

Opening the Doors: Return-to-Workplace Considerations During COVID-19

Part Two: Potential Screening Measures for Employees Returning to the Workplace

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Employment

Whether a company is an essential business or is expecting to reopen its doors in the coming weeks, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations. Generally speaking, employees can be required to come to work, but this general rule must be considered against the backdrop of an unprecedented national health crisis that gives rise to a novel legal landscape.

This five-part series examines the most challenging issues faced by employers who are planning to reopen or continue productive operations:

1. Navigating the Legal Risk of Return ([Part One](#))
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Potential Screening Measures for Employees Returning to the Workplace

Employers may want to adopt screening procedures for any employees attending or returning to the workplace. The [CDC](#) and many jurisdictions are now encouraging such checks. Furthermore, the EEOC has issued updated [guidance](#) clarifying that employers may conduct body temperature checks, COVID-19 diagnostic testing, and other limited medical inquiries of their employees during the COVID-19 pandemic without violating the Americans with Disabilities Act (ADA), given the threat of harm presented by infected employees in the workplace. (Employers should note that when the pandemic ends, they will be required to revert to stricter rules around employee medical



inquiries and medical tests.)

What Can Employers Ask Employees About Symptoms During the Pandemic?

Employers are permitted to ask employees whether they are experiencing any COVID-19 symptoms, such as a fever, chills, cough, shortness of breath, body aches, sore throat, or other symptoms identified by the CDC or other public health authorities. Employers may require that employees answer questions or provide certifications concerning their experience of any COVID-19 symptoms or their exposure to individuals with confirmed cases. Employers may do this on a daily basis or at other intervals, as well as when an employee calls in sick, and must maintain information as a confidential medical record. Employers should be careful not to ask health questions that are unrelated to COVID-19, including asking about underlying medical conditions or symptoms not associated with COVID-19. (For the purpose of determining whether an employee should be permitted to remain at home, employers can ask employees to certify as a general matter that they have an underlying health condition that heightens their risk of harm if they were to contract COVID-19.)

What Are Best Practices for Body Temperature Checks?

Employers who decide to implement temperature checks during the pandemic should, as an initial consideration, determine whether they will ask employees to check their own temperatures at home or conduct checks onsite. In either scenario, employers should give notice to employees that the checks will be performed or required.

Additionally, for onsite checks, employers should observe best practices, including:

- setting forth a consistent process for conducting the checks;
- considering whether to use a third party to conduct the testing (with appropriate confidentiality agreements);
- providing private space for conducting checks;
- using no-contact thermometers or thermal scanners for checks, and conducting proper disinfecting as may be required;
- ensuring social distancing if employees must wait in line for the check;
- compensating non-exempt employees for time spent waiting, if applicable; and
- determining whether to conduct checks as a “go/no go” or to keep a log of temperature results.

Employers should also ensure compliance with [EEOC guidance](#) concerning how any temperature or other medical information collected in the process will be stored.

Finally, employees should be notified that temperature checks will not necessarily ensure a COVID-19-free workplace, because a significant percentage of employees infected with COVID-19 may be asymptomatic.

Are There Special Considerations for Employee Diagnostic Testing for COVID-19?

Some employers may choose to provide or require COVID-19 diagnostic testing for employees, particularly as faster tests are developed and made more readily available. Currently, there are several types of diagnostic tests available in the United States, including blood-based screening tests, which look for antibodies developed by the body in response to the virus, and molecular tests, which typically use nasal or throat swabs to look for the presence of the virus itself. There are different regulatory requirements applicable to each type of test, and employers should confirm that any testing is performed in a manner consistent with the requirements of the Centers for Medicare and Medicaid Services (CMS) and U.S. Food and Drug Administration (FDA). For example, according to current CMS guidance, any entity conducting COVID-19 testing (even for purposes of employee screenings) is required to maintain appropriate certification under the Clinical Laboratory Improvement Amendments (CLIA). Employers should also ensure that tests used for employee screening have received necessary FDA authorization for that purpose (e.g., point-of-care or home use). Employers should be aware of applicable local, state, and/or federal public health reporting obligations related to COVID-19 diagnostic testing.

The EEOC has released guidance authorizing employers to administer COVID-19 tests to employees before permitting employees to enter the workplace. The guidance indicates that a COVID-19 test is one that “detects the presence of the COVID-19 virus,” but the guidance does not specifically mention screening (antibody) tests. The EEOC advises that employers should ensure that the tests are accurate, and that employers should review guidance from the FDA and CDC and other public health authorities regarding what may or may not be considered safe and accurate testing. Additionally, the agency advises employers to consider the incidence of false-positives or false-negatives for a particular test, and to be aware that accurate testing only reveals whether someone currently has the virus but does not mean someone will not acquire the virus later. Employers should also generally observe the best practices cited with respect to temperature checks, above, with any diagnostic testing.

If “Immunity Credentialing” or Similar Immunity Certification Is Adopted, What Should Employers Know?

If antibody (serology) tests become widely available to screen for potential immunity to the coronavirus, government authorities may consider issuing certificates of immunity or other indicators of an individual’s immunity to the virus. These certificates may then be used to determine which individuals can safely move about in public without presenting a threat to themselves or others, and employers may want to consider how to use these to determine who could safely return to the worksite. As this issue unfolds, employers are advised to pay close attention to CDC, EEOC and other guidance that is issued on how employers could use the certificates to screen workers, as there are a host of possible employment law risks, including discrimination claims and medical confidentiality considerations.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Employment practice:

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