

# LYNETTE LABINGER

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ATTORNEY AT LAW

June 8, 2020

## VIA EMAIL

Kenny Alston, Chief Legal Counsel  
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Rhode Island Department of Health  
Three Capitol Hill  
Providence, RI, 02908

The Hon. Peter Neronha  
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Attorney General  
150 South Main Street  
Providence, RI 02903

Dear Mr. Alston and Attorney General Neronha:

I write as cooperating counsel for the American Civil Liberties Union Foundation of Rhode Island (“ACLU”). This letter concerns the communication and application of standards for “Reopening RI,” and particularly the standards governing access to public accommodations, including but not limited to in-dining restaurants. Because the ACLU believes some of the information being provided to implement those standards is misleading and could lead to violations of anti-discrimination laws, we request that you take swift action to address these concerns.

As part of the plan to gradually reopen the State for business, the Department of Health has provided “Phase II Guidelines” for Restaurants (Restaurant Guidelines)<sup>1</sup> and General Business/Organization Guidelines (GBO),<sup>2</sup> each of which “require[s] establishing, at minimum, symptom screening and COVID-19 risk procedures to screen anyone entering a business or organization’s facilities.” The GBO Guidelines state that “people whose responses to screening questions indicate they are sick, or who show visible signs of illness, *must be denied entrance and instructed to isolate.*” (Emphasis added). The Phase II Restaurant Guidelines contain similar language.

But in determining if someone shows “signs” of illness, the GBO Guidelines, unlike the Restaurant Guidelines, further correctly caution to consider whether the symptoms are the result of allergies or another non-infectious cause. Indeed, in the definitions of “COVID-19 symptoms” set forth in the Regulations adopted by the Department of Health, the Department makes clear that not every elevated temperature or body ache denotes the presence of COVID-19:

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<sup>1</sup> [https://www.reopeningri.com/resource\\_pdfs/Phase-II/Phase-II-restaurant-guidance-updated-05.30.20.pdf](https://www.reopeningri.com/resource_pdfs/Phase-II/Phase-II-restaurant-guidance-updated-05.30.20.pdf) accessed 6/8/20.

<sup>2</sup> [https://www.reopeningri.com/resource\\_pdfs/Phase-II/Phase-II-General-Business-Organization-Guidance-05.28.20.pdf](https://www.reopeningri.com/resource_pdfs/Phase-II/Phase-II-General-Business-Organization-Guidance-05.28.20.pdf), accessed 6/8/20.

“COVID-19 symptoms” means the occurrence of any of the symptoms of COVID-19, as set forth in CDC guidance, when they develop over a period of hours to days and cannot be explained by allergies or other noninfectious disease. Such symptoms include, among others, sweating, chills, repeated shaking with chills, muscle pain, body aches or other symptoms consistent with fever, temperature measured above 100.4°F, cough, congestion, sore throat, shortness of breath, headache, or new loss of taste or smell.

Regulations of the Department of Health, effective June 1, 2020, Title 216, chapter 50, subchapter 15, Part 7, Section 7.2(A)(8)<sup>3</sup>

The GBO Guidelines do not mandate the format for conducting screenings, which can proceed verbally either in person or by phone, by app or informational poster.

The Department of Health has developed “sample questions” and a form or poster titled “COVID-19 Screening Tool” for use by businesses and organizations, including restaurants. A copy of the linked Screening Tool, accessed June 8, 2020, is attached.<sup>4</sup>

The Screening Tool in its present form is misleading and may cause needless stigma and distress to employees and patrons, and may also create potential liability to employers and establishments. According to the Screening Tool, restaurants and other establishments (excluding those providing certain essential services, such as grocery stores, pharmacies or gas stations) are required to “screen employees, clients, and/or visitors for symptoms of COVID-19” by eliciting a “yes” or “no” response to a series of questions about “symptoms.” The list of “symptoms” includes “cough,” “shortness of breath or difficulty breathing,” “muscle or body aches,” “headache,” “runny nose or stuffy nose,” among others.

The Screening Tool provides that, if the individual has “answered ‘yes’ to any of the questions above, you will be asked to leave the building.” The Screening Tool provides no room for clarification or nuance. The ACLU is aware of at least one restaurant that announced plans to use the Screening Tool to deny service in accordance with its instructions.

