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Some Health Care Employees Are Working Despite Having COVID. Could Other Industries Follow Suit?

"If a patient hears that their nurse has tested positive that morning, the patient may be uncomfortable," said Abigail Kagan, a McDermott Will & Emery associate.

By Jessica Mach | January 14, 2022



Strapped for workers amid the omicron surge, some employers, especially in the battered health care sector, are trying to cope by relaxing COVID-19 safety measures—with some bringing employees back to work even if they test positive for the virus.

Those moves—fueled by new Centers for Disease Control and Prevention guidance and early reports that omicron causes milder symptoms than previous COVID variants—could signal a turning point in how employers deal with COVID safety moving forward, employment lawyers say—especially if employers continue to wrestle with both worker scarcity and surges in consumer demand.

“If a patient hears that their nurse has tested positive that morning, the patient may be uncomfortable,” said Abigail Kagan, an associate at McDermott Will & Emery.

“On the other hand, if it’s the difference between having no nurse, or having a nurse that medical authorities in the U.S. seem to believe is not going to be contagious anymore, that’s something that employers have to think about ... taking all of the medical information into consideration.”

In late December, as omicron spread rapidly across the country, the CDC made a number of updates to its COVID guidance. One, a contingency plan (<https://www.cdc.gov/coronavirus/2019-ncov/hcp/mitigating-staff-shortages.html>) for health care facilities facing critical staffing shortages, allowed workers who have tested positive for COVID to report to work if they “are well enough and willing” to do so.

In the weeks that followed, public health agencies in some states, including California (<https://www.latimes.com/california/story/2022-01-12/california-to-covid-positive-healthcare-workers-keep-working>) and Rhode Island (<https://www.providencejournal.com/story/news/politics/2022/01/01/rhode-island-healthcare-workers-covid-positive-permitted-facility-staffing-crisis/9066882002/>), reinforced the CDC guidance with their own policies; some health care facilities in New Jersey and Missouri (<https://www.politico.com/news/2022/01/10/doctors-covid-staff-shortage-526842>) also used the CDC’s updated guidelines to assess when to bring back infected workers.

The CDC also shortened the isolation period for people infected with COVID from 10 days to five (<https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html>). The same day the agency published the update, Delta, which lobbied for the change, announced (<https://news.delta.com/delta-working-implement-new-covid-19-isolation-guidance-issued-cdc>) the new guidelines would give “more flexibility for Delta to schedule crews and employees to support a busy holiday travel season and a sustained return to travel by customers.”

Kagan said while some of the health care facilities she advises are allowing infected employees to “stay out of the workplace for longer than is required by the CDC,” she also expects that “most, if not all, health care employers would be following the latest CDC guidance.” Kagan’s clients are throughout the country.

Many health care facilities are trying to strike the right balance between making sure they have the resources to avoid the strain many experienced during the early days of the pandemic on the one hand, and making sure their employees and patients feel safe on the other, Kagan said.

The CDC has “suggested that individuals can continue to test positive for COVID days to weeks or months after they’re no longer contagious,” Kagan noted.

Rolling out these new policies is no small decision for any company: In addition to weighing how the move could affect their relationships with workers, patients, consumers and sometimes unions, employers have to make sure their policies abide by collective bargaining agreements and civil rights laws.

Companies that plan to take advantage of the new CDC guidelines—whether in health care or otherwise—will have their work cut out for them, said Randi May, a partner at Hogue Newman Regal & Kenney. One of the biggest challenges is practical: How would a more lenient COVID workplace policy affect morale?

If “people are coming into the office with COVID, they have to work closely with people, it could create a really negative work environment. It could create some interpersonal conflict as well,” May said.

As a result, such policies could end up achieving the opposite of what they intended. In response this week to California’s new guidance for health care workers, Sand Reding, president of the California Nurses Association, told ABC10 (<https://www.abc10.com/article/news/health/coronavirus/covid-positive-asymptomatic-healthcare-workers-return-to-work/103-a1702279-7c7b-4c8f-8c47-efe051b67fe1>), “There’s not a shortage of nurses. There’s a shortage of nurses that want to come in and work in those type of conditions.”

There are other hurdles. For one, employers aren’t always permitted to decide, on their own, whether to roll out a relaxed COVID policy. This is especially the case in health care and aviation, where many workers are represented by unions. Employers are required to bargain with unions over most employment conditions, May noted, though some collective bargaining agreements may have provisions that say government guidelines—like those by the CDC—“supersede everything else.”

Navigating laws that offer employees the right to workplace accommodations and medical leave can also be a challenge, Kagan said. The law remains unsettled on whether having COVID always qualifies as a disability under the Americans with Disabilities Act, while the federal Family and Medical Leave Act has a number of state analogues whose provisions can vary, Kagan said.

Still, with the CDC’s new guidance to back them up and under the pressure of labor shortages, could more employers be rolling out newly relaxed COVID safety policies moving forward?

While Corinne Smith hasn’t seen any of her Texas-based health care clients do so, she said she can imagine a future where it happens. “I have talked to people that were talking about what type of shortages they’re facing with their staffing and how difficult it is to care for patients,” said Smith, a shareholder at Winstead. “They’re spending a lot of money on staffing companies, getting temporary nurses in, and that’s getting more and more difficult to find.”

If pressures increase, Smith said, more health care facilities in Texas “might start to change, and we could probably shift to something like we’re seeing in New York.”

May is more skeptical—particularly when it comes to other industries moving closer to pre-pandemic norms. “I don’t think it’s going to be this big turning point, no—I think it’s going to be more of a slow, gradual shift. Some offices that have people working remotely may be a little more inclined to require some days in the office.”

Attitudes toward COVID and the risks it poses are not the only factor at play. “I just think the attitudes have changed toward remote work, and that employers are going to have to adapt, and they don’t have that much of a choice because that’s what the workers are expecting,” May said.

As the science develops, it may also be necessary to reinforce stricter safety measures again.

“Omicron might seem mild for now,” May said. “We haven’t seen the long-term effects yet.”