



# Keeping the Doors Open: Managing Workplace Medical and Legal Risks in the Pre-Vaccine Era

JW Webinar | July 10, 2020

# Our Panel

*Yes,*  
**WE ARE**



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# Agenda



- Legal Baselines
  - State and local public health orders
  - Federal workplace rules
- Assessing and Managing the Disease
  - COVID-19 Business Re-opening Challenges
  - Testing Types and Use
  - RTW Strategy & Process Management
  - Vendor Landscape
- Response
  - Managing legal risk
  - Model Scenarios

- Texas – statewide public health orders
  - GA-29: Statewide mask requirement.
  - July 2 Proclamation: Ban on large (>10 ppl) gatherings.
  - GA-28: Occupancy limit; no bars; floating the river.
  - Healthcare: TMB Emergency Rule; long-term care facilities; elective procedures.
- Local government public health orders
  - Most urban areas: Health and safety policies with masks required for most businesses.
  - Austin: Increased mask requirements (no exception for indoor social distancing). Enforcement (nuisance findings, \$2,000 fines).
  - Dallas County: ‘Ban’ on mandatory RTW testing; paid sick leave usage.
  - Harris County: Ban on public gatherings, including foreclosure sales.

## Federal Workplace Rules: OSHA

- OSHA's "Guidance on Returning to Work":
  - Provides general principles for relaxing restrictions that were put in place to slow the spread of COVID-19
  - Divides reopening into 3 phases:
    - Phase 1: Make telework available if possible, limit number of employees allowed in the office, provide accommodations for high risk individuals, limit non-essential business travel
    - Phase 2: Continue to allow for telework if possible, restrictions on the number of employees in the office can be eased but social distancing measures should be strictly enforced, non-essential business travel can resume, continue to accommodate high risk individuals
    - Phase 3: Businesses can resume unrestricted staffing of work sites

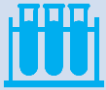
- Per OSHA, for each phase of reopening:
  - Employers should implement strategies for basic hygiene, social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training that are appropriate for the particular phase.
  - Employers should develop and implement policies and procedures that address preventing, monitoring for, and responding to any emergence or resurgence of COVID-19 in the workplace or community
  - Employers should be flexible and prepared to make necessary adjustments as the number of COVID-19 cases changes in the community



## Federal Workplace Rules: EEOC

- EEOC's publication, *"Pandemic Preparedness in the Workplace and the Americans With Disabilities Act"*
- EEOC's guidance, *"What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws"*
  - Organized in FAQ format
  - Answers questions relating to COVID-19 and the ADA, ADEA, Title VII, Pregnancy Discrimination Act, etc.
  - Provides guidance on using health inquiries and medical examinations for returning employees to work
  - Addresses legal accommodations relating to COVID-19
  - Updated frequently to address the changing situation

# COVID-19 Business Re-opening Challenges



Screening &  
Testing



Process  
Management



Technology



Privacy &  
Security



Clinical Oversight



Communication  
Support



## Legal Parameters for Screening: Employees

- Require self-reporting of COVID-19 symptoms, exposure or diagnosis
- Require responses to health inquiries regarding symptoms, exposure or diagnosis
- Require medical exams and testing, including temperature screens and COVID-19 testing, prior to entering the worksite
  - Antibody testing cannot be required
- Require reporting of travel or high risk activities

# Assessing and Managing the Disease



- Avoid Legal Pitfalls:
  - Ensure COVID-19-related policies are applied consistently and equally
  - Avoid singling out certain groups (*e.g.*, over 65) or particular activities (*e.g.*, attending political protests) for screening or required isolation
  - Provide reasonable accommodations when possible to individuals in high risk groups

## Legal Parameters for Screening: Third Parties

- *If* screening:
  - Be consistent.
  - Use a method and criteria recommended by health authorities (e.g., CDC, DSHS).
  - Have a plan in place for objections and symptomatic responses.
  - Pay attention to local health orders.
  - If screening those with contractual right to enter, review the contract first.
  - Avoid unnecessary retention of health information.