The Screening Tool does not accurately reflect the standards set forth in the GBO Guidelines, which do *not* require denial of entry based simply on a “yes” answer. To the contrary, the GBO Guidelines advise establishments to “[d]eny entry to people with COVID-19 symptoms *if they can’t be explained by allergies or another non-infectious cause*, as listed by the CDC” (emphasis added). By omitting this critical distinction, the Screening Tool may become a vehicle for discrimination on the basis of disability.

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<sup>3</sup> [https://risos-apa-production-public.s3.amazonaws.com/DOH/REG\\_11109\\_20200602083513.pdf](https://risos-apa-production-public.s3.amazonaws.com/DOH/REG_11109_20200602083513.pdf), accessed 6/8/20.

<sup>4</sup> [https://www.reopeningri.com/resource\\_pdfs/COVID19\\_Screening\\_Tool\\_English-NEW.pdf](https://www.reopeningri.com/resource_pdfs/COVID19_Screening_Tool_English-NEW.pdf), accessed 6/8/20. The current version is dated May 29, 2020.

## **I. Both state and federal law prohibit discrimination in employment and public accommodation based upon disability.**

The laws of the United States, including the Americans with Disabilities Act, 42 U.S.C. §12101, and of the State of Rhode Island, including the Fair Employment Practices Act, R.I.G.L. chapter 28-5, the Public Accommodations Act, R.I.G.L. chapter 11-24, the Civil Rights of People with Disabilities Act, R.I.G.L. chapter 42-87, and the Rhode Island Civil Rights Act, R.I.G.L. chapter 42-112, broadly prohibit discrimination in employment and public accommodations against persons with disabilities. “Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001). While these laws permit exclusion, in certain instances, of individuals who pose a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation,” *see, e.g.*, 42 U.S.C.A. § 12111, actual facts, not wild speculation, must be established by the entity excluding a person with a disability from employment or access to programs, benefits, services, or public accommodations. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 649 (1998); *School Board of Nassau Cty., Fla. v. Arline*, 480 U.S. 273 (1987).

## **II. The Department of Health’s Screening Tool fails to account for the existence of diagnosed, disabling conditions that have nothing to do with COVID-19, and fails to provide notice of any procedure to challenge their applicability or seek exemptions.**

The CDC has identified a number of “symptoms,” reproduced by the Department of Health in its Screening Tool, as indicators of COVID-19. We understand that, in the absence of an instant test to rule out COVID-19, given the transmissibility of the virus, it may be appropriate and reasonable to urge or even require that individuals with *unexplained* or *undiagnosed* symptoms stay home from work or a public place.

But the Screening Tool paints with too broad a brush, unnecessarily excluding and stigmatizing individuals with disabilities or other health conditions that present no heightened risk of COVID-19. Many conditions other than COVID-19 produce the “symptoms” identified by the Department of Health in its Screening Tool. At the same time, it has been reported that as many as 80% of persons who actually have COVID-19 exhibit no symptoms at all.<sup>5</sup>

The Screening Tool fails to account for those distinctions. Instead, anyone who truthfully answers a question that he or she has a cough, a muscle ache, a headache, or a runny nose is directed to be denied access to employment or a public accommodation.

Respectfully, this standard is arbitrary and discriminates against individuals with disabilities. For example, an individual with diagnosed and documented COPD (Chronic Obstructive Pulmonary Disorder) would most likely have a cough, shortness of breath and/or

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<sup>5</sup> <https://www.cebm.net/covid-19/covid-19-what-proportion-are-asymptomatic/>, accessed 6/6/20. Centre for Evidence-Based Medicine of the University of Oxford reported “[t]hat between 5% and 80% of people testing positive for SARS-CoV-2 may be asymptomatic.” *See also* <https://www.cidrap.umn.edu/news-perspective/2020/04/study-many-asymptomatic-covid-19-cases-undetected>, accessed 6/6/20.

difficulty breathing.<sup>6</sup> According to the Screening Tool, an affirmative answer, without more, would mandate that such individual—clearly someone who meets the definition of a person with a disability under the cited statutes—be sent home from work or denied service on the basis of that disability. Similarly, an individual with seasonal allergies would be excluded for acknowledging congestion or a runny nose. An individual with chronic diarrhea from irritable bowel syndrome, or an individual with headaches and fatigue from fibromyalgia, would also be excluded.

In each case, there would be no justification for the exclusion, but it is summarily mandated by the Screening Tool. The Screening Tool deputizes and arms line workers to be the “symptom police” but provides none of the tools or training necessary to distinguish between undiagnosed symptoms, which *could* be a sign of COVID-19, and diagnosed disabilities, which are not. A business or restaurant, acting in reliance upon the literal language of the Screening Tool, will expose its line workers and the business itself to lawsuits brought by excluded employees and patrons for discrimination on the basis of disability under the cited federal and state laws.

