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# Employee Testing, Tracing, and Disclosure as a Response to the Coronavirus Pandemic

Matthew T. Bodie\* & Michael McMahon\*\*

## I. Introduction

The novel coronavirus pandemic has continued to rage in the United States well past the initial period of contagion. Unlike countries across the globe, the United States largely failed to implement a comprehensive plan of prevention and containment.<sup>1</sup> In the absence of a coordinated national response, efforts to contain the pandemic devolved to state governments, localities, and private businesses and families. States scrambled to obtain adequate numbers of ventilators and personal protective equipment (PPE),<sup>2</sup> while localities fiercely debated the closing of schools, parks, and bars.<sup>3</sup> And employers in every industry faced difficult questions in managing the health of their workforce while continuing to operate, if legally permitted.

Both workers and management are uncertain about the appropriate steps to take in order to operate safely. In May 2020, the Center for Disease Control (CDC) issued guidelines for businesses on conducting their business in the midst of the pandemic, including a “Resuming Business Toolkit” purporting to lay out steps.<sup>4</sup> The Occupational Health and Safety Administration (OSHA) also published guidance for employers about operating their

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<sup>1</sup> Compare Loveday Morris, *Angela Merkel is riding high as she steers Europe’s coronavirus recovery effort*, WASH. POST (July 16, 2020), [https://www.washingtonpost.com/world/europe/angela-merkel-coronavirus-legacy/2020/07/16/fab207c2-c5d1-11ea-a825-8722004e4150\\_story.html](https://www.washingtonpost.com/world/europe/angela-merkel-coronavirus-legacy/2020/07/16/fab207c2-c5d1-11ea-a825-8722004e4150_story.html) with Michael D. Shear, Noah Weiland, Eric Lipton, Maggie Haberman & David E. Sanger, *Inside Trump’s Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html> (noting that by April, the administration’s “ultimate goal was to shift responsibility for leading the fight against the pandemic from the White House to the states”).

<sup>2</sup> Daniella Diaz & David Shortell, *Unfulfilled PPE contracts leave states scrambling for supplies amid the coronavirus pandemic*, CNN.COM (May 8, 2020), <https://www.cnn.com/2020/05/08/politics/ppe-contracts-states-fraud-waste-scramble-coronavirus/index.html>.

<sup>3</sup> Kelly Bauer, *‘We Will Shut You Down’: City Will Close Bars, Restaurants If They Break Coronavirus Rules, Lightfoot Warns*, BLOCK CLUB CHICAGO (July 2, 2020), <https://blockclubchicago.org/2020/07/02/we-will-shut-you-down-city-will-close-bars-restaurants-if-they-break-coronavirus-rules-lightfoot-warns/>.

<sup>4</sup> Center for Disease Control, *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, May 2020 (updated May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; Center for Disease Control, *Resuming Business Toolkit, Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/Resuming-Business-Toolkit.pdf>.

businesses.<sup>5</sup> However, critics have charged that these administrative actions failed to require firms to take specific steps or to protect them against litigation if they do take such steps.<sup>6</sup> Without clarity from the federal government on appropriate workplace safety measures, companies must assess the appropriate measures to take on a case-by-case basis.

This essay examines the legal framework for one common approach to workplace coronavirus prevention and mitigation: testing, tracing, and disclosure. These methods are often lumped together as a time-honored yet technologically-enhanced approach to reining in the spread of disease.<sup>7</sup> Individuals are tested for SARS-CoV-2; if they test positive, then their activities are traced to see who has come into contact with them during the potential period of infection. The contacts are then informed that they have come into close proximity with a positive person and asked to take appropriate precautions. The presence of the virus may also be disclosed more widely; for example, retail stores may notify the public that one of their employees was infected.

Employer programs of testing, tracing, and disclosure have become somewhat commonplace during the pandemic. But their quick adoption has left behind questions about their legality and their advisability. Because these programs involve sensitive information about employee health and social interactions, they necessarily pit the importance of health and safety against expectations of personal privacy. This essay will proceed to examine what existing law has to say about employee virus testing, contact tracing, and disclosure of test results to other workers, customers, and the public. The details do matter. Private-sector employers can implement a responsible testing, tracing, and disclosure program under the law, but they should take steps to ensure that the invasions into worker privacy are minimized to reduce potential harm.<sup>8</sup>

## II. Testing

To keep the novel coronavirus from spreading within the workplace, infected workers must stay away. Employers can count on self-policing to some extent and can encourage

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<sup>5</sup> OSHA, Revised Enforcement Guidance for Recording Cases of COVID-19 (May 19, 2020): <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

<sup>6</sup> Fatima Hussein, *AFL-CIO Sues OSHA to Force Temporary Worker-Safety Standard*, BLOOMBERG (May 18, 2020), <https://news.bloomberglaw.com/safety/afl-cio-sues-osha-to-force-temporary-worker-safety-standard>; Annie Palmer, *There's a fight brewing over whether companies are responsible when workers get coronavirus*, CNBC.COM (June 19, 2020), <https://www.cnbc.com/2020/06/19/coronavirus-lawsuits-businesses-and-labor-groups-clash-over-liability.html>.

<sup>7</sup> Charles D. Weiss, *AIDS: Balancing the Physician's Duty to Warn and Confidentiality Concerns*, 38 EMORY L.J. 279, 309 (1989) (discussing the successful use of contact tracing to control the spread of sexually transmitted diseases).

<sup>8</sup> This essay does not discuss the requirements imposed on public-sector employers by federal and state law. Unlike private-sector employers, government agencies must follow U.S. constitutional requirements, especially the Fourth Amendment's prohibition on unreasonable searches. For a discussion of the unique importance of privacy protection for public-sector employees, see Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601 (2016).

employees to stay home with a paid leave program.<sup>9</sup> But particularly because symptoms of SARS-CoV-2 can be mild or even nonexistent, testing is necessary to shut the virus out.<sup>10</sup> OSHA has suggested that employers should take steps to prevent transmission of the disease at the workplace.<sup>11</sup> Given these responsibilities, it is important for employers to manage a system of testing within the workplace while remaining sensitive to the privacy of employee health data.

Employers have primarily used two diagnostic tools to determine novel coronavirus infection: virus testing and temperature checks. While virus testing is a much better guide to determine its presence, these tests can take long periods,<sup>12</sup> can have varying rates of false positives and negatives,<sup>13</sup> and can be difficult to procure.<sup>14</sup> As a quicker and easier substitute, many employers are requiring temperature checks for workers prior to the start of work.<sup>15</sup> In providing guidance for critical infrastructure workers, the CDC stated that “employers should measure the employee’s temperature and assess symptoms prior to them starting work. Ideally,

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<sup>9</sup> The Families First Coronavirus Response Act (FFCRA) requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. Employers are also increasing their own individual programs. Brian O’Connell, *COVID-19 Spurs Expanded Paid Leave*, SHRM.ORG (May 30, 2020), <https://www.shrm.org/hr-today/news/all-things-work/pages/covid-19-spurs-expanded-paid-leave.aspx>.

<sup>10</sup> Noah Higgins-Dunn & Berkeley Lovelace, Jr., *Top HHS official says ‘most’ of the coronavirus transmission is from asymptomatic people*, CNBC.COM (July 17 2020, 8:39 AM), <https://www.cnbc.com/2020/07/17/top-hhs-official-says-most-of-the-coronavirus-transmission-is-from-asymptomatic-people.html>.

<sup>11</sup> The employer may have a duty to monitor cases of COVID-19 in their workplace under OSHA’s general duty clause. The clause requires employers to keep their workplace free from any recognized hazards that cause or are likely to cause death or serious physical harm to employees. 29 U.S.C. § 654(a)(1). OSHA has issued coronavirus-specific workplace-preparedness guidance directing employers to “develop policies and procedures for prompt identification and isolation of sick people.” Occupational Safety and Health Administration, *Guidance on Preparing Workplaces for COVID-19* (Mar. 2020), <https://www.osha.gov/Publications/OSHA3990.pdf>. The guidance does not require mandatory employee testing.

<sup>12</sup> Rachel Weiner, William Wan & Abigail Hauslohner, *Long delays in getting test results hobble coronavirus response*, WASH. POST (July 12, 2020 5:30 p.m. CDT), [https://www.washingtonpost.com/health/long-delays-in-getting-test-results-hobble-coronavirus-response/2020/07/12/d32f7fa8-c1fe-11ea-b4f6-cb39cd8940fb\\_story.html](https://www.washingtonpost.com/health/long-delays-in-getting-test-results-hobble-coronavirus-response/2020/07/12/d32f7fa8-c1fe-11ea-b4f6-cb39cd8940fb_story.html).

