Alert

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COZEN O'CONNOR

Potential Pitfalls of Temperature Screenings

A few short weeks ago, employer-mandated temperature checks would have been considered an overbroad medical exam under the Americans with Disabilities Act and the California Fair Employment and Housing Act. In the midst of the COVID-19 pandemic, however, temperature screenings have become a sanctioned and, in some jurisdictions, mandatory practice. Both the U.S. Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing (DFEH), recently published guidelines giving employers the green light to implement temperature checks during the COVID-19 pandemic for the limited purpose of evaluating the risk an employee's presence poses to others in the workplace. In certain California counties such as Fresno, Mariposa, and Tuolumne, temperature screenings are now mandatory for employers in essential businesses. Additionally, at least one state, Delaware, has mandated that high-risk employers implement screening processes each day. In their April 16, 2020 "Guidelines For Opening Up America Again," the White House and the Center for Disease Control (CDC) have proposed that **all** employers develop and implement policies regarding temperature checks prior to allowing employees to return to or enter the work premises. Pursuant to such policies, employees registering a temperature of 100.4 degrees Fahrenheit or higher (as currently recommended by the CDC), and/or who are experiencing other symptoms of COVID-19, will be required to go home and not return to work until that individual satisfies the return to work criteria published by the CDC.

In light of these recent developments, and in anticipation of further screening requirements, employers should begin developing a temperature screening policy to address the legal issues presented by such screenings. One consideration is whether to pay non-exempt employees for time spent during temperature screenings. Although no California or federal court has examined this particular issue, the California Supreme Court's recent holding in *Frlekin v. Apple, Inc.*, No. S243805 (February 13, 2020) suggests that time spent by employees in temperature screenings could be deemed compensable time under California law.

In *Frlekin*, the California Supreme Court reviewed whether Apple needed to pay employees for time spent waiting in line after their shift to have their personal belongings searched in order to prevent employee theft. The court unanimously held that Apple must compensate its employees for the time they spent on Apple's premises waiting for and undergoing required exit searches of their bags, packages, or personal technology devices. Citing California Wage Order No. 7, which requires employers to pay employees a minimum wage for "the time during which an employee is subject to the control of an employer," the *Frlekin* Court concluded that Apple employees, even though not working at the time, were clearly under Apple's control during the exit searches because the employees were subject to discipline if they did not follow the search policy, were confined to the premises during the search, and were required to perform certain tasks as part of the exit search, such as finding a manager or security personnel to perform the search, opening their bags, and removing/displaying their technology devices. In so holding, the court indicated that the level of employer control is the determinative issue, rather than the mere fact that the activity is required. Factors to consider in determining the level of employer control include the location of the activity, whether the employer requires employees to engage in the activity, whether the activity benefits the employer or employee, and whether the activity is enforced through disciplinary measures.

Applying these factors to the context of employer-mandated temperature screenings, California employers may be required to compensate employees for the time spent waiting for and undergoing temperature checks and screenings, particularly if these actions occur on workplace premises, and are enforced via disciplinary measures if an employee unreasonably refuses to comply with the screening. Although the analysis of this issue could turn on the purpose of the scan — i.e. temporary public health emergency as opposed to a tangible benefit to the employer

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and the application of such a policy to all persons entering the work site and not just employees — employers seeking to mitigate risk should interpret state law in a conservative manner and compensate employees for their time spent waiting for and undergoing temperature screenings. Employers deciding this issue, however, ultimately should consult with their legal counsel.

Temperature screenings may become the new norm for all employers during the course of the pandemic, so California employers can take additional steps now to avoid the potential pitfalls of such screenings down the road.

