

# 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



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# **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?



# 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.

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# 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

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# **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  $\frac{2}{3}$  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](http://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.

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# 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



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THANK YOU!

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