



How Employers Can Maintain Workplace Privacy Compliance During the COVID-19 Pandemic

By David J. Oberly



As the novel coronavirus (COVID-19) pandemic has deepened over the last two months, employers across all industries have experienced significant difficulties in navigating the complexities of collecting and using employee health information as part of their COVID-19 response efforts, while at the same time also ensuring they do not run afoul of workplace privacy law.

Due to the substantial health threat posed by COVID-19, employers have been required to monitor personal, private aspects of employees' lives in unprecedented ways. But despite these unprecedented circumstances, employees are still entitled to their individual privacy rights. Consequently, employers must strike the proper balance between managing the safety of the workplace and ensuring employee privacy in order to avoid finding themselves on the receiving end of an EEOC complaint or civil lawsuit.

Key Recent Guidance Provides Clarity and Flexibility on Workplace Privacy Issues

Fortunately, several pieces of key guidance have been issued by the Centers for Disease Control and Prevention (CDC), the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA), which together provide critical direction on many of the thorny workplace privacy issues that have arisen in connection with COVID-19.

Importantly, this guidance also provides employers with a fairly significant degree of flexibility to aggressively respond to the health emergency and minimize the threat posed by COVID-19 to the greatest extent possible. This is primarily due to the EEOC's determination that COVID-19 satisfies the definition of a "direct threat" under the Americans

With Disabilities Act (ADA). As a result, employers have been given considerably more leeway to monitor the health of employees to mitigate the risk of community spread of the virus in ways that would normally violate the ADA's restrictions on disability-related inquiries and medical examinations.

Employee Body Temperature Measurements

One major issue facing employers concerns their ability to take employees' temperatures to screen for COVID-19.

While body temperature measurements are normally considered "medical examinations" prohibited by the ADA, the EEOC has clarified that because COVID-19 constitutes a direct threat, employers are permitted to measure all employees' body temperature. Importantly, however, employers cannot single out specific employees to have their temperature taken unless the employer has a reasonable belief based on objective evidence that the worker



may have COVID-19. Further, CDC guidance recommends that employers measure the temperature of workers who were or may have been exposed to the virus as a “pre-screening” measure before they are allowed to return to the workplace. Employers may also bar employees from remaining at work if they refuse to allow their temperature to be taken.

Scope of Permissible Employee COVID-19 Inquiries

Another major issue impacting all employers is the scope of permissible questions that employers may ask their employees relating to COVID-19.

Generally speaking, employers are permitted to ask all employees who enter the workplace questions relating to COVID-19 exposure and other health-related issues, including the following: (1) if they have COVID-19; (2) if have been tested for COVID-19; (3) if they are experiencing symptoms commonly associated with COVID-19; or (4) if they have come in contact with anyone who has been diagnosed with COVID-19 or who has experienced symptoms of the virus. Furthermore, employers may ask employees who report feeling sick at work or who call in sick if they are experiencing symptoms of COVID-19. Employers may also bar employees from remaining at work if they refuse to answer inquiries pertaining to COVID-19.

However, if an employer seeks to direct an inquiry to a specific employee, under the ADA the employer must have a reasonable belief based on objective evidence that the employee might have COVID-19. Also, if employees are working remotely, these questions are off limits completely.

Employee COVID-19 Medical Testing

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On this issue, the EEOC has clarified that employers are permitted to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus, and as a condition of allowing employees to return to the workplace.

Requiring Employees to Leave Work/Remain at Home and Provide a Doctor's Note Upon Return

Another key tool in managing the risk of COVID-19 exposure and community spread is to ensure that sick employees remain away from the office until they return to full health.

In this respect, the EEOC and the CDC both permit employers to require employees to leave the office and remain at home if they have COVID-19 or are otherwise experiencing symptoms associated with the virus. The EEOC has further provided that once those sick employees are set to return to work, requiring a doctor's note stating the employee is fit for duty before returning to work is permitted under the ADA.