<sup>13</sup> Curt Devine, *Coronavirus test used by White House has questionable accuracy*, CNN.COM (July 3, 2020 7:11 a.m.), <https://www.cnn.com/2020/07/03/politics/coronavirus-white-house-test-abbott/index.html>.

<sup>14</sup> Soo Rin Kim, Matthew Vann, Laura Bronner & Grace Manthey, *Want A COVID-19 Test? It’s Much Easier To Get In Wealthier, Whiter Neighborhoods*, FIVETHIRTYEIGHT.COM (July 22, 2020), <https://fivethirtyeight.com/features/white-neighborhoods-have-more-access-to-covid-19-testing-sites/>.

<sup>15</sup> See, e.g., Ben Fox Rubin, *Amazon begins temperature checks for warehouse workers as coronavirus spreads*, CNET (Apr. 2, 2020 7:12 AM), <https://www.cnet.com/news/amazon-begins-temperature-checks-for-warehouse-workers-as-coronavirus-spreads/>.

temperature checks should happen before the individual enters the facility.”<sup>16</sup> Local governments have also encouraged or required employer temperature checks in their reopening orders.<sup>17</sup>

Temperature checks and coronavirus testing are both considered medical examinations under the Americans with Disabilities Act (ADA).<sup>18</sup> The ADA, which covers most private employers with 15 or more employees,<sup>19</sup> was designed to protect workers with disabilities from discrimination or exclusion from the job market. As part of its overall statutory scheme, the Act forbids employers from requiring employees to undergo medical examinations or making disability-related inquiries of employees, unless the examination or inquiry is both job-related and consistent with business necessity.<sup>20</sup> These limitations apply to all employees, as well as job applicants; the employee need not have a disability to be covered.<sup>21</sup> The EEOC has stated that an examination will be considered job-related and consistent with business necessity if the employer has a reasonable belief, based on objective evidence, that an employee’s ability to perform essential job functions will be impaired by a medical condition; or that an employee poses a direct threat due to a medical condition.<sup>22</sup>

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<sup>16</sup> Centers for Disease Control and Prevention, Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 (2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf>.

<sup>17</sup> See, e.g., Ohio Department of Health, COVID-19 Information for Employers and Employees: Employee Screening for COVID-19, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/general-resources/Screening-Employees-for-COVID-19> (stating that the Governor and Department of Health Director “strongly recommend that all employees perform a daily symptom assessment each day before work” that includes guidance for employees to “take [their] temperature with a thermometer each day”); Saint Louis County Director of Public Health, Business and Individual Guidelines for Social Distancing and Re-Opening (May 8, 2020), <http://stlcorona.com/dr-pages-messages/public-health-orders/director-of-public-health-business-and-individual-guidelines-for-social-distancing-and-re-opening/> (mandating that “all Businesses shall conduct daily screenings of employees and volunteers who work in their facilities for symptoms of COVID-19.”).

<sup>18</sup> See 42 U.S.C. § 12101 et seq.; Equal Employment Opportunity Comm’n, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (March 21, 2020), at § II.B.7, <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [hereinafter EEOC, Pandemic Preparedness in the Workplace] (“[M]easuring an employee’s body temperature is a medical examination.”).

<sup>19</sup> See 42 U.S.C. § 12111.

<sup>20</sup> 42 U.S.C. § 12112(d).

<sup>21</sup> EEOC, Pandemic Preparedness in the Workplace, *supra* note PPW, at § II (citing 42 U.S.C. § 12112(d)(4)(A)). See also *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997) (quoting the district court in agreement that “it makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability”); *Fredenburg v. Contra Costa County Dept. of Health Services*, 172 F.3d 1176, 1182 (9th Cir. 1999) (holding that “plaintiffs need not prove that they are qualified individuals with a disability in order to bring claims challenging the scope of medical examinations under the ADA”); *Conroy v. New York State Dept. of Correctional Services*, 333 F.3d 88, 94 (2d Cir. 2003) (stating that “a plaintiff need not prove that he or she has a disability unknown to his or her employer in order to challenge a medical inquiry or examination under [the ADA]”).

<sup>22</sup> Equal Employment Opportunity Comm’n, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA (July 26, 2000), § A.5,

Employee testing, whether it be a temperature screen or a coronavirus test, is likely justified based on the “direct threat” that an infected employee would pose to other workers. The Act defines a direct threat as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodations.”<sup>23</sup> In its coronavirus guidance, the EEOC ascertained that “based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard.”<sup>24</sup> It seems unlikely that a court would find otherwise, given the severity of the disease and its contagiousness, which according to studies is more contagious than the seasonal flu.<sup>25</sup> The EEOC allows employers to require testing before an employee is permitted to start work or return to work.<sup>26</sup>

The ADA also forbids employers from asking “a question (or series of questions) that is likely to elicit information about a disability.”<sup>27</sup> EEOC guidance from 2009 states that “asking an individual about symptoms of a cold or the seasonal flu is not likely to elicit information about a disability”<sup>28</sup> and therefore is not prohibited by the ADA. Employer questionnaires about potential SARS-CoV-2 symptoms would be similar to those concerning a cold or seasonal flu, and it’s therefore unlikely these types of “symptom checks” constitute a disability-related inquiry. The CDC has provided a list of COVID-19 symptoms<sup>29</sup> and encourages employers to “consider conducting daily in-person or virtual health checks (e.g., symptom and/or temperature screening) of employees before they enter the facility.”<sup>30</sup> Because of the crossover in symptoms

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<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>.

<sup>23</sup> 42 U.S.C. § 12111(3).

<sup>24</sup> EEOC, *Pandemic Preparedness in the Workplace*, *supra* note PPW, at § II.B.

<sup>25</sup> *See* Centers for Disease Control and Prevention, *Similarities and Differences between Flu and COVID-19* (July 10, 2020), <https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm> (“While COVID-19 and flu viruses are thought to spread in similar ways, COVID-19 is more contagious among certain populations and age groups than flu. Also, COVID-19 has been observed to have more superspreading events than flu.”).

<sup>26</sup> Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at § A.6 (updated June 17, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [hereinafter EEOC, *What You Should Know About COVID-19*] (“Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.”).

<sup>27</sup> Equal Employment Opportunity Comm’n, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA* (July 26, 2000), § B.1, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>. Conversely, “questions that are not likely to elicit information about a disability are not disability-related inquiries and, therefore, are not prohibited under the ADA.” *Id.*

<sup>28</sup> EEOC, *Pandemic Preparedness in the Workplace*, *supra* note PPW, at § II.A.1.

<sup>29</sup> Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Symptoms of Coronavirus* (May 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

<sup>30</sup> CDC, *Interim Guidance for Businesses and Employers*, *supra* note 4.

between the coronavirus and the CDC's list of influenza (flu) symptoms,<sup>31</sup> the EEOC guidance implies that symptom screenings would similarly not be a disability-related inquiry.

A more complicated question is whether an employer might inquire if employees might be more susceptible to the disease or more likely to develop serious complications if they were to contract it. The ADA generally prohibits an employer from making inquiries as to whether an employee has a specific medical condition or disability, even if this condition or disability would make them more vulnerable to particular diseases.<sup>32</sup> This approach presumably would apply to the novel coronavirus. Broad inquiries such as asking employees to list "any illness, injury or past accidents" would constitute a disability-related inquiry because the question necessitates revealing a disability if an employee has one.<sup>33</sup> Furthermore, EEOC guidance provides that asking more specific questions, such as whether an individual is immunocompromised, constitutes a disability-related inquiry because "a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS."<sup>34</sup>

However, the severity of the novel coronavirus may change this equation. Speaking about the flu in its 2009 guidance, the EEOC stated:

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.<sup>35</sup>

Because the EEOC has declared COVID-19 a direct threat, normally prohibited inquiries as to employees' medical conditions may be allowable if they are designed to protect employees at higher risk for COVID-19. One such inquiry would be whether an employee is immunocompromised.<sup>36</sup> However, it is unclear whether the employer could screen for conditions or disabilities (such as diabetes, high blood pressure, or heart conditions) that do not heighten risk of contagion but do increase the likelihood of a severe or fatal reaction. The EEOC has provided guidance on how employers can create ADA-compliant inquiries that identify which employees are more likely to be unavailable for work. It suggests designing questions that "identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the

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<sup>31</sup> Centers for Disease Control and Prevention, Influenza (Flu): Flu Symptoms & Complications (Sept. 18, 2019), <https://www.cdc.gov/flu/symptoms/symptoms.htm>.

