

## Can I test my employees? Yes, but make sure you follow certain steps.



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As businesses are re-opening across the country, employers are grappling with new questions about how to ensure worker safety. A common question is whether employers should be taking employees' temperatures before they return to work, and if so, how? Luckily, there is some helpful guidance for this tricky, novel issue.

**First, employers can take employees' temperatures.** The Centers for Disease Control and Prevention (CDC) and state/local health authorities have acknowledged the community spread of COVID-19 and issued attendant precautions, so employers are now permitted to measure employees' body temperature. The CDC considers a person to have a fever when he or she has a measured temperature of at least 100.4 degrees Fahrenheit. Employers should also consult state and local guidelines regarding temperature levels, as some state and local governments and agencies have set their own thresholds for what constitutes a fever.

**Second, temperature testing should be done in the least invasive way possible.** Employers should consider using no-contact thermometers or touchless thermometers to conduct the tests if they're available. The tests will ideally be facilitated or administered by a person with proper medical training, such as an R.N. or an on-site medical staff person. Having a medically experienced person on-site will help ensure the tests are conducted correctly and ultimately make the process more efficient. In the event the nurse or on-site medical personnel is training your employees, make sure to document the training in writing. And if you do not have a nurse or medical professional on-site, consider designating one or more management-level personnel to conduct the testing. This individual should also have training related to the proper use of the thermometer or scanning equipment, including what to do in scenarios when an error in the thermometer's reading is discovered down the road.

**Third, employers should also establish a plan for managing the safety of the person administering the test.** According to the CDC, there are several methods you can use to protect the person conducting the temperature screening. The most protective practices incorporate social distancing or physical barriers to eliminate or minimize the screener's exposure to close contact with a person who

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has symptoms during screening. If social distance or barrier controls aren't a feasible option, personal protective equipment can be used when the screener is within six feet of an employee during screening.

**Fourth, consider what you are going to do with the test results.** If an employer decides to record the employee's temperature results, the information must be confidentially maintained (i.e. separately from the employee's personnel file) and only provided to individuals who need to know the information. Employers can also consider simply recording "no" (meaning the employee's temperature is under the appropriate threshold) or "yes" (meaning the employee has a fever at 100.4 degrees or above) for each employee, instead of recording each individual employee's specific temperature on any given work day. Regardless, the information that is recorded should be treated as a confidential medical document and not placed in any employee's personnel file.

**Finally, don't forget the other discrimination laws.** In terms of discrimination liability, employers should also understand how taking employee temperatures affects their responsibilities under the American with Disabilities Act or Equal Employment Laws. For example, testing must be conducted in a neutral and consistent way, as singling out particular employees (or specific groups of employees) may lead to discrimination claims. Making decisions based on fears, stereotypes, or assumptions will likely increase your odds of facing a discrimination claim someday.

Employers on the fence about taking employee temperatures should be aware that many individuals carrying the COVID-19 virus do not have a fever or other symptoms. In other words, taking temperatures isn't foolproof. As always, when making ADA-related decisions during the pandemic, employers should consult the latest guidance and knowledgeable employment counsel.

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