have had close contact with someone who has tested positive or have otherwise been advised by the Maine CDC to self quarantine.
Enforcing the Rules
Enforcing the Rules - Employees

• Do not let failure to follow protocols go
• If unintentional, coach but be firm
• If intentional, you have to discipline
• If intentional by managers you have to discipline more
• First actions will set critical precedent
• Do not discriminate
• If you don’t, increase risk
  • Infection
  • Liability
Enforcing the Rules - Guests

• Differences
  – Paying customers
  – Won’t be there forever
  – Maybe no one will notice
  – Risk is probably low

• Similarities
  – Still setting example
  – Non-enforcement invites non-compliance
  – Requires more diplomacy
You Are Now the Mask Police

• EO 2 FY 20/21 requires certain businesses to “implement measures requiring customers to wear face coverings.”
• Includes all restaurants and lodgings
• In all coastal counties except Washington
• Also Lewiston, Auburn, Augusta, Bangor, Brewer
• Policy in area covered by order has to be: 
  no mask=no service
How Do You Enforce the Mask Rule

• EO says to “implement measures” - how far does it intend you to go?
• “Such measures may, for example, include denial of entry or service” is not much help
• Should you:
  – Put up a sign?
  – Ask nicely and back off?
  – Refuse service to the unmasked?
  – Call police if they won’t leave?
De-escalating Tense Situations

- Be calm, don’t escalate emotionality of others
- Ask disarming questions
  - How are you?
  - How is your meal/service/etc.
- Commiserate a bit – masks can be a pain
- Remind it’s not at the table, only to and from
- Be clear why your business has no choice but to follow the mask requirement
- Staff only doing what business requires
Restaurants: Make Masks the New Neckties

• Establishments that require ties keep some on hand for guests who don’t have one
• Do the same with masks:
  – provide them to guests won’t or say they can’t
Hotels: Make a Virtue of Necessity

• Preempt disputes, tell your guests *before* they arrive
• “Masks required – and provided!”
• “Need a mask? We provide them!”
• “Masks – you need ‘em, we have ‘em”
• “First one is on the house!”
• My favorite: “We got you covered!”
• Far better than ugly confrontation
When Employees Are Unable to Work
Reasons Employees May be Unable to Work

- COVID-19 positive / symptoms
- Vulnerable to complications from COVID-19
- Family member vulnerable
- No child care
- Close contact / asked to self quarantine
- Fear / anxiety
Unemployment
Layered Leave Obligations

- Extreme Public Health Emergency Leave – Maine
- Families First Coronavirus Relief Act (FFCRA)
- Family and Medical Leave Act (FMLA)
- Americans with Disabilities Act (ADA) / Maine Human Rights Act (MHRA)
Extreme Public Health Emergency Leave

Statute requires “reasonable and necessary” leave, with or without pay if needed:

• Because employee is under investigation, supervision or treatment;
• Employee is acting in accordance with an extreme public health emergency order;
• Employee is in quarantine or isolation;
• Employer has asked employee not to work to avoid exposing others;
• Employee is needed to provide care or assistance to spouse, domestic partner, parent, or child.
Exceptions to Public Health Emergency Leave

• Undue hardship, including need to downsize.

• Employee fails to communicate need for leave within a reasonable time.

• Public employee’s services are necessary to protect public’s health and safety.
Families First Coronavirus Response Act (FFCRA)

- Effective April 1, 2020
- Applies to employers with fewer than 500 employees
- Provides up to 2 weeks of Emergency Paid Sick Leave (at full or 2/3 pay, depending on reason for leave, with caps)
- Expands the FMLA to cover individual who is unable to work because caring for a child whose school / child care is closed due to COVID-19 (with 2/3 pay, subject to cap).
- Amounts paid pursuant to FFCRA are reimbursed through a payroll tax credit.
Emergency Paid Sick Leave – Qualifying Reasons

- Employee subject to a government isolation or quarantine order;
- Employee has been advised by a health care provider (HCP) to self-quarantine;
- Employee is experiencing symptoms and is seeking diagnosis;
- Employee is caring for an individual subject to a government order or who has been advised by a HCP to self quarantine;
- Employee is caring for child whose school / child care has closed;
- Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services (none yet exist).
Emergency Paid Sick Leave – Amount of Leave

• Full time employees (those scheduled to work at least 40 hours per week) - 80 hours.