<sup>32</sup> EEOC, Pandemic Preparedness in the Workplace, *supra* note PPW, at III.B.9.

<sup>33</sup> *Miller v. Whirlpool Corp.*, 807 F.Supp.2d 684, 685, 687 (N.D. Ohio 2011).

<sup>34</sup> EEOC, Pandemic Preparedness in the Workplace, *supra* note PPW, at § II.A.1.

<sup>35</sup> *Id.* at § III.B.9.

<sup>36</sup> Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): People Who Are at Higher Risk for Severe Illness (May 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.



risk of complications).” The EEOC’s example asks employees to answer either “yes” or “no” to the question of whether, in the event of a pandemic, they would be unable to come to work because of any of the listed reasons, which include both medical and non-medical reasons.<sup>37</sup> This ambiguity, however, makes it more difficult for employers to assess whether some employees might be placing themselves at higher risk by working.<sup>38</sup>

Other coronavirus-related inquiries are allowable under the ADA if they are not disability-related. Given the geographies of the COVID-19 threat, employers may wish, or be required, to inquire about an employee’s travels before clearing them to work.<sup>39</sup> EEOC guidance states that travel-related questions are not disability-related inquiries, and that “employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee’s return to the workplace after visiting a specified location, whether for business or personal reasons.”<sup>40</sup> Given the progression of the disease in 2020, local “hot spots” are likely to continue to erupt, and requiring quarantine after such travel as a prophylactic measure may make sense.

The term “HIPAA” is commonly invoked as a universal prohibition on health-related inquiries or disclosure.<sup>41</sup> However, the Health Information Portability and Accountability Act (HIPAA)<sup>42</sup> is not the all-inclusive privacy scheme that it is often imagined to be. In particular, HIPAA’s coverage is more narrow than generally understood. The Act applies only to health plans, health care clearinghouses, and healthcare providers.<sup>43</sup> Employers are only covered if they fit into one of these categories; the most common possibilities are employers with their own sponsored health plans or health care providers such as hospitals or doctors’ offices. Further, HIPAA’s Privacy Rule specifically excludes from its coverage “individually identifiable health information in employment records held by a covered entity in its role as an employer.”<sup>44</sup> Thus, even if an employer is a covered entity, employment records are excluded from the Privacy Rule’s protections.

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<sup>37</sup> See EEOC, *Pandemic Preparedness in the Workplace*, *supra* note PPW, at § III.A.2.

<sup>38</sup> Especially if liable for work-transmitted cases of the virus, some employers may make crude judgments about keeping workers away based on risk factors such as obesity or diabetes. Centers for Disease Control and Prevention, *People with Certain Medical Conditions* (updated July 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (noting the increased risk factors of COVID-19 for those with obesity, high blood pressure, and type-2 diabetes).

<sup>39</sup> In St. Louis County, the Department of Public Health issued a travel advisory recommending that employers add “a question related to recent travels and social distancing behaviors” to their employee health screenings. St. Louis County Department of Public Health, *2019 Novel Coronavirus (“COVID-19”) Advisory to Residents and Employers Regarding Holiday Weekend Activities*, <http://mura.stlouisco.com/sites/default/assets/pdfs/press-release/st-louis-county-travel-advisory-dph-travel-advisory-05252020.pdf>.

<sup>40</sup> EEOC, *Pandemic Preparedness in the Workplace*, *supra* note PPW, at § II.B.8.

<sup>41</sup> Or “HIPPA,” as the case may be.

<sup>42</sup> Health Information Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 26, 29, and 42 U.S.C.).

<sup>43</sup> 45 C.F.R. § 103.

<sup>44</sup> 45 C.F.R. § 160.103.

After the initial lockdown, many employers required employee testing before returning to work.<sup>45</sup> HIPAA would be involved in the employer's receipt of this information, as the healthcare provider who conducts the test would be considered a covered entity, and the results of the test would be considered protected health information (PHI) covered by the Privacy Rule. An employee can consent to release this information and absolve the health care provider of privacy concerns; this is the easiest and likely most common method for employers to get the information.<sup>46</sup> If the employee doesn't give consent, there are two avenues for the provider to still release the information. First, HHS guidance on HIPAA and COVID-19 states that providers "may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public" – which could, presumably, include notification of an employer without the patient's consent.<sup>47</sup> HIPAA has been held to allow disclosure without patient authorization in order to notify individuals that may have been exposed to COVID-19<sup>48</sup> and to notify health authorities conducting disease investigations.<sup>49</sup> But there is no elucidated requirement to notify a patient's employer. The decision to disclose test results to an employer would be at the discretion of the health provider.<sup>50</sup> Second, providers

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<sup>45</sup> See, e.g., Phil Galewitz, *Some Employers May Require Employees Get Tested for COVID-19 Before Coming Back to Work*, TIME (May 7, 2020 1:18 PM), <https://time.com/5833633/employer-coronavirus-testing/>.

<sup>46</sup> Receiving employee consent and authorization for the health provider to release test results to the employer is the simplest mechanism under HIPAA for an employer to receive this information, and is unlikely to be difficult for employers to obtain: EEOC guidance states that "an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus." EEOC, *What You Should Know About COVID-19*, *supra* note 25, at § A.6. Further, the EEOC stated in a COVID-19 webinar that "the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to answer questions about whether he has COVID-19, symptoms associated with COVID-19, or has been tested for COVID-19." Equal Employment Opportunity Commission, *Transcript of March 27, 2020 Outreach Webinar* (Mar. 27, 2020), <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1>. Since an employer has the legal power to bar an at-will employee who refuses to consent to the disclosure of their test results, virtually all at-will employees will consent to such disclosure.

<sup>47</sup> HHS Bulletin, *supra* note HHS-B.

<sup>48</sup> For example, providers may need to inform other patients who were in the waiting room at the same time. 45 C.F.R. § 164.512(b)(1)(iv) .

<sup>49</sup> *Id.* § 164.512(b)(1)(i). See also Office of the National Coordinator for Health Information Technology, Department of Health and Human Services, *Permitted Uses and Disclosures: Exchange for Public Health Activities* (Dec. 2016), [https://www.healthit.gov/sites/default/files/12072016\\_hipaa\\_and\\_public\\_health\\_fact\\_sheet.pdf](https://www.healthit.gov/sites/default/files/12072016_hipaa_and_public_health_fact_sheet.pdf); Office for Civil Rights, Department of Health and Human Services, *Bulletin: HIPAA Privacy and Novel Coronavirus* (Feb. 2020), <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

<sup>50</sup> *Id.* (noting that "HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health and safety"). HHS has issued a Notification of Enforcement Discretion stating that it will not impose penalties for violations of the Privacy Rule against covered health care providers or their business associates for uses and disclosures of PHI by business associates for public health and health oversight activities during the pandemic. Department of Health and Human Services, *Notification of Enforcement Discretion under HIPAA to Allow Uses and Disclosures of Protected Health Information by Business Associates for Public Health*

could arguably disclose testing information to employers without patient authorization as a “permitted disclosure” under HIPAA’s public health exception.<sup>51</sup> This exception only allows for the covered entity to provide the test results to the employer if: (a) the employer requested the test, (b) the test was provided for employment-related reasons, and (c) the employer has a legal duty to keep records on the information in the test results.<sup>52</sup> As to this last element, OSHA has issued guidance regarding when employers should record employee cases of the novel coronavirus.<sup>53</sup> To be fully compliant with the public health exception, the health care provider must provide written notice to the patient “that protected health information relating to the medical surveillance of the workplace and work-related illnesses and injuries is disclosed to the employer.”<sup>54</sup>

State laws may also come into play to protect employee health information. The Illinois Biometric Information Privacy Act (BIPA) protects the collection and use of biometric identifiers and biometric information.<sup>55</sup> BIPA defines biometric information as any information “based on an individual’s biometric identifier used to identify an individual;”<sup>56</sup> the Act includes “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry” as biometric identifiers.<sup>57</sup> Most testing methods will not use any of these types of biometric information. For example, an employer’s recording of an employee’s temperature does not involve an iris scan, fingerprint, voiceprint, or scan of hand or face geometry. A coronavirus test also does not involve this information, as tests for current presence of the virus generally involve the taking bodily samples from the respiratory system,<sup>58</sup> while tests for past infection involve testing a patient’s blood.<sup>59</sup>

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and Health Oversight Activities in Response to COVID-19 (Apr. 2, 2020), <https://www.hhs.gov/sites/default/files/notification-enforcement-discretion-hipaa.pdf>.