## Legal Parameters for Screening: Third Parties

- Public accommodations: Be mindful of potential ADA issues
  - Is COVID-19 a disability?
  - Customer/visitor screening as “eligibility criteria”?
  - “Direct threat”?
- Some factors to consider:
  - Nature of the business
  - Is social distancing possible?
  - Indoors vs. outdoors?
  - Presence of higher-risk individuals?

→ ***Assessment of actual risk under the circumstances***

# Testing Types & Use

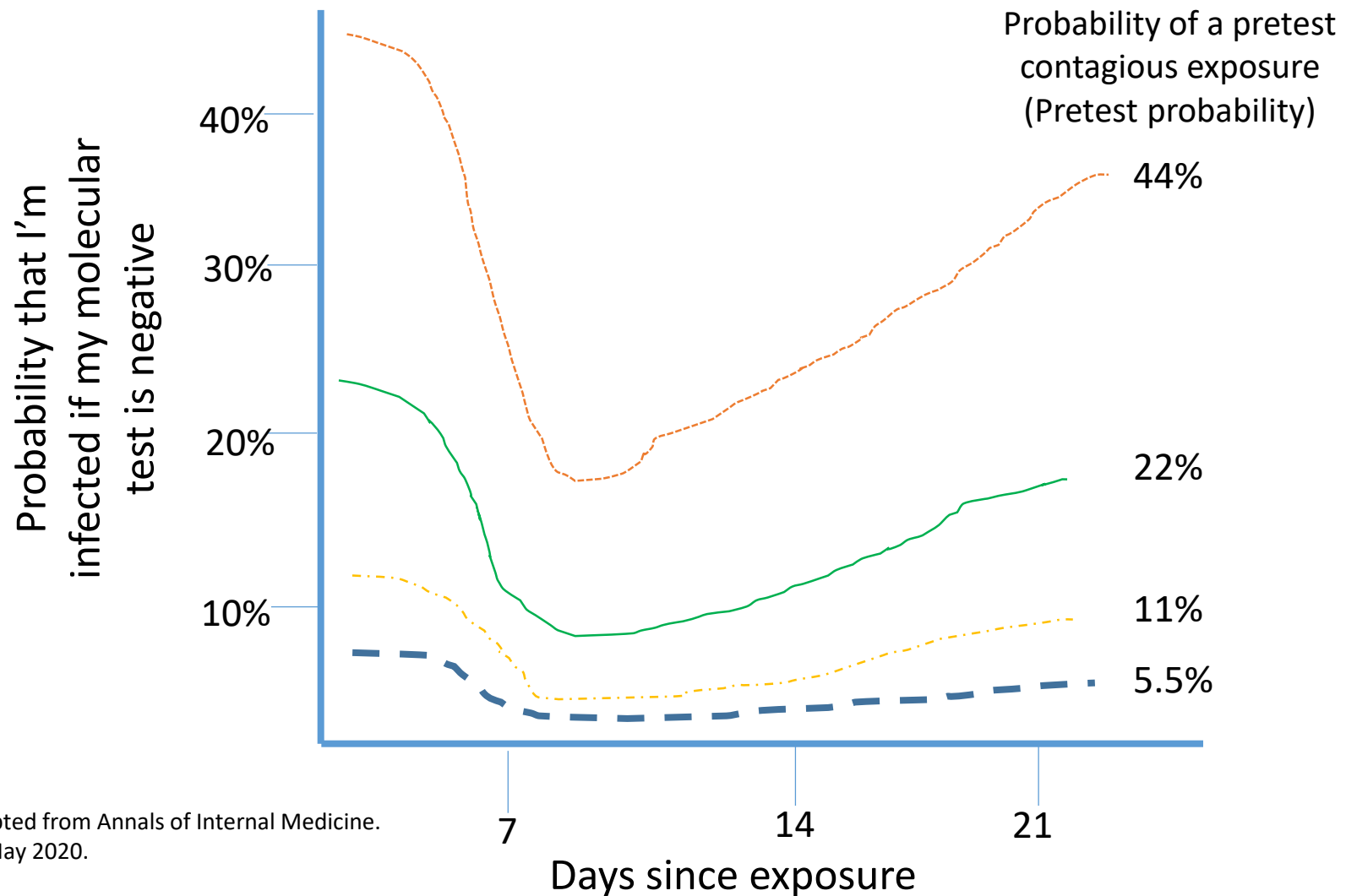


	Molecular (PCR)	Antigen	Antibody
Purpose	Diagnose active infection	Diagnose active infection	Research; past infection
Employer applicability	YES	YES	NO
General screening of asymptomatic persons	NO*	NO	NO
Testing of high-risk or symptomatic persons	YES	YES	NO
Pros	Lower false negative rate (when collected ~7-10 days after symptom onset) Widely available Doctor's visit not required "Drive-thru" sites	Point-of-care test for same-day results	N/A
Cons	Results back in 2-5 days**	High false negative rate May need to retest with PCR Limited availability Urgent care or ER visit	N/A

\*June 16, 2020 FDA announced efforts to support development of testing for general screening of asymptomatic persons

\*\*There are 4 EUA point-of-care molecular tests performed in an urgent care or ER setting that provide same-day results

# Can I trust a negative result?



Adapted from Annals of Internal Medicine.  
13 May 2020.



# Process Management

- Planning should go beyond symptom screening and testing
- Assume a positive test or outbreak will occur

## **Employer key questions for process management**

- Do you have critical infrastructure workers?
- Is there an internal occ health team or onsite clinic that can provide clinical oversight?
- Is there an established telemedicine provider and what is their scope of service?
- Will HR (or some other function) be a RTW resource?
- What is the capacity of internal resources (contact tracing)?
- Are vendors needed to fill in the gaps?
- What is the budget?

# RTW Strategy – Four Key Areas

- Symptom Screening
- Testing
- Contact Tracing
- Case Management
- Who is administering each of the above components?
