

COVID-19 Employee Temperature Screening:

Key Workplace Privacy Considerations for Employers



By David J. Oberly

As a result of the Equal Employment Opportunity Commission's ("EEOC") determination that COVID-19 satisfies the Americans With Disabilities Act's ("ADA") "direct threat" standard, employers are now permitted to conduct employee temperature checks as a COVID-19 risk mitigation measure. Likewise, the Centers for Disease Control and Prevention ("CDC") has also recommended many employers implement daily temperature screening measures. A handful of states and municipalities have also either recommended or ordered employers to conduct regular temperature checks.

While the exact timing is not known, at some point soon current stay-at-home orders will be rolled back and employees will return to their traditional physical work environments. Employers will need to balance minimizing the risk of community spread and ensuring the health of their workers with avoiding impediments that could negatively impact productivity. One of the most significant measures employers will have at their disposal is daily temperature checks.

This form of health screening raises a range of significant compliance challenges, particularly in workplace privacy. To date, no guidance has been issued to provide employers with direction regarding *how* temperature screenings must be conducted to stay compliant with the law.

Key Considerations & Best Practices

To mitigate the substantial privacy risks stemming from temperature screenings, employers should address the following key considerations and implement these best practices:

Adhere to Strict Privacy & Security Standards: Screening programs should incorporate detailed guidance designed to protect the privacy and confidentiality of employees during and after the screening process. Communications and interactions between the screener and the employee must be shielded from being viewed or heard by others when screenings are conducted.

The screening process must also ensure the identities of employees who exhibit fevers during their screenings remain confidential.

- **Documentation:** Develop a standardized documentation process that efficiently and accurately captures information and protects employee privacy and confidentiality. To facilitate this process in an organized and managed fashion, employers may consider the use of a COVID-19 Written Employee Temperature Screening Log.
- **Additional COVID-19 Risk Factor Inquiries:** Determine whether the temperature screening program will also encompass additional inquiries regarding other COVID-19 risk factors, which can serve as an additional health screening measure to further mitigate the risk of community spread. In doing so, consider the implementation of a standardized COVID-19 Employee Written Health Screening Questionnaire.
- **Employees Who Fail Temperature Screenings:** Develop a protocol for handling employees who fail their temperature screenings that safeguards their privacy and confidentiality. Advise employees of the process that has been implemented for failed temperature screenings, through a COVID-19 Employee Temperature Screening Privacy Notice given to employees who fail temperature checks.
- **Health Certification Requirements for Returning to Work:** Employers may choose to require employees who fail temperature checks to submit a self-certification stating they are no longer ill before being allowed to return to work, through the use of a COVID-19 Employee Self-Certification to Return to Work form. The EEOC has clarified that employers are also permitted under the ADA to require employees to provide a doctor's note stating they are fit for duty before returning to the workplace.

• **Privacy Policies & Notices:**

Ensure privacy policies adequately address the type(s) and purpose(s) of employee information collected. If they do not, employers may choose to utilize a separate supplemental privacy policy which directly addresses employee temperature screenings. Provide written notice to employees of the COVID-19 temperature screening program *prior* to the time any screenings are conducted. These issues can be addressed through the use of a tailored COVID-19 Employee Temperature Screening Program Privacy Policy & Notice (as well as a CCPA-Compliant COVID-19 Employee Temperature Screening Program Notice at Collection for employers that fall under the scope of the California Consumer Privacy Act (“CCPA”)).

• **Data Security:** Ensure reasonable data security measures are in place to safeguard employee health data from unauthorized access, disclosure, or acquisition. Periodically address current security measures and modify as necessary to address and neutralize any new or evolving threats.

• **Disclosures:** In the event an employee is determined to have a confirmed or suspected case of COVID-19, employers should inform co-workers of their potential exposure to the virus. Employers must ensure they comply with the ADA’s confidentiality requirements in making any disclosures of this nature, which requires employers to refrain from directly disclosing the sick employee’s identity or any *other* identifying information.

• **Recordkeeping:** Ensure compliance with ADA recordkeeping requirements when conducting temperature screenings. This requires all employee health records to be treated as confidential medical records and the maintenance of written health information in medical files independent of employees’ main personnel files.

• **Monitor & Comply With Changes in Workplace Privacy Guidance:**

Regularly monitor for new or updated/revised orders or guidance issued by governmental and public health authorities, as well as industry regulators.

• **Consult With Experienced Counsel:**

Finally, before implementing any new employee temperature screening programs or modifying existing programs, it is critical that employers first contact experienced employment and cybersecurity/privacy counsel to ensure: (1) Any action taken complies with current workplace privacy law in the locations where your company conducts business; and (2) Its screening program has robust privacy and security measures in place to stay compliant with the law, protect employee privacy, and ensure the security of sensitive employee health information.

As employees return to work, temperature screenings will remain a critical aspect of minimizing the risk of community spread of COVID-19 in the workplace. By adhering to proper privacy practices and utilizing proper documentation, employers can conduct effective and compliant employee temperature screenings that minimize their scope of potential liability exposure.

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