<sup>51</sup> See 45 C.F.R. § 164.512(b)(1) (2016).

<sup>52</sup> See *id.* § 164.512(b)(1)(v). See also Department of Health and Human Services, Does the HIPAA Privacy Rule’s public health provision permit covered health care providers to disclose protected health information concerning the findings of pre-employment physicals, drug tests, or fitness-for-duty examinations to an individual’s employer? (2013), <https://www.hhs.gov/hipaa/for-professionals/faq/301/does-the-hipaa-public-health-provision-permit-health-care-providers-to-disclose-information-from-pre-employment-physicals/index.html>.

<sup>53</sup> See Occupational Safety and Health Administration, Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (May 19, 2020), <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19> [hereinafter OSHA, Revised Enforcement Guidance]. The guidance requires employers to record positive cases if: (1) the worker has a confirmed case of the virus, as defined by the CDC; (2) the transmission is work-related; and (3) the case involves one or more of the general recording criteria. *Id.*; see also 29 C.F.R. §§ 1904.5, 1904.7.

<sup>54</sup> 45 C.F.R. § 164.512(b)(1)(v)(D).

<sup>55</sup> 740 ILL. COMP. STAT. ANN. § 14/1 et seq. BIPA protects only Illinois residents and it applies only to private entities. See *id.* (defining a private entity to “not include a State or local government agency”). See also *id.* § 14/15 (providing that BIPA’s substantive provisions on retention, collection, disclosure, and destruction of biometric information only apply to private entities).

<sup>56</sup> *Id.* § 14/10.

<sup>57</sup> *Id.*

<sup>58</sup> Centers for Disease Control and Prevention, *Test for Current Infection* (May 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/testing/diagnostic-testing.html>.

<sup>59</sup> Centers for Disease Control and Prevention, *Test for Past Infection (Antibody Test)* (May 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/testing/serology-overview.html>.

It is also important to note that the BIPA's definition of biometric identifier includes so many exclusions related to health care that it seems to rule out the Act applying to novel coronavirus testing. It excludes biological materials regulated under the Genetic Information Privacy Act, information regulated under HIPAA, and any "image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening."<sup>60</sup> Because of this wide exclusion of healthcare information from the Act's definition of biometric identifiers, it is unlikely that the BIPA applies to COVID-19 testing in an employment situation. One possible exception would be devices that utilize facial recognition in temperature taking, described as using "facial recognition to identify the faces of individuals walking past the device and thermal scanning to take their temperatures."<sup>61</sup> Such technology would implicate BIPA because of the collection of faceprint data, and the employer would need to follow the law's detailed requirements on notification, consent, storage, and deletion.<sup>62</sup>

In the European Union, the General Data Protection Regulation (GDPR) requires a specific justification for data processing and specifically highlights the sensitivity of health data.<sup>63</sup> Although the GDPR was interpreted in some countries as prohibiting employee testing and temperature checks,<sup>64</sup> by this point the practice is seen as relatively uncontroversial, as long as the employee data is protected and minimized.<sup>65</sup> Unlike the European Union, the United States

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<sup>60</sup> 740 ILL. COMP. STAT. ANN. § 14/10.

<sup>61</sup> David Stauss, Malia Rogers & Megan Herr, *U.S. Privacy Law Implications with the Use of No-Contact Temperature Taking Devices*, BYTE BACK (April 27, 2020), <https://www.bytebacklaw.com/2020/04/u-s-privacy-law-implications-with-the-use-of-no-contact-temperature-taking-devices/>.

<sup>62</sup> 740 ILL. COMP. STAT. ANN. §§ 14/15, 14/20.

<sup>63</sup> Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) (EU) [hereinafter GDPR]. An easily accessible version of the GDPR can be found at: Intersoft Consulting, GDPR, <https://gdpr-info.eu/>. The GDPR prohibits the processing of health data without one of list of specified exceptions. *See id.* Art. 9.

<sup>64</sup> Catherine Stupp & Kristin Broughton, *Companies Walk Fine Line on Employee Data Amid Coronavirus Outbreak*, WALL ST. J. (March 12, 2020 9:59 a.m.), <https://www.wsj.com/articles/companies-walk-fine-line-on-employee-data-amid-coronavirus-outbreak-11583948984> ("A spokeswoman for Belgium's regulator said body temperature checks seem unnecessary based on current information from health authorities."); Douglas Busvine, *EU privacy rules no obstacle to coronavirus fight; smartphone tracking a no-no*, REUTERS (March 10, 2020 7:57 a.m.), <https://www.reuters.com/article/us-health-coronavirus-privacy-explainer/eu-privacy-rules-no-obstacle-to-coronavirus-fight-smartphone-tracking-a-no-no-idUSKBN20X1MP> ("Employers are not allowed to take mandatory readings of the temperature of employees or visitors, nor can they require them to fill out compulsory medical questionnaires, according to French data protection office CNIL.").

<sup>65</sup> *See, e.g.*, U.K. Information Commissioner's Office, *Testing*, (last checked July 22, 2020), <https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/testing/> (noting that an employer's health and safety obligations "will cover most of what employers need to do, as long as they are not collecting or sharing irrelevant or unnecessary data"); Daphne Diorio Borri, Cristiano Pambianchi & Giulia Brambilla, *COVID-19: Guidance for Employers in Italy*, BIRD & BIRD (last checked July 22, 2020),

has no national data protection statute. The closest we come to a generalizable privacy obligation is the common law's intrusion upon seclusion tort—one of the four privacy torts first set forth in the Restatement (Second) of Torts.<sup>66</sup> The Restatement of Employment Law builds upon the intrusion tort to specifically protect employees against “wrongful employer intrusions upon their protected privacy interests.”<sup>67</sup> In order to incur liability, the employer's action must intrude upon an employee's protected employee privacy interest and must also be considered wrongful. Temperature checks and coronavirus tests would definitely fall under a protected employee privacy interest, as employees have an interest in the privacy of their physical persons and health data.<sup>68</sup> However, if conducted reasonably, these actions would not be tortious, as they would not be “highly offensive” to a reasonable person under the circumstances.<sup>69</sup> The “highly offensive” test generally compares the nature and scope of the privacy intrusion against the legitimate employer interests behind the intrusion. In this case, the tests would be justified by the severity of the pandemic as well as the interests of both employers and employees in staunching the virus's spread. Health and safety concerns are generally accorded significant deference when legitimate and reasonably carried out.<sup>70</sup>

Employers can follow practical steps to minimize the intrusion into employee privacy through their testing regimes. If an employee registers a high temperature, the employer can then send the employee home or order a test without recording the actual temperature. The checks could also be conducted by outside medical professionals who keep all information about the program confidential. Of course, if an employee tests positive, then public health guidelines would counsel that the employee's contacts be traced and then informed of possible exposure. To these next steps we now turn.

### III. Contact Tracing

Contact tracing has been identified as a critical piece of the public health puzzle to contain the coronavirus in absence of treatment or vaccine.<sup>71</sup> In most countries around the globe,

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<https://www.twobirds.com/en/news/articles/2020/global/covid-19-guidance-for-employers-in-italy> (noting that employers had a legal obligation to do temperature checks in the Lombardy region of Italy).

<sup>66</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977). The privacy protection provided under the California Constitution has been interpreted to follow the general outline of the common-law protection. *See* CAL. CONST. Art. 1, § 1; *Hill v. Nat'l Collegiate Athletic Assn.*, 865 P.2d 633, 649 (Cal. 1994) (calling the common law “an invaluable guide in constitutional privacy litigation”). There is also a statutory privacy provision in Massachusetts. MASS. GEN. LAWS ch. 214, § 1B.

<sup>67</sup> RESTATEMENT OF EMPLOYMENT LAW § 7.01 (2015).

<sup>68</sup> *Id.* § 7.03(a)(1) (physical person and bodily functions), § 7.04(a) (personal information).

<sup>69</sup> *Id.* § 7.06(b).

<sup>70</sup> For example, courts have accorded protections for employee drug testing especially when health and safety issues are in play. *See, e.g., Wilcher v. City of Wilmington*, 60 F. Supp. 2d 298, 303-05 (D. Del. 1999); *Gilmore v. Enogex, Inc.*, 878 P.2d 360, 366-67 (Okla. 1994).