• Part time employees - leave equal to the number of hours they are normally scheduled to work over 2 workweeks
  • If erratic, calculate average daily hours over past 6 months (or length of employment if shorter).
Emergency Paid Sick Leave – Amount of Pay

- If taken for self (reasons 1-3), hours paid at regular rate, but capped at $511 per day ($5,110 in the aggregate).
- If taken to care for another (reasons 4-6), hours paid at 2/3 regular rate, but capped at $200 per day ($2,000 in the aggregate).
- “Regular rate” – compute looking at six month period leading up to leave, or employee’s entire employment (whichever is shorter).
  - Note rules around calculating regular rate for tipped employees and need to include service charges and non-discretionary bonuses.
Expanded FMLA

• Available for 1 reason only: To care for a child whose school / child care is closed due to COVID-19
• Notwithstanding normal FMLA eligibility rules, employee eligible if on payroll for the 30 calendar days before leave
  • Note if employee laid off on or after 3/1/20 and rehired before 12/31/20, they qualify.
• First 10 days unpaid (employee will get Paid Sick Leave if not already used), remainder paid at 2/3 regular rate.
• FMLA leave already taken will reduce amount to which employee is entitled under Expanded FMLA.
Small Business Exception

• Employers with fewer than 50 employees may be exempt from child-care-related leave if an authorized officer of the business has determined and documented:
  • Providing the leave would cause expenses / obligations to exceed available business revenues and cause business to stop operating, even at minimal capacity;
  • Absence of employees on leave would entail a substantial risk to business’s financial health because of their specialized skills, business knowledge or responsibilities;
  • There are insufficient workers able to provide the services that are needed for the business to operate at a minimal capacity.
Posting Requirements

• All covered employers (even those qualifying for small business exception) must:
  • Post poster / notice in physical workplace (if open);
  • Mail / email it; or
  • Post it on the employer’s website.
• Notice available at www.dol.gov/whd.
• Need not post in any language but English.
FFCRA Tax Credits

• Employers will be reimbursed for the cost of providing paid sick leave and expanded FMLA—including qualified health plan expenses and employer’s share of Medicare tax—through tax credits.
  • Amounts not required to be paid presumably will not be credited.
• Employers may hold back FICA payroll taxes on all wages and compensation paid to all employees, until they are reimbursed.
• If the credit exceeds the offset taxes, employer will be refunded the difference.
Liability
Am I Liable if Someone Gets Sick?

• It depends
• Fact-specific
• Two categories of people
  • Employees
  • Everyone else
    – Guests
    – Vendors
    – Visitors
Employees – Workers Comp

- Workers compensation covers employees who contract COVID-19 at work
- Employee has to show connection to work
- Employee does not have to show fault
Everyone Else - Negligence

- **Duty of care** – hospitality establishments owe a duty of reasonable care to guests for reasonably foreseeable harm.
- **Breach** – failure to exercise ordinary care to protect guests from the foreseeable risk of COVID infection.
- **Causation** – the failure caused the infection.
- **Harm** – the guest suffered actual loss or damage from the infection.
Guests

• Greater duty of care
• Encouraging them to come to your business
• Taking their money
• Foreseeable that inviting public creates risk of COVID transmission
• Must use reasonable care to prevent spread
Others

• Not encouraging them to come to your business
• Not taking their money – they are coming for yours
• Still foreseeable that inviting public creates risk of COVID transmission
• Still a duty of care
• But extent of effort to prevent spread probably not as great
• Doing enough for guests≈doing enough
What is Reasonable Care?

• Every prevention & mitigation step you are already taking:
  • Following OSHA guidance
  • Following State checklist
  • Enforcing masks
  • Enforcing tests/quarantines
  • Anything idiosyncratic to your premises
  • Clear notice and repeated reinforcement
  • Consistent enforcement of rules & protocols for employees and guests

• Documentation to prove you did it
Insurance Coverage

• Check your policies for any exclusions for disease or pandemics
• Especially check at your next renewal
• Business interruption probably has one
• Liability coverage is what matters for covering claims by guests
Liability Waivers?

• What message are you trying to send?
• Do you ask guests to waive food poisoning claims?
• Slip & fall claims?
• Waivers make sense in certain contexts
• Doubtful for hospitality guests
THANK YOU!
Presenters

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