Prepare a Written Policy Explaining the Screening Process and Encourage Employees to Self-Monitor

Employers should create written policies that specifically outline the temperature and health screening requirements that will be implemented throughout the pandemic. The policy should provide employees with an explanation of the temperature screening process and the purpose underlying such a policy (ensuring the safety and health of employees in the workplace) and should inform the employees of the location of the screening, and of the potential consequences of the screening (i.e., that employees registering a temperature of 100.4 degrees or higher and/or experiencing other symptoms of COVID-19 will be sent home and not be allowed to return to the workplace until certain conditions are satisfied) as recommended by the CDC or the employee's health care provider. Employers should distribute this policy to all employees, and in the case of nonessential businesses, before employees return to the workplace after shelter-in-place orders have been lifted. This will help ensure that confusion is minimized and that employees have ample opportunity to ask questions regarding the policy prior to its implementation.

Employees also should be encouraged to self-monitor their symptoms, report to their employer any symptoms related to COVID-19 prior to entering the worksite, and to stay home if they have COVID-19 related symptoms. To enable employees to self-monitor, employers will want to provide information to their employees about COVID-19 related symptoms as identified by the CDC and health authorities.

Determine Who Will Conduct Screening

Ideally, employers would have a medical professional perform temperature screenings to ensure accuracy and professionalism. However, it may not be practical for employers to have an employee with a medical background on staff and it may be prohibitively expensive to hire such an employee. Therefore, employers may be forced to choose an employee or small group of employees to perform temperature checks. In choosing those employees who will perform the tests, employers should keep in mind that testing employees will have an obligation to keep testing information confidential. For this reason, it may be desirable to have human resources employees or other management employees perform testing instead of the employees' direct supervisors.

Prepare a Testing Log

Employers should create a mechanism for tracking when employees report to work with temperatures at or above the CDC noted 100.4 fever. Whether employers should log all employees' temperature information or whether they should only record when an employee is screened with a temperature at or above 100.4 has not been definitively answered by any guidance. While employers may want to keep a log of all temperatures screened to document their nondiscriminatory practices and/or to defend against potential claims that they allowed someone to work who had a fever, on balance, employees' privacy rights could outweigh the employer's interest. To protect privacy, employers could instead log only the temperatures of employees who screen at or above 100.4. Going even further, employers may choose not to log the exact temperature at all. Instead, employers may wish to only record the time the employee was tested, the employee's name, and that the employee registered a fever. Ultimately, choosing how much information to log is a business decision that requires careful consideration. Regardless of what temperatures employers choose to record, the log should also include the employee's name and position and contact information so the employer can engage in follow up with any employees sent home as a result of the screening, including providing return to work instructions to those employees.

Maintain Employee Privacy

Almost as important as the screening itself, employers must ensure that sensitive personal and medical information is kept confidential and employees should feel all communications and actions are cloaked in privacy. This might include the creation of a screening barrier and a separate area where employees will be informed that their results showed a fever of at least 100.4 degrees and/or that their symptoms suggest they could have the virus and that they must return home until the fever and symptoms have subsided. Additionally any and all documentation should be kept in strict confidence in a separate medical file and should only be accessible on a need-to-know basis. Finally, employees performing testing should be instructed not to discuss the testing results with any other employees who do not have a need to know.

Provide Notice At Collection

For those employers subject to the California Consumer Privacy Act (CCPA), employers must provide employees a CCPA-compliant Notice at Collection anytime employers collect certain personal information. Employees subject to temperature screenings should receive a CCPA notice explaining what information will be collected (employees' body temperature) and the purpose/use of such collection (to maintain a safe working environment). The notice should also be posted at the screening location.

Conduct Screenings in a Non-Discriminatory Manner

Employers should be careful to ensure that screening measures are implemented in a way that cannot be perceived as discriminatory. The DFEH has issued guidance affirming that employers can indeed measure employees' body temperature and suggested that such checks are non-discriminatory if they are performed on all employees entering the facility. As such, employers should ensure that all employees, regardless of seniority or position, are screened in order to avoid the appearance of discrimination.

The abrupt paradigm shift to mass temperature screenings in the workplace is sure to come with its share of confusion, but if employers prepare in advance, they can ensure that many of the pitfalls and uncertainty related to screenings are minimized or even eliminated.