<sup>71</sup> *See, e.g.,* Centers for Disease Control and Prevention, *Case Investigation and Contact Tracing: Part of a Multipronged Approach to Fight the COVID-19 Pandemic* (April 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/principles-contact-tracing.html> (accessed May 28, 2020).

contact tracing has been the primary responsibility of public health authorities.<sup>72</sup> But the Trump administration has failed to employ such tracing in any meaningful way, and states have struggled to develop their own systems.<sup>73</sup> As a result, private entities have been forced to consider their own programs to protect their workers and customers.<sup>74</sup> The Administration's reopening guidelines, issued in April 2020, encourage employers to "develop and implement policies and procedures for workforce contact tracing following employee [positive coronavirus] test."<sup>75</sup> As a result, employers have implemented systems of tracing employees' contacts with fellow workers, suppliers, and customers in order to provide notice of employee infections.<sup>76</sup> Staffing companies have already begun marketing contact tracing solutions to businesses,<sup>77</sup> while technology firms have announced new contact-tracing platforms.<sup>78</sup> These systems build on existing technologies that have allowed employers to monitor employees for years.<sup>79</sup>

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<sup>72</sup> Ian Bremmer, *The Best Global Responses to COVID-19 Pandemic*, TIME.COM (June 12, 2020), <https://time.com/5851633/best-global-responses-covid-19/> (discussing how countries like Taiwan, South Korea, and Iceland employed contact tracing to stifle the virus); cf. CDC, Case Investigation and Contact Tracing, *supra* note CICT (stating that contact tracing "is a core disease control measure employed by local and state health department personnel for decades").

<sup>73</sup> Paige Winfield Cunningham, *The Health 202: U.S. isn't ready for the contact tracing it needs to stem the coronavirus*, WASH. POST (June 15, 2020), <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2020/06/15/the-health-202-u-s-isn-t-ready-for-the-contact-tracing-it-needs-to-stem-the-coronavirus/5ee6528b602ff12947e8c0d7/> (noting that "states and localities largely haven't assembled the teams necessary to carry [contact tracing] out on a scale that public health experts say is necessary"); Joel Achenbach, William Wan, Karin Brulliard & Chelsea Janes, *The crisis that shocked the world: America's response to the coronavirus*, WASH. POST (July 19, 2020) <https://www.washingtonpost.com/health/2020/07/19/coronavirus-us-failure/> (noting that contact tracing has been rendered "ineffectual").

<sup>74</sup> See, e.g., Kathryn Vasel, *Contact tracing could become a regular part of office life. Here's how it will work*, CNN.COM (June 10, 2020 4:35 p.m.), <https://www.cnn.com/2020/06/10/success/employee-contact-tracing/index.html>.

<sup>75</sup> See White House, *Guidelines for Opening Up America Again* (2020), <https://www.whitehouse.gov/openingamerica/> (accessed May 28, 2020).

<sup>76</sup> See Charcour Koop, *Hairstylist with COVID-19 served 84 clients while symptomatic, Missouri officials say*, KANSAS CITY STAR (May 22, 2020 6:25 PM), <https://www.kansascity.com/article242946596.html>; Katherine J. Wu, *2 Stylists Had Coronavirus, but Wore Masks. 139 Clients Didn't Fall Sick.*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/health/coronavirus-hair-salon-masks.html>.

<sup>77</sup> See, e.g., NVT Staffing, *Contact Tracing Employer: Taking the Initiative to Help Your Business get Back in Action*, <https://nvtstaffing.com/contact-tracing/>, accessed May 28, 2020 (marketing the website owner's services as "an elite contact tracer employer operating nationwide" that is the "go-to contact tracing employer [who] will find trained and qualified professionals for you to ensure [that contact-tracing] protocols are implemented for the safety of all.").

<sup>78</sup> See, e.g., *Facedrive Health's Contact Tracing Platform, "TraceSCAN" to Help Mitigate and Forecast Future COVID-19 Outbreaks*, BUSINESS WIRE (May 28, 2020 7:00 AM), <https://www.businesswire.com/news/home/20200528005281/en/> (announcing a new contact-tracing technology product as "a comprehensive solution that combines a smart contact tracing app, wearable technology and artificial intelligence" that is "available for businesses as an additional health and safety measure provided by responsible employers to their employees.").

<sup>79</sup> See, e.g., David Kravets, *Worker Fired for Disabling GPS App that Tracked Her 24 Hours a Day*, ARS TECHNICA (May 11, 2015, 9:41 AM), <http://arstechnica.com/tech-policy/2015/05/worker-fired-for-disabling-gps-app-that-tracked-her-24-hours-a-day> [<https://perma.cc/476P-L94B>].

Commentators have encouraged employers to develop contact tracing systems, even if purely voluntary for employees, in order to fulfill their duties under other laws to provide a safe workplace.<sup>80</sup> In order to implement a system of contact tracing, the employer must have two pieces of information: the results from SARS-CoV-2 testing, and the people with whom the employee has come into contact. HIPAA applies when a healthcare provider discloses PHI in the form of a positive COVID-19 diagnosis.<sup>81</sup> As discussed in Part II, disclosing such results to the employer is likely permitted, even without patient authorization, where the test was mandated by the employer. However, employers otherwise need patient authorization to get such information.<sup>82</sup> The CDC does not recommend that employers mandate employee authorization or self-disclosure of test results, instead urging employers to “talk with . . . employees about planned changes and seek their input” and to “collaborate with employees and unions to effectively communicate important COVID-19 information.”<sup>83</sup>

The second piece of information is to determine whom the employee might have infected by coming into close proximity. In the past, tracing efforts were “analog” in that they involved manually recording a person’s contacts, either through observation or from recollection. However, “digital” contact tracing efforts have revolutionized the field, allowing for automatic tracing and recording of a person’s actions and the people with whom they came into contact. A variety of phone applications use proximity-based technology (usually Bluetooth or WiFi signals) or geolocation data (such as GPS) and are marketed to both employers and public health authorities.<sup>84</sup>

When it comes to employee location data, U.S. law has relatively weak privacy protections in place regarding the collection and use of this data.<sup>85</sup> A great deal of employee monitoring already takes place through phones, personal electronic devices, RFID chips, and video and audio recordings. Although commentators have pushed for specific rules in conducting

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<sup>80</sup> See, e.g., Lauren Holman, *Is Contact Tracing the Right Tool for Your Company to Help Combat COVID-19 Spread?*, OCCUPATIONAL HEALTH & SAFETY MAGAZINE (May 28, 2020), <https://ohsonline.com/articles/2020/05/28/is-contact-tracing-the-right-tool-for-your-company-to-help-combat-covid19-spread.aspx>. For example, the general duty clause of the OSH Act requires that employers provide employees with a safe work environment free of recognized hazards.

<sup>81</sup> Except for where permitted, covered entities must receive patient authorization before disclosing PHI. 45 C.F.R. § 164.508.

<sup>82</sup> *Id.* § 164.502(iv). Test results coming directly from a laboratory to the employer would also require patient consent under the Clinical Laboratory Improvement Amendments of 1988. *Id.* § 493.1291(l).

<sup>83</sup> CDC, Interim Guidance for Businesses and Employers, *supra* note 4.

<sup>84</sup> See Nancy Cleeland, *Contact Tracing for Employers*, SHRM.ORG (June 2, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/contact-tracing-employers.aspx>. See also Taylor E. White, Carrie Hoffman & John Litchfield, *United States: Employer Use Of Contact Tracing Apps: The Good, The Bad, And The Regulatory*, MONDAQ (July 9, 2020), <https://www.mondaq.com/unitedstates/health-safety/963394/employer-use-of-contact-tracing-apps-the-good-the-bad-and-the-regulatory>.