While there is nothing simple about the circumstances we are all confronting, there is a straightforward solution to the issues raised in this letter:

- First, make clear in the text of the Screening Tool that it is a guideline and not a mandate and that it will not provide a defense or justification to discriminate against individuals with disabilities.
- Second, change the question from

“Have you had any of the following symptoms in the past three days?”

to a statement along the following lines:

“Please read this list. If you have had any of the following symptoms in the past three days, and you don’t know why, please stay home.”

- Third, omit – or revise in accordance with the changes suggested above – the statement in red at the end of the Screening Tool (“If you have answered ‘yes’ to any of the questions above, you will be asked to leave the building.”).

We would also ask that you review all other guidance to ensure that the language mandating wholesale exclusion of individuals without regard to the cause of their symptoms be omitted and that you take affirmative steps to alert restaurants and other businesses that the Screening Tool has been modified to conform to the GBO Guidelines.

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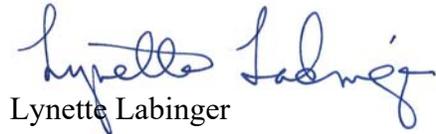
<sup>6</sup> <https://www.mayoclinic.org/diseases-conditions/copd/symptoms-causes/syc-20353679>, accessed 6/6/20.

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In closing, I want to emphasize that we fully appreciate the exigencies under which the State is operating and the difficult decisions that the State has had to make to address this medical crisis. At the same time, the State must be ever vigilant not to add to the stigma and burdens that persons with disabilities suffer when they are singled out or excluded from employment or access to programs, services, and public accommodations to which they are fully entitled.

In light of the urgency of this situation, we request that you provide a response to our concerns by June 16, 2020. We look forward to your prompt response. Thank you.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lynette Labinger". The signature is fluid and cursive, with the first name "Lynette" written in a larger, more prominent script than the last name "Labinger".

Lynette Labinger

enclosure

cc: Claire Richards, Executive Counsel to the Governor  
Michael Evora, Executive Director, RI Human Rights Commission

# REOPENING RI

## COVID-19 Screening Tool

Use this tool to screen employees, clients, and/or visitors for symptoms of COVID-19.

### SYMPTOMS

HAVE YOU HAD ANY OF THE FOLLOWING SYMPTOMS IN THE PAST THREE DAYS?	YES	NO
COUGH		
SHORTNESS OF BREATH OR DIFFICULTY BREATHING		
FEVER OR CHILLS		
MUSCLE OR BODY ACHES		
SORE THROAT		
HEADACHE		
NAUSEA OR VOMITING		
DIARRHEA		
RUNNY NOSE OR STUFFY NOSE		
FATIGUE		
RECENT LOSS OF TASTE OR SMELL		

### RISK FACTORS

	YES	NO
Have you been in close contact (less than six feet) with anyone with COVID-19 or symptoms of COVID-19 in the past 14 days? <sup>1</sup>		
Have you traveled anywhere outside the 50 United States in the past 14 days?		
Have you traveled to Rhode Island for a non-work-related purpose from another city, town, county, or state that currently has a stay-at-home restriction, a shelter-in-place restriction, or a similar restriction, declaration, or announcement due to a COVID-19 outbreak? <sup>2</sup>		
Have you been directed to quarantine or isolate by the Rhode Island Department of Health or a healthcare provider in the past 14 days? If so, when does/did your quarantine or isolation period end?		
<p><b>IF YOU HAVE ANSWERED "YES" TO ANY OF THE QUESTIONS ABOVE, YOU WILL BE ASKED TO LEAVE THE BUILDING.</b></p> <ul style="list-style-type: none"> <li>• <b>Employees:</b> Please contact your supervisor and your Human Resources representative.</li> <li>• <b>Visitors:</b> Please call to discuss when you can return to this facility.</li> </ul>		

<sup>1</sup> Does not apply to people who come into contact with people with symptoms of COVID-19 during the course of their daily work while wearing full and appropriate personal protective equipment (PPE). See <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assessment-hcp.html> for more information.

<sup>2</sup> Public health, public safety, and healthcare workers are exempt. Does not apply to anyone traveling for medical treatment, to attend funeral or memorial services, to obtain necessities like groceries, gas, or medication, to drop off or pick up children from day care, or to anyone who must work on their boats.

05/29/2020

