

Temperature Scans, Testing, and Medical Inquiries in the Workplace

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Overview of Webinar Topics

1. Employer temperature check testing
2. Legality of testing employees for the COVID-19 virus and/or antibodies and immunity
3. Best practices for employee inquiries regarding sickness and symptoms
4. Handling symptomatic employees



Available Sizes



Employer Temperature Check Testing

BETHANY SALVATORE

EEO Guidance on Health Screening

Temperature scans, Covid-19 tests, and symptom monitoring during the COVID-19 pandemic are not improper medical exams under the ADA because they are job related and consistent with business necessity to protect employees in the workplace.

EEO laws apply during the COVID-19 pandemic, but do not interfere with or prevent employers from following CDC or state/local public health guidance

Health Screening and Testing

Given the serious nature of COVID-19, and its' ADA “direct threat” status, the EEOC, in partnership with the CDC, has determined that employers may:

1. Measure employees' body temperature
2. Conduct COVID-19 Testing
3. Establish COVID-19 Protocols
4. Request Medical Certifications

EEOC TEMPERATURE SCAN TECHNICAL ASSISTANCE

When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

Temperature Check Policy Recommendations

- Confirm policy complies with state and local orders
- Describe process –screening area, safety measures, social distancing
- Set threshold – 100.4 degrees Fahrenheit
- Describe consequences of fever
- Address recordkeeping
- Explain self-monitoring expectations
- Obtain written authorization

Temperature Check Best Practices

- Provide PPE to individual administering check
- Use touchless thermometer/scanner, if available
- Maintain 6-foot distance
- Scan everyone (all employees, visitors and vendors)
- Use CDC 100.4 degree Fahrenheit cutoff
- Scan in private location, if possible
- Keep records confidential
- Be consistent!

Temperature Check Records

- EEOC allows employers to maintain a log of temperature check results but must maintain confidentiality of this information, other than disclosing the employee to a public health agency when the company learns the employee has COVID-19
- https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- Medical records should be maintained confidentiality in an employment file separate from the personnel file.

State Temperature Check Laws

- Colorado

- Employers must implement symptom monitoring protocols (including workplace temperature monitoring), conduct daily temperature checks and monitor symptoms in employees

- Order:

<https://drive.google.com/file/d/1l13eSver8iS1fE149gmKHCLoHPgutNvO/view>

- Monitoring Form:

https://drive.google.com/file/d/1uKwFlhc7wWa3OvnPw0zXWv49na_KGHdC/view

State Temperature Check Laws

- Pennsylvania

- Employers must implement temperature screenings and ensure that employees practice social distancing while conducting temperature screenings once an employer learns that a probable or confirmed case of COVID-19 was on the premises

- Order:

<https://www.governor.pa.gov/wp-content/uploads/2020/04/20200415-SOH-worker-safety-order.pdf>

State Temperature Check Laws, cont.

- Vermont

- All businesses must, to the extent feasible, pre-screen or survey employees prior to the start of each work shift to verify that each employee has no symptoms of respiratory illness (fever, cough, and/or shortness of breath), including temperature checks

- Order:

- <https://accd.vermont.gov/news/update-new-work-safe-additions-stay-home-stay-safe-order>

State Temperature Check Laws, cont.

- Delaware

- High-Risk Essential Businesses are required to screen every employee, visitor and member of the public before entering the business.

- Order:

https://coronavirus.delaware.gov/wp-content/uploads/sites/177/2020/04/High-Risk-Business-List_04.2.20.pdf

Temperature Checks: Big Questions

1. Is temperature scanning mandatory or voluntary? Does it depend on the industry and/or geographic location?
2. Who should conduct the temperature check? Should this function be outsourced? Where should testing occur?
3. Is time spent waiting for temperature checks compensable?
4. Does the company need to provide notice before conducting the temperature check?

COVID-19 Testing

DAVID BARRON



Testing for Active Covid 19 Virus and Antibodies

Quest Diagnostics Rolls Out Home COVID-19 Antibody Test for Purchase Online

The Immune Response test retails for \$119.

IgG – Post-Infection Antibody
IgM – Active Infection Antibody

BUSINESS

Amazon Aims to Test All Employees for Covid-19

Bezos, in shareholder letter, says company has begun assembling equipment to build its first lab

Is an 'immunity certificate' the way to get out of coronavirus lockdown?