<sup>85</sup> Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CAL. L. REV. 735, 747 (2017) (“There are no federal laws that expressly address employer surveillance or limit the intrusiveness of such surveillance.”); Matthew T. Bodie, Miriam A. Cherry, Marcia L. McCormick & Jintong Tang, *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961, 988 (2017) (“In the workplace, there is no legal protection against surveillance per se.”).

such monitoring, what currently exists is a patchwork of provisions that largely leave monitoring unregulated. Several states require employers to follow certain protocols when electronically monitoring their employees. California makes it a misdemeanor to use an electronic tracking device to follow the location or movement of a person without her consent.<sup>86</sup> Connecticut requires employers to provide prior written notice of the monitoring,<sup>87</sup> while Delaware requires advance written notice which the employee must then acknowledge.<sup>88</sup> The relatively new California Consumer Privacy Act (“CCPA”) regulates the collection and use of information that includes information relevant to contact tracing: a person’s name, geolocation data, and other professional or employment-related information.<sup>89</sup> However, the CCPA currently exempts an employer’s collection and use of employees’ information in the context of the employment relationship from most provisions of the law.<sup>90</sup> Even with this exemption, the CCPA still requires the employer to provide notice of data collection to its employees; this notice must include the type of personal information collected and its intended use.<sup>91</sup> The CCPA also requires the employer to adequately protect data collected by the employer, and employees may bring suit in the event of a data breach.<sup>92</sup>

Employee consent would also likely clear any hurdles imposed by the Electronic Communications Privacy Act of 1986 (“ECPA”), which prohibits anyone, including employers, from intercepting “any wire, oral, or electronic communication” without appropriate justification.<sup>93</sup> An “intercept” is defined as the “aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.”<sup>94</sup> ECPA would apply to data collected by a contact tracing app from an employee’s phone if the method of collection was considered to be an “intercept.” Courts have held that an employer’s automated logging of text messages and a website’s use of cookies have constituted an interception.<sup>95</sup> Keeping track of an employee’s movements through an automated system may be considered an interception if the method records the transmission while still in transit.<sup>96</sup>

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<sup>86</sup> CAL. PENAL CODE § 637.7 (West); *see also* Kendra Rosenberg, *Location Surveillance by GPS: Balancing an Employer's Business Interest with Employee Privacy*, 6 WASH. J.L. TECH. & ARTS 143, 149 (2010).

<sup>87</sup> CONN. GEN. STAT. § 31-48d (2020); *Gerardi v. City of Bridgeport*, 985 A.2d 328, 335 (Conn. 2010) (prohibiting an employer from electronically monitoring an employee's activities without prior notice).

<sup>88</sup> DEL. CODE ANN. tit. 19, § 705 (2020).

<sup>89</sup> CAL. CIV. CODE § 1798.140(o) In addition, the CCPA only covers employers if they have a gross annual revenue of \$25 million or more, earn 50% or more of their annual revenues from selling consumers’ personal information, or buy, sell, or receive the personal information of 50,000 or more consumers, households, or devices. *Id.* § 1798.140(c).

<sup>90</sup> *Id.* § 1798.145(h) (excluding personal information collected “by a business about a natural person in the course of the natural person acting as ... an employee of ... that business.”) It should be noted that this exemption is temporary and is currently set to expire on January 1, 2021.

<sup>91</sup> *See id.* §§ 1798.145(h)(3); 1798.100(b).

<sup>92</sup> *See id.* §§ 1798.145(h)(3); 1798.150(a)(1).

<sup>93</sup> 18 U.S.C. § 2511(1)(a).

<sup>94</sup> *Id.* § 2510(4).

<sup>95</sup> *Shefts v. Petrakis*, 758 F. Supp. 2d 620, 629-30 (2010) (text messages); *In re Pharmatruk, Inc.*, 329 F.3d 9, 21 (1st Cir. 2003) (cookies).

<sup>96</sup> Ajunwa, Crawford & Schultz, *supra* note ACS, at 749 (“An employer need not intercept the electronic information employees send from work devices or even from personal devices. Technological advances



However, if the employer merely reviews the results of the employee's movements in a recorded state, a court might conclude there was no interception. In addition, ECPA applies only to communications, which are defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature."<sup>97</sup> Depending on the method of data collection, there may not be any "communication." Finally, ECPA provides that an interception is lawful where one of the parties "has given prior consent to such interception."<sup>98</sup> Consent may be actual or implied, and implied consent "is 'consent in fact' which is inferred 'from surrounding circumstances indicating that the party knowingly agreed to the surveillance.'"<sup>99</sup> In employment contexts, courts have held that clear notice of employer monitoring, containing information regarding the manner of the monitoring and clear notice that the employee will be monitored personally, is sufficient to constitute consent under ECPA.<sup>100</sup>

A truly comprehensive tracing program would also monitor employees' activities while outside of work.<sup>101</sup> Even here, the protections for employee privacy are uncertain. Employee contacts and location data would likely not be covered under HIPAA as PHI, as only in rare circumstances would it relate to the health condition of an individual.<sup>102</sup> State "off-duty" activity laws protect employees from discipline or discharge due to recreational engagements or the use of legal products (such as alcoholic beverages or tobacco products).<sup>103</sup> They would only come into play if the employer punished workers in some way for failing to participate in the tracing program or for failing to follow suggested stay-at-home or social-distancing measures. And most state statutes allow an exception for employer actions based on their own legitimate interests.<sup>104</sup> Given the severity of the pandemic and the extraordinary public health measures put in place by federal, state, and local authorities, courts would likely excuse employer's discipline

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mean that most electronic communications are stored in some form after they have been sent and even after the sender attempts to erase the information.").

<sup>97</sup> 18 U.S.C. § 2510 (2012).

<sup>98</sup> *Id.* § 2511(2)(a)(iii)(c).

<sup>99</sup> *Williams v. Poulos*, 11 F.3d 271, 281 (1st Cir. 1993) (quoting *Griggs-Ryan v. Smith*, 904 F.2d 112, 116-17 (1st Cir. 1990)).

<sup>100</sup> *Id.* at 281-82. In a case involving telephone monitoring, where the telephone user was told several times that all calls would be monitored, the notice combined with the continued use of the telephone line was sufficient to constitute consent. *Griggs-Ryan v. Smith*, 904 F.2d at 118.

<sup>101</sup> See, e.g., Chip Cutter & Thomas Gryta, *As States Reopen, the Boss Wants to Know What You're Up To This Weekend*, WALL ST. J. (May 28, 2020, 11:01 AM), <https://www.wsj.com/articles/the-boss-wants-to-know-what-youre-up-to-this-weekend-11590678062?>

<sup>102</sup> See 45 C.F.R. § 160.103 (for example, if the employee went to a doctor's office).

<sup>103</sup> See, e.g., CAL. LAB. CODE § 98.6 (West 2020) (providing a private cause of action for discharges based on Cal. Labor Code § 96(k), which protects "lawful conduct occurring during nonworking hours away from the employer's premises"); N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2020) (outlawing discrimination because of "an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property"); see generally Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment at-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 253-55 (2017).

<sup>104</sup> See COLO. REV. STAT. § 24-34-402.5(1) (West 2020) (permitting discipline or discharge if the requirement relates to "a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees" or is "necessary to avoid a conflict of interest with any responsibilities to the employer"); see also Bodie, *supra* note MTB-2017, at 254 (noting that courts are wary to "infringe upon the employer's interests").

to protect a tracing program as long as that program was focused solely on protecting health (and not ulterior motives).

An employer's contact-tracing efforts could also intrude upon an employee's seclusion. As discussed in Part II, the tort of intrusion upon seclusion requires an intentional and highly offensive intrusion upon the solitude or seclusion of another.<sup>105</sup> Courts will not always find that employee consent absolves the employer from liability, especially if the employee was threatened with job loss for noncompliance.<sup>106</sup> Employer privacy intrusions may be justified by legitimate employer interests, and the protection of fellow employees, customers, and the underlying business is a strong argument in favor of tracing. Courts have found no liability in instances where employer vehicles were monitored, even if off duty.<sup>107</sup> However, tracking an employee's off-duty movements may fall outside this justification, especially if the employer were to use the data for reasons other than addressing the pandemic.<sup>108</sup>

If local or national governments develop their own contact tracing programs, employers may want employees to participate in these larger efforts. Advocacy organizations have pushed for any such programs to be completely voluntary.<sup>109</sup> However, these programs could be voluntary from the government's perspective but required by employers. Businesses would have to weigh the health benefits to employees, customers, and the public against employee discontent and the lack of employer control over the program.

Once an employer has determined an employee's contacts over the estimated period of infection, the employer must inform those contacts of the possibility of contagion. But disclosure via contact tracing is just one method of disclosure out of a wider array of potential notifications. We turn now to the issue of disclosure.

#### **IV. Disclosure**

The final step in a testing and tracing program is disclosure to individuals in the zone of possible contagion. Employees may be justifiably upset if not informed of co-worker infection. The OSH Act requires employers to keep their workplace free from any recognized hazards that

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<sup>105</sup> RESTATEMENT (SECOND) OF TORTS § 652B; RESTATEMENT OF EMPLOYMENT LAW §§ 7.01, 7.06.

<sup>106</sup> RESTATEMENT OF EMPLOYMENT LAW § 7.06 cmt. h (“In the employment context, employee consent obtained as a condition of obtaining or retaining employment is not effective consent to an employer intrusion and does not in itself provide a defense to wrongful intrusion under this Section.”).