Disclosures of Cases of COVID-19

One of the issues that has most vexed employers in connection with COVID-19 relates to the scope of permissible disclosures of confirmed or suspected cases of COVID-19. Employers are permitted — and encouraged — to inform other employees of their coworker's confirmed or suspected case of COVID-19 and

their possible resulting exposure to the virus, so long as the disclosure would not reveal the identity of the sick employee. Importantly, however, employers must ensure the confidentiality of the sick employee's identity as required by the ADA in making this disclosure to coworkers. Employers must refrain from doing two things: First, specifically disclosing the identity of the sick employee; and second, disclosing *other information* that would allow coworkers to identify the sick individual.

These rules differ slightly, however, in the context of staffing agencies and contractors. Pursuant to the EEOC, when a staffing agency or contractor that places an employee in an employer's workplace learns that the employee has COVID-19, that agency or contractor is permitted to disclose the identity of the sick employee, as the employer may need to determine if the employee had contact with anyone in the workplace.

Finally, the EEOC has clarified that employers may also disclose the names of employees to public health agencies when they are made aware of an employee who has COVID-19 due to the threat of substantial harm to other individuals who may be exposed to the virus by coming into contact with the sick employee.

Recordkeeping Requirements

Lastly, employers must also ensure that they adhere to proper recordkeeping practices to avoid exposure to workplace privacy liability. If an employer collects any personal health information relating to COVID-19 from an employee, the employer must treat that



information as a confidential medical record and maintain the information in a confidential medical file separate from the employee's main personnel file. In addition, the employer must also limit access to the employee's medical file to only those individuals with a business need to know.

Compliance Strategies

To mitigate the risk of potential legal exposure stemming from workplace privacy mishaps, employers can consider implementing the following strategies and best practices:


- **Proportionality/Data Minimization:** As a starting point, employers should adhere to the principles of proportionality and data minimization when collecting, using and disclosing COVID-19 employee personal health information. Specifically, when seeking information from employees, only that information which is fundamental to safeguarding the health and wellbeing of workers should be collected. Similarly, any disclosures of COVID-19 employee health information should be nonspecific as possible and devoid of any information that could potentially identify a sick employee.
- **Dedicated COVID-19 Privacy Protocol:** Employers should consider developing a dedicated COVID-19 privacy protocol that provides detailed information and guidance on how the employer will collect, retain, secure, and delete employee health information that is to be used as part of the employer's COVID-19 response efforts. At the same time, employers should ensure their HR policies and procedures pertaining to employee health information are consistent with public health

recommendations and existing workplace privacy laws and guidance.

- **Privacy Notices:** Employers should ensure they have the appropriate privacy notices in place that directly address matters relating to COVID-19, including the collection of employee COVID-19 health information. Employers should consider providing a supplemental notice for COVID-19-specific matters if those issues are not adequately discussed in the employer's general privacy policy. In addition, employers should also consider creating a more specific COVID-19 employee privacy notice that can be given to workers who are diagnosed with COVID-19 to inform them what to expect in terms of use and disclosure of their information in connection with the employer's communication of the individual's COVID-19 diagnosis to coworkers.
- **Data Security Measures:** Employers should also ensure they have effective data security safeguards in place to protect employee health information from being improperly accessed or acquired. This is especially important at this particular juncture, as cyber criminals have stepped up the frequency of their cyberattack campaigns to take advantage of the unique security vulnerabilities that have arisen as a result of COVID-19 — and with respect to employees working remotely for the foreseeable future in particular, which has significantly weakened companies' overall security posture.

- **Stay Current and Compliant With Evolving Guidance:** Finally, employers should also stay current with the ever-evolving guidance relating to COVID-19 workplace privacy issues and take immediate action to comply with any new requirements that may be promulgated moving forward.

Conclusion

Ultimately, privacy issues will remain one of the toughest challenges that employers will continue to face for the duration of the COVID-19 public health emergency. While the recently issued COVID-19 workplace privacy guidance has provided vital direction for employers as they attempt to balance privacy rules and workplace safety concerns while taking action in response to the growing health threat posed by COVID-19, it is likely that the current guidance will change over time as the COVID-19 pandemic evolves. As such, employers should always consult experienced legal counsel before taking any action that may implicate workplace privacy issues to ensure that those actions comply with the current state of workplace privacy law in the employer's particular jurisdiction. 

About the Author



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