By [Laura Smith-Spark](#), CNN

🕒 Updated 3:00 PM ET, Fri April 3, 2020

Can an Employer Test for Covid-19 – “Yes”

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace? (4/23/20)

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if [employees entering the workplace have COVID-19](#) because [an individual with the virus will pose a direct threat](#) to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review [guidance](#) from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Based on guidance from medical and public health authorities, employers should still require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.



Can an Employer Refuse to Hire if Positive for Covid-19 – “Yes”

C.3. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it? (3/18/20)

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

C.4. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it? (3/18/20)

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.



Discrimination Against Covid-19 Victims

Can an employer terminate an employee who tests positive for Covid-19 after engaging in risky behavior like going to the beach or traveling to a “hot spot”?

For current employees who test positive for Covid-19, there are a number of available causes of action for discrimination or retaliation under ADA, FMLA, FLSA (Paid Sick Leave under Families First Act) and applicable state laws.

Although technically, discipline for engaging in prohibited behavior is different from discipline for being sick or absent, this is almost certainly likely to be challenged, and would require an actual policy be in place and enforced consistently. Many states also have laws prohibiting discipline against employees who engage in “lawful off duty activity.”

Preference for Recovered Covid-19 Victims: Immunity Discrimination

If Covid-19 continues to be a lingering threat to businesses, or returns in seasonal waves, employees who have immunity will be more desirable. Consider the advantage of a nursing home employee or grocery worker that will not get Covid-19 again or spread it to others (assuming there is actual immunity).

The concept of antibody testing raises difficult questions.

- Can employers test applicants or employees for immunity?
- Will applicants and employees tout their immunity to their advantage?
- Will the government issue immunity certificates (as some have proposed) to avoid fraudulent claims of immunity?

Immunity Discrimination Theories

- 1. Disability discrimination** – This is a preference to those who have been sick and recovered, and against those who are well. It is the opposite of disability discrimination. That said, beware of adverse impact arguments because disabled individuals are more likely to shelter in place and therefore less likely to have been exposed.
- 2. Age discrimination** – The preference for immune workers is age neutral – how could it be age discrimination? Again, beware of adverse impact arguments related to older workers being less likely to have been exposed because of sheltering in place.
- 3. Genetic Information Discrimination (GINA)** -- Is an antibody test a “genetic test?” The statute states: “genetic test does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.” Since antibodies are proteins made by immune cells, GINA would appear to not be applicable.

Rise in Traditional Discrimination Claims

Employers may see a rise in lawsuits from “Vulnerable Employees” claiming they were not hired or were terminated because of fears of increased absenteeism or inability to work if they get sick from Covid-19, from females who need to care for children out of school, or from Asian employees due to xenophobia.

- Age Discrimination
- Disability Discrimination
- Gender Discrimination
- National Origin Discrimination

1. Elderly individuals.

2. Individuals with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy.

Best Practices to Avoid Discrimination Claims

1. Train managers on permissible subjects for job interviews – it will be hard to avoid discussion of Covid-19 and that will lead down a dangerous path.
2. Any and all testing or medical inquiries should be done in accordance with ADA guidelines, be job related and applied consistently. Create a written policy with guidelines and protocols for managers to apply.
3. No good deed goes unpunished – Don't presume an older or disabled person does not want a job or an assignment (like traveling).
4. Be open to reasonable accommodation requests - religion, disability, pregnancy.
5. Wherever possible, base policies on CDC and government recommendations or guidelines, and be ready to change policies if recommendations or situation on the ground changes.

Covid-19 Testing – The Big Questions

1. Is the cost of Covid-19 or antibody testing worth it to an employer? What if the employer offers antibody testing on a voluntary basis at the employer's expense?
2. If an applicant is turned away for failing a Covid-19 test, what are the best practices to avoid a discrimination claim?
3. If there is a job with high exposure to the virus, can an employer lawfully consider whether the employee is immune in making the assignment? Can an employer consider whether the employee falls into the "Vulnerable" category?



Monitoring Employee Health: *Soliciting Employee Health Information*

BOBBI BRITTON TUCKER

Employee Health Screening Inquiries are Permissible During the Duration of this Pandemic

As mentioned, given the “direct threat” status of COVID-19, employers may, among other things, inquire about employees’ health as it relates to COVID-19.

Employee Health Screening Inquiries

As an initial monitoring step, employers should implement policies requiring employees to promptly inform the employers if the employees test positive for, or are diagnosed with COVID-19, and to stay home.