- Are they “talking” to each other

# Vendor Landscape

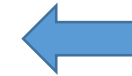


Pre-Positive Case  
Identification



## **4 Key Resources:**

1. Symptom Screening
2. Testing
3. Contact Tracing
4. Case Management



Post-Positive Case  
Identification

Customizability, Customer Support, Risk Mitigation & Cost

- Remote device-based Screening
- Screen & Test Only
- Clinical Management
- Process Management

Fees vary in range:

1. Some individualized components are free
2. Fees range from \$2 - \$10 PEPM (individual components through full service)

- Legal guidelines - Notifying others?
  - Employees
    - Maintain confidentiality of all medical information, including results of temperature screens, health questionnaires or COVID-19 tests
    - Limit rumors and speculation by issuing a general notice to the workforce if an employee tests positive for COVID-19
    - Notice should reassure employees that, unless they have been directly notified, it is not believed the employee was in close contact with or shared a common workspace with the infected employee
    - Do not reveal the identities of employees who have tested positive for COVID-19

- Legal guidelines - Notifying others?
  - Individualized decision
  - Plan ahead!
  - Third parties:
    - Tenants – consider advising of (1) location within building, (2) dates of suspected exposure, (3) affected common areas, and (4) general decontamination measures.
    - Customers/Visitors
      - Close contact?
      - Decontaminate per CDC Community Facilities (or applicable) guidelines
    - Public health authorities?
    - Insurance/indemnity?

- Model Scenarios
  - Hypothetical #1: Employee reports confirmed positive test
  - Hypothetical #2: Employee reports potential exposure
  - Hypothetical #3: Tenant reports employee confirmed positive test
  - Hypothetical #4: Contractor reports positive test of employee temporarily assigned to customer's site.



# Q&A

Please visit our  
dedicated Coronavirus  
resource page at

[JW.com/Coronavirus](https://www.jw.com/Coronavirus)

July 10, 2020







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