

Screening Employee Temperatures and COVID-19¹

Overview

The federal Americans with Disabilities Act (“ADA”) and corresponding state and local laws protect workers from disability discrimination. Among other prohibitions, these laws restrict employers’ ability to inquire about medical conditions and require medical examinations such as taking an employee’s temperature. Certain exceptions to these restrictions apply when an employee presents a “direct threat” to the health and safety of others in the workplace.

The Equal Employment Opportunity Commission (“EEOC”), which administers the ADA, has recently issued guidance on how it will apply the ADA to employer monitoring of employee temperatures as a means of protecting employees and reducing the spread of the Coronavirus. An overview of this guidance and related legal issues is provided below.²

EEOC Guidance

In a March 21 issuance that updated guidance previously issued in 2009 in response to the emergence of the H1N1 “swine flu,” EEOC stated that the current COVID-19 pandemic is within the “direct threat” exception to restrictions on employer medical inquiries and testing. Specifically, the EEOC has stated that employers may take employee temperatures to test for fevers before they enter the workplace, as a means of limiting potentially infected employees’ contact with others. In addition, the EEOC stated that employers may report confirmed cases of COVID-19 to public health officials as required by applicable law.

The EEOC also noted that employees who refuse to submit to an otherwise uniformly applied temperature screening can be barred from the workplace.

Notably, the EEOC did not say that employers must take employee temperatures. Some employers may choose simply to inquire about COVID-19 symptoms or exposure to other persons with COVID-19, rather than administering temperature tests.

¹ **NOTE: This is a general overview of the legal issues pertaining to the screening of employees’ temperatures in conjunction with the Coronavirus (COVID-19) pandemic. This overview is not intended to provide legal advice. Qualified legal advice should be sought for how the law applies in any particular situation.**

² State and local agencies may have their own guidelines on this issue, which may or may not be consistent with the EEOC’s guidance. This overview only addresses the EEOC guidance and related legal issues.

Other Legal Considerations

There are a variety of legal considerations that an employer should address and plan for before undertaking any temperature screening of employees.

First, if an employer opts to apply temperature screens, it should do so only on the grounds that (i) the COVID-19 pandemic is widespread or an imminent threat in the community in which the employer will use such screening based on assessments by state and local health authorities or the U.S. Centers for Disease Control, and (ii) the testing will help to protect the employer's workforce and others in the workplace against the spread of COVID-19. This will strengthen the grounds for doing the temperature screens and will help to insulate the employer against claims that the testing is not in fact justified by the "direct threat" exception.

Second, temperature screening should not be done on a selective or case-by-case basis, but rather should be done uniformly within job groups and across similarly situated job groups. Screening that is done for *all* employees who have regular contact with others is easier to defend than a screening program that selectively targets only a small subset of the workforce, particularly if the targeted subset disproportionately includes minorities, women, or other protected groups.

Third, strict temperature testing protocols should be uniformly followed in administering any temperature screening program. These protocols should be based on clear medically based criteria for how employee temperatures are measured, what cutoffs are used for determining normal versus "trigger" temperature readings, what actions are taken when a "trigger" reading appears, and what records are kept. Medical advice should be obtained in establishing these protocols, and guidelines from public health authorities should be followed. This will help to assure that the screening program is narrowly tailored and administered in a manner that clearly focuses on mitigation of COVID-19 risks.

Fourth, employee names, temperature readings, and other medical information (including information that is either documented or simply known to employer officials) should be kept strictly confidential. Such information should be shared only with company personnel based on a need-to-know basis tied to their administration of the screening program. In addition, employers may share the information with public health authorities when required to do so. This will help to avoid potential liability for invasion of employee privacy. When information is shared, only what absolutely must be shared should be disclosed.

Fifth, personnel who administer the temperature screening should be provided with proper personal protective equipment and trained in how to use it, given clear testing protocols, trained in how to follow those protocols, trained in proper disposal of biowaste (if any), and monitored and screened for signs of COVID-19 themselves. Simply giving HR or supervisory personnel a thermometer and telling them to check for employee temperatures above a specified reading is not enough. The employees involved in administering the temperature screening are at greater risk because of their closer contact with multiple

employees, and they need to be adequately protected. Absent such precautions, an employer could be liable for claims by such employees who contract COVID-19.

Sixth, an employer that undertakes a temperature screening program should keep abreast of updates from public health authorities, as much remains unknown about the Coronavirus. Changes in public health guidance may dictate changes in the employer's program.

Finally, as the incidence of COVID-19 subsides and we move in the direction of more normal economic activity, employers who have undertaken an employee temperature screening program will need to continually reassess the justification and defensibility of that program. Based on input from public health authorities and medical experts, there will come a time when the program will need to be reduced and/or discontinued.

Conclusion

The COVID-19 pandemic has raised a plethora of legal issues for employers, and the use of temperature screening to help fight the Coronavirus implicates many of those issues. Employers should undertake such screening only after consideration of such issues and consultation with qualified legal counsel.