The policies should also require employees to report when they come in close contact with persons in the last 48 hours, who have tested positive for, or have been diagnosed with COVID-19, and when the employees are experiencing COVID-19 symptoms.

The policies should also provide employees with information regarding what actions the employees should take, and if isolated, when and under what circumstances the employees are able to return to work.



Employee Health Screening Inquiries

In addition to requiring that employees self-report, employers should monitor employees' health. This may be done on a regular basis using a formal process such as a health questionnaire, or as a result of the employer having a reasonable belief based on objective evidence, that the employee may be exhibiting COVID-19 related symptoms.











- Employers must ensure that all screening and decisions related to screening are done in a consistent manner, to avoid claims of disparate treatment based on protected classifications.

Employee Health Screening Inquiries

Employers should limit their health inquiries to specific COVID-19 related symptoms.

Common COVID-19 symptoms include:

- Coughing
- Shortness of breath
- Fever
- Chills
- Fatigue
- Aches and pains
- Sore throat
- Headaches
- New loss of taste or smell

Symptoms	Coronavirus <small>Symptoms range from mild to severe</small>	Cold <small>Gradual onset of symptoms</small>	Flu <small>Abrupt onset of symptoms</small>
 Fever	Common	Rare	Common
 Fatigue	Sometimes	Sometimes	Common
 Cough	Common* (usually dry)	Mild	Common* (usually dry)
 Sneezing	No	Common	No
 Aches and pains	Sometimes	Common	Common
 Runny or stuffy nose	Rare	Common	Sometimes
 Sore throat	Sometimes	Common	Sometimes
 Diarrhea	Rare	No	Sometimes for children
 Headaches	Sometimes	Rare	Common
 Shortness of breath	Sometimes	No	No

Sources: World Health Organization, Centers for Disease Control and Prevention

Employee Health Screening Inquiries

Employers should avoid asking health-related questions about employees' family members.

- The Genetic Information Non-Discrimination Act generally prohibits questions about the health of employees' family members.

Instead, employers should consider asking whether the employee has had close contact (within 6 feet for any notable period of time) with anyone who has tested positive for, or has been diagnosed with COVID-19.

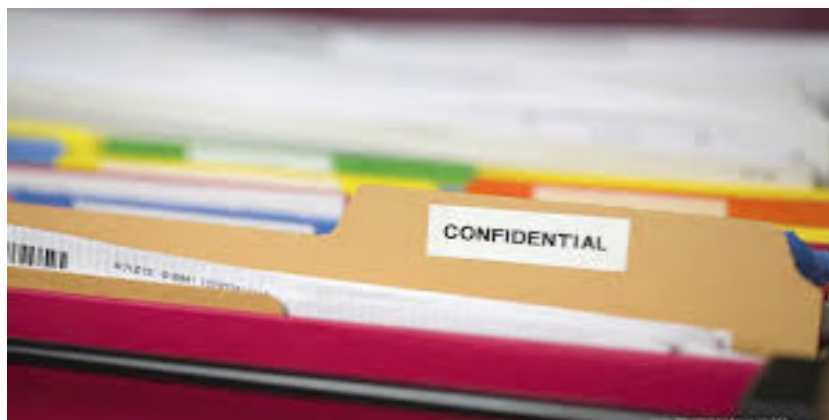
Employee Health Screening Inquiries

Employers must treat documentation relating to the results of all inquiries/screening methods as confidential medical records.

At all points of collecting, storing, transmitting, using, and disclosing the screening results, the employer must carefully safeguard this information.

Employee Health Screening Inquiries

Disclosure of health screening information should be limited to only those who need the information to prevent the direct threat of COVID-19 to others in the workplace.



Employee Health Screening Inquiries

When implementing screening measures, employers must not forget other employment-related laws.

For example, employers must evaluate wage and hour laws to determine whether or not they are required to compensate hourly workers for their time spent completing the screening process.

State Required Health Screening and Testing

As states begin to reopen, some states and local municipalities are requiring employers to regularly screen the health of employees for COVID-19 symptoms.

Examples:

- Colorado - Requires retailers to implement daily temperature checks and symptom monitoring protocols such as an employee health screening form.
- Delaware - Requires high-risk businesses to screen each incoming employee using a basic questionnaire asking if the employee has COVID-19 symptoms.
- D.C. - Retail food sellers (including grocery stores, supermarkets, convenience stores, food halls, and food banks) must check employees for COVID-19 symptoms before their shifts, and exclude employees with cold- or flu-like symptoms. If an employee exhibits symptoms during shift, the employee must be sent home.