<sup>107</sup> *Elgin v. St. Louis Coca-Cola Bottling Co.*, No. 4:05CV970-DJS, 2005 WL 3050633 (E.D. Mo. Nov. 14, 2005); *Tubbs v. Wynnee Transp. Servs. Inc.*, No. H-06-0360, 2007 WL 1189640, at \*10 (S.D. Tex. Apr. 19, 2007).

<sup>108</sup> *Cf. Pulla v. Amoco Oil Co.*, 882 F. Supp. 836 (S.D. Iowa 1994), *aff'd* in relevant part and *rev'd* in part, 72 F.3d 648 (8th Cir. 1995), (potentially highly offensive for employer to access an employee's credit-card account to determine if he had used the card during his sick leave, and for what purposes).

<sup>109</sup> Paul Schwartz, *Protecting privacy on COVID-19 surveillance apps*, IAPP.ORG (May 8, 2020), <https://iapp.org/news/a/protecting-privacy-on-covid-surveillance-apps/> (identifying a “core set of best practices” for tracing programs, including voluntary choice, state-of-the-art data security, and data minimization and deletion protocols).

cause or are likely to cause death or serious physical harm to employees.<sup>110</sup> OSHA has issued coronavirus-specific workplace-preparedness guidance directing employers to “develop policies and procedures for prompt identification and isolation of sick people.”<sup>111</sup> The guidance does not mention mandatory employee testing. However, if the employer does know that an employee has tested positive, there is a strong argument that the general duty clause creates a responsibility to warn other employees in the workplace that they may have come in contact with someone diagnosed with COVID-19. Thus, balanced against employee privacy interests are practical, ethical, and even legal responsibilities to notify of potential illness transmission.

Under the ADA, information obtained through disability-related inquiries or medical examinations must be kept confidential and must be collected and maintained on separate forms and in separate medical files.<sup>112</sup> In its recent guidance in light of the pandemic, the EEOC elucidated several exceptions to the ADA’s confidentiality requirements, including notification to supervisors and managers in order to make necessary accommodations, as well as communication with state agencies in accordance with workers’ compensation laws.<sup>113</sup> The guidance further reiterates that the ADA’s confidentiality requirements, and its limited exceptions, apply to employers who gather information through allowable disability-related inquiries and medical examinations, such as temperature checks and COVID-19 symptom screenings.<sup>114</sup> Courts have held that the ADA’s confidentiality protections apply to all employees and applicants, not just those with a disability.<sup>115</sup>

The ADA’s confidentiality provisions undoubtedly apply to testing information that the employer receives through an employer-mandated test. However, information that is disclosed by the employee voluntarily may not be protected. This question is far from academic, as employees may frequently get tested outside of work but then notify their employers about the results.<sup>116</sup> The EEOC’s pandemic guidance states that if an employee voluntarily discloses a specific medical condition or disability outside of a disability-related inquiry, “the employer must keep this information confidential.”<sup>117</sup> Courts, however, have held that voluntarily disclosed information, provided to an employer outside of the context of a disability-related inquiry or medical examination, is not subject to the ADA’s protections.<sup>118</sup> These cases may be

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<sup>110</sup> 29 U.S.C. § 654(a)(1).

<sup>111</sup> Occupational Safety and Health Administration, Guidance on Preparing Workplaces for COVID-19 (Mar. 2020), <https://www.osha.gov/Publications/OSHA3990.pdf>.

<sup>112</sup> *Id.* § 12112(d)(3)(B); 29 C.F.R. § 1630.14(c) (2019).

<sup>113</sup> EEOC, Pandemic Preparedness in the Workplace, *supra* note PPW, at n. 19.

<sup>114</sup> *Id.* at § II.A.2.

<sup>115</sup> *See, e.g.,* *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 969-70 (8th Cir. 1999).

<sup>116</sup> *See, e.g.,* Complaint at 21, *Palmer, et al v. Amazon.com, Inc. et al*, 2020 WL 2967912, No. 1:20-cv-02468-BMC, Doc. #1 (E.D.N.Y. June 3, 2020), available at <https://www.publicjustice.net/wp-content/uploads/2020/06/Palmer-v.-Amazon-filed-complaint.pdf> (stating that an Amazon employee who visited a medical clinic outside of work for a COVID-19 test and subsequently tested positive “promptly sent [instant] messages to human resources staff letting them know about her positive test”).

<sup>117</sup> Pandemic Preparedness in the Workplace, *supra* note PPW, at § III.B.9.

<sup>118</sup> *EEOC v. Thrivent Financial for Lutherans*, 700 F.3d 1044, 1046 (7th Cir. 2012) (employee disclosure of migraines subsequently disclosed to prospective employers); *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1032-33 (10th Cir. 2011) (employee disclosure of HIV-Positive status subsequently disclosed to another employee); *Cash v. Smith*, 231 F.3d 1301, 1307-08 (11th Cir. 2000).

distinguishable, if only because they do not involve the novel coronavirus; employees likely feel more of a personal and public health obligation to disclose their diagnosis even if not directly asked. Given the EEOC's guidance, confidentiality is likely called for even outside of a medical examination or inquiry.

The ADA is also unclear about the extent to which a positive diagnosis can be disclosed. The Act itself does not explicitly allow for employers to notify public health officials. The EEOC, however, has stated in recent guidance that employers may “disclose the name of an employee to a public health agency when it learns that the employee has COVID-19” without elaborating further.<sup>119</sup> This exception may be based on the idea that state and local authorities require disclosure, as ADA regulations do state that “it may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation.”<sup>120</sup> This would appear to allow an employer to disclose an employee's COVID-19 diagnosis to CDC or public health authorities if required to do so. However, there does not appear to be any federal requirement for employers to notify health authorities: the CDC only instructs employers to send sick employees home, notify potentially exposed employees, and follow cleaning and disinfection recommendations to prevent further spread within the workplace,<sup>121</sup> while OSHA guidance instructs employers to develop policies and procedures to identify and isolate sick employees before removing them from the worksite.<sup>122</sup> Nevertheless, the EEOC's recent guidance states that “the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.”<sup>123</sup> Ultimately, this may be a non-issue in certain jurisdictions, as the testing providers (who are unlikely to be an individual's employer and thus not subject to ADA confidentiality rules in this context) are likely required to disclose positive results to public health authorities under local or state public health orders, thus absolving employers of the responsibility to do so.<sup>124</sup>

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<sup>119</sup> EEOC, What You Should Know About COVID-19 and the ADA, *supra* note 25.

<sup>120</sup> 29 C.F.R. § 1630.15(e). Courts have held that there is no conflict between ADA confidentiality provisions and requirements under other federal laws to disclose employee medical information. *See Big Ridge, Inc. v. Federal Mine Safety and Health Review Commission*, 715 F.3d 631, 656 (7th Cir. 2013) (finding no conflict between the ADA's confidentiality provisions and the Mine Safety and Health Administration's requirement to inspect and copy employee medical records as required under the federal Mine Safety Act).

<sup>121</sup> CDC, Interim Guidance for Businesses and Employers, *supra* note 4..

<sup>122</sup> Occupational Safety and Health Administration, Guidance on Preparing Workplaces for COVID-19, at 9-10, <https://www.osha.gov/Publications/OSHA3990.pdf>.

<sup>123</sup> EEOC, Pandemic Preparedness in the Workplace, *supra* note PPW, at § III.B.18.

<sup>124</sup> *See, e.g.*, Saint Louis County Department of Public Health, Rapid Notification Order (Mar. 31, 2020), <http://stlcorona.com/dr-pages-messages/public-health-orders/director-of-public-health-rapid-notification-order/> (requiring any healthcare provider or laboratory company who receives a positive test result for COVID-19 to immediately electronically report the finding to the Department of Public Health, but no later than six hours after receiving the notification of the positive test result). The public health exception allows covered entities to disclose PHI for health oversight activities, defined as disclosure “to a health oversight agency for oversight activities authorized by law . . . necessary for appropriate oversight of the health care system . . .” 45 C.F.R. § 164.512(d). HHS issued coronavirus-specific guidance in February 2020 explicitly stating that “the Privacy Rule permits covered entities to disclose needed protected health

Current CDC guidance encourages employers to perform contact tracing and inform workers of any potential exposure to COVID-19.<sup>125</sup> However, employers should take care that contact tracing preserves the confidentiality of the infected individual to the extent possible.<sup>126</sup> In a coronavirus webinar, the EEOC stated that notification of the identity of the individual with COVID-19 should only be made to officials within the employer’s organization on a “need to know” basis, and contacted individuals should only be informed of the potential transmission—not the infected individual’s identity.<sup>127</sup> While in smaller organizations employees may be able to infer the identity of the employee who tested positive, employers are prohibited from confirming or otherwise revealing the employee’s identity.<sup>128</sup> The importance of confidentiality is highlighted in past EEOC guidance for restaurants relating to foodborne illnesses, which states that “the ADA prohibits [the employer] from disclosing the name of the employee who may have caused the exposure to a food-related disease” and states that employers “may inform your other employees that they may have been exposed and may have to be tested.”<sup>129</sup>

Therefore, while employers should alert individuals who were likely exposed to the novel coronavirus by an employee, they should do so in a manner that preserves the confidentiality of the identity of the individual to comply with the ADA. By anonymizing this information, employers can provide this warning in a way that avoids it being classified as PHI under HIPAA.<sup>130</sup> Keep in mind, however, that as discussed in Part II, HIPAA only applies to employers who are (generally speaking) health care providers or self-insurers of health care plans, and employment-related information is not covered.<sup>131</sup>

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information without individual authorization to a public health authority, such as the CDC or a state or local health department.” See HHS Bulletin, *supra* note HHS.