State Required Health Screening and Testing

(continued)

Examples:

- Georgia - Requires restaurants, food establishments, gyms, fitness centers, bowling alleys, and personal care services to screen and evaluate employees who exhibit signs of illness, such as a fever over 100.4F, cough, or shortness of breath. Employers must require employees who exhibit signs of illness to seek medical attention and not report to work.
- Michigan - Requires food selling establishments and pharmacies to ask employees about symptoms and screening questions as they report for work.
- Montana – Requires health assessments on employees at the beginning of each shift. Personal care services businesses must also screen customers prior to appointments for symptoms.
- Ohio – Requires daily health assessments on employees.

State Required Health Screening and Testing

(continued)

Examples:

- Pennsylvania - Requires construction employers to employ jobsite screening based on CDC guidance to determine if employees should work and prohibits any employees with any symptoms of COVID-19 from working. Also, if a business has been exposed to a person who is a probable or confirmed case of COVID-19, the employers must implement a temperature screening protocol.
- Texas – Requires retail businesses to screen employees before coming into the business for specified symptoms consistent with COVID-19 or known close contact with a person who is lab-confirmed to have COVID-19
- West Virginia - Requires certain employers to monitor their employees daily for common symptoms of COVID-19, including checking employees' temperatures upon arrival for work.

Health Screening and Testing Issues

As employers evaluate screening and testing requirements and recommendations, they will need to work through several issues including:

- Who will perform the screening/testing (*e.g.*, company nurse, HR, employees self-test);
- Where will the screening/testing take place (*e.g.*, drive-thru testing while employees in cars, separate entrance of the building);
- Whether or not the screening/testing results will be recorded;
- If recorded, how will the information be recorded (*e.g.*, a daily log sheet listing all employees, a separate log sheet per employee);
- How and where will the screening/testing information be stored, and for how long must it be maintained by the employer;
- How much time will the screening/testing process take, and will the time be de minimis.

Employee COVID-19 Self-Screening Tool

COVID-19 EMPLOYEE SELF-SCREENING FORM

Employee Name:	
Date:	Time:

1. In the past 24 hours, have you experienced (please mark a check in either the "yes" or "no" column):

SYMPTOM	YES	NO
Cough		
Shortness of Breath		
Fever (100.4° F or above)		
Chills		
Fatigue		
Muscle Aches and Pains		
Sore Throat		
Headaches		
New Loss of Taste or Smell		

If you answer "yes" to any of the symptoms listed above, or your temperature is 100.4° F or higher, do not go into work. Immediately contact Human Resources to report off from work. Self-isolate at home and contact your primary care physician's office for direction.

You should also:

- Isolate at home for a minimum of 7 days since symptoms first appear, **AND**
- Have 3 days without fevers (without the use of medicine) and improvement in respiratory symptoms.

If symptoms such as shortness of breath are due to a known, non-worsening chronic condition, mark "No".

2. Within the past 48 hours, have you:

Had close contact with an individual who tested positive for, or was diagnosed with COVID-19?

Yes No

If you answer "yes" to this questions, please contact Human Resources before going to work, to further discuss.

Workplace Health Monitoring Apps

A number of companies have developed employer-focused applications that help track employees who have reported COVID-19 symptoms, and facilitate contact tracing within a workforce.

For example, League, Inc.'s Health Operating System, in addition to helping companies understand the health (and associated risks/costs) of their employee population, recommending health programs & services, etc., it helps employers gather location and health data about their organizations.

Employers should understand the risks, notice obligations and requirements, and privacy considerations associated with this type of technology before deciding to implement it within their workplaces.



Employee Health Screening: Big Questions

1. If an employee says he/she feels fine, but the supervisor thinks the employee looks ill, can the employer send the employee home? How about those around the sick employee?
2. As a practical matter, what are the best options for employee screenings? Self screens, HR screens, telemedicine, phone apps?
3. If an employer sends an employee home because the employee appears to be experiencing COVID-19 symptoms, must the employer pay the employee for a full day of work?
4. How long must an employee stay home before reporting back to work, after being sent home because the employee appeared to be experiencing COVID-19 symptoms?



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