<sup>125</sup> See CDC, Interim Guidance for Businesses and Employers, *supra* note 4.

<sup>126</sup> The CDC guidance calling for employer contact tracing also cautions employers to “maintain confidentiality as required by the Americans with Disabilities Act.” *Id.*

<sup>127</sup> EEOC COVID-19 webinar at 12:20, available at <https://www.youtube.com/watch?v=i8bHOtOFFJU>.

<sup>128</sup> *Id.* Further, the importance of keeping confidential the identity of an employee who may have exposed others in the workplace to a disease is highlighted in past EEOC guidance (which, notably, has since been rescinded) for restaurants relating to foodborne illnesses, which states that “the ADA prohibits [the employer] from disclosing the name of the employee who may have caused the exposure to a food-related disease” and states that employers “may inform your other employees that they may have been exposed and may have to be tested.” Equal Employment Opportunity Commission, How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers, at § 11, <https://www.eeoc.gov/fact-sheet/how-comply-americans-disabilities-act-guide-restaurants-and-other-food-service-employers>.

<sup>129</sup> *Id.*

<sup>130</sup> PHI, as defined by HIPAA, requires that the information identifies or can be used to identify an individual. 45 C.F.R. § 160.103. Therefore, even if employers do not directly identify an individual, it is important for employers to sufficiently anonymize the information provided to other employees.

<sup>131</sup> Ehrlich v. Union Pacific Railroad Company, 302 FRD 620, 628 (D. Kan. 2014) (“[T]here are no federal statutes generally prohibiting the release of medical records by an employer . . . . The privacy rule of [HIPAA] does not directly regulate employers or other plan sponsors that are not HIPAA covered entities.”).

Employers may also be liable under tort law for disclosing employee health information. The tort of public disclosure of private facts prohibits giving publicity to private matters if the matter is not a public concern and such disclosure is highly offensive.<sup>132</sup> The Restatement of Employment Law applies this tort to information that the employee provided in confidence to the employer, unless the employee has consented to its disclosure.<sup>133</sup> Courts have found that disclosing an employee's medical information can be tortious in certain contexts, and not in others.<sup>134</sup> HHS has determined that the COVID-19 pandemic “does not alter the HIPAA Privacy Rule's existing restrictions on disclosures of protected health information to the media.”<sup>135</sup> Although HIPAA does not control the common law, this advice may provide some context for what a reasonable employer would do and what might be considered “highly offensive.”

Two factors are likely to be meaningful to potential liability under the public disclosure tort. First, because anonymous disclosure is likely to suffice in providing sufficient warning to potentially infected individuals, an employer would need additional public health justification to release the employee's name. True, there may be some situations where even an anonymous disclosure reveals identity.<sup>136</sup> But employers have generally balanced the need for specificity of time and location in information with the interest of privacy. Second, the scope of the disclosure matters. The traditional publicity tort requires public disclosure—namely, “communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”<sup>137</sup> However, a set of courts along with the Restatement of Employment Law have adopted a “special relationship” approach which allows for liability when there is disclosure to a small but particularly relevant or salient group.<sup>138</sup> Disclosure to fellow employees has been found to be a particularly relevant group.<sup>139</sup>

One final area of potential liability is the potential for unwanted disclosure of employee health data through a data breach. Keeping data on employee health outcomes and geographical movements puts employers at risk of both intentional hacking as well as unintentional release of data by employees or third-party contractors. All fifty states have data breach notification requirements covering the escape of sensitive data, although these statutes focus on the type of

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<sup>132</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>133</sup> RESTATEMENT OF EMPLOYMENT LAW § 7.05 (2015).

<sup>134</sup> *Compare* French v. U.S. Dep't of Health & Hum. Servs., 55 F. Supp. 2d 379 (W.D.N.C. 1999) (finding disclosure of employee medical information to potential employer stated a claim in tort), *with* Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871, 879 (8th Cir. 2000) (employer investigation of employee staph infection was justified based on “concern for public health”).

<sup>135</sup> *See* Department of Health and Human Services, OCR Issues Guidance on Covered Health Care Providers and Restrictions on Media Access to Protected Health Information about Individuals in Their Facilities (May 5, 2020), <https://www.hhs.gov/about/news/2020/05/05/ocr-issues-guidance-covered-health-care-poviders-restrictions-media-access-protected-health-information-individuals-facilities.html>

<sup>136</sup> This is a growing problem in big data as well. *See* Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701 (2010).

<sup>137</sup> RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (2015).

<sup>138</sup> *See, e.g.*, *Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977).

<sup>139</sup> *See id.* (calling “fellow employees” one example of a group to whom disclosure might be embarrassing); *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990) (disclosure of mastectomy to other employees was sufficient publicity under the tort).

identifying information that facilitates identity theft.<sup>140</sup> Nevada requires organizations handling personal information to “adopt reasonable data security measures” to protect the information from unauthorized access,<sup>141</sup> as do Oregon<sup>142</sup> and New York,<sup>143</sup> while Rhode Island requires organizations to adhere to several data security principles including “[implementing] and [maintaining] a risk-based information security program.”<sup>144</sup>

Data security is critical. The overall stress of the pandemic, combined with the pressure of getting sensitive information to critical individuals in a timely way, may lead employees to cut corners or neglect security protocols. To reduce the potential for risk, employers can: minimize the data collected (e.g., do not collect individual employee temperatures); develop rigorous policies for handling the data; train employees on good security habits; use encryption or other cybersecurity techniques when storing employee data; and having a notification regime in place to meet the requirements for national and state data breach notification statutes, which are often time-sensitive.<sup>145</sup>

## V. Conclusion

Given the failure of the federal government to develop a cohesive national pandemic strategy, as well as the wide variation in the effectiveness and seriousness of state and local public health efforts, employers would be prudent to develop their own testing, tracing, and disclosure systems in order to prevent widespread workplace outbreaks. This is especially critical for employers whose employees cannot work from home. U.S. law generally affords a wide deference to employers in developing and implementing their own systems of testing, tracing, and disclosure. At the same time, there are important rules to follow in managing such sensitive employee information. While the patchwork of federal and state laws creates a confusing legal landscape for employers, those that follow best practices will generally find themselves within the confines of the law. Critical steps include: providing clear notice to employees about what is required of them and how the employer will use employees’ personal information; limiting sharing of personal information to those who “need to know;” crafting disclosures that protect individual privacy while promptly alerting affected employees of potential virus exposure; and maintaining strong data security systems and practices. A haphazard approach to testing, tracing, and disclosure can result in costly liability. Those employers who engage in thoughtful development and implementation of their COVID-19 prevention and mitigation efforts can both

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<sup>140</sup> Under Missouri data breach laws, for example, “personal information” is defined as first and last name in combination with a Social Security, driver’s license, or other government identification number, financial account or credit/debit card number, or medical or health insurance information. MO. REV. STAT. § 407.1500.1(9).

<sup>141</sup> NEV. REV. STAT. § 603A.210.1.

<sup>142</sup> OR. REV. STAT. § 646A.622 (2020).

<sup>143</sup> N.Y. GEN. BUS. LAW § 899-bb.2 (McKinney 2020).

<sup>144</sup> 11 R.I. GEN. LAWS § 11-49.3-2 (2020).

<sup>145</sup> For an overview of state data breach notification laws, see Nat’l Conf. of State Legislatures, Security Breach Notification Laws (last accessed July 22, 2020), <https://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>.

avoid costly legal entanglements and be rewarded with the preservation of their business operations to the extent possible in the current pandemic environment.