

# Employer Workplace Privacy Considerations For COVID-19 Employee Health Screening Programs

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During the return-to-work phase of the COVID-19 pandemic, many employers will implement a range of risk mitigation measures designed to combat the community spread of COVID-19 in the workplace. One of the primary tools employers will have to limit the potential for workplace exposure is the ability to conduct daily employee health screenings. While health checks can be an extremely effective tool in the fight against COVID-19, there are also a range of significant privacy issues that employers must consider when developing and implementing employee health screening programs and protocols.

## Current Legal Landscape

As the nation moves into the return-to-work phase of the pandemic, employers will face a range of challenges as it relates to minimizing the risk of community spread of the virus and ensuring the health of their workers, while at the same time avoiding any impediments that could negatively impact employees' productivity. One of the most significant measures that employers will have at their disposal to monitor employee health and mitigate the health risks associated with COVID-19 in the workplace is the ability to assess employees' health status through daily and periodic health screenings.

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 health screenings as a COVID-19 risk mitigation measure. In addition, a handful of states and municipalities have also either recommended or ordered employers to conduct regular health checks to screen employees for indicators of COVID-19 infection to reduce the spread of the virus. In particular, to help protect the public against the spread of COVID-19, Ohio Governor Mike DeWine and the state's Department of Health strongly recommend that employees receive daily symptom assessments before entering the workplace.

With that said, while the EEOC and other governmental bodies have made clear that health screenings are permissible during the COVID-19 pandemic, this particular risk mitigation measure raises a range of significant compliance challenges, particularly in the area of workplace privacy.

## Key Considerations & Best Practices

To mitigate the substantial privacy risks stemming from health screenings, employers should address the following key considerations when developing COVID-19 employee health screening programs and implement the following best practices where necessary:

- **Scope of Permissible Inquiries:** Employers are permitted to ask *symptom-related questions* designed to determine whether employees are experiencing symptom associated with COVID-19 (or have been tested and/or diagnosed with COVID-19), as well as

*exposure-related questions* designed to determine whether employees have come into close contact with anyone who has been diagnosed with COVID-19 or who has otherwise experienced symptoms of the virus. In doing so, employers must ensure that all screening inquiries are narrowly tailored to assess issues that are directly related to workers' health and the threat of COVID-19, and that such inquiries are *not* overly broad or unnecessary to directly address the threat of COVID-19.

- **Pre-Shift Written Questionnaires:** When utilizing pre-shift written questionnaires for health screenings, employers must ensure all questionnaires are designed to elicit only “yes” or “no” responses. Questionnaires should be completed at the beginning of workers' shifts to identify any potentially sick workers before they enter the workplace.
- **Pre-Shift Verbal Screenings:** When utilizing pre-shift verbal screenings, employers must ensure they are structured in a manner that avoids making inquiries that are broader than necessary to directly address the threat posed by COVID-19. Like written questionnaires, verbal screenings should be completed at the beginning of workers' shifts to identify any potentially sick workers prior to the time they enter the workplace.
- **Periodic Verbal Screenings & Inquiries:** When conducting periodic verbal screenings and inquiries, employers must ensure that their visual inspections of employees for symptoms associated with COVID-19 illness conform with current COVID-19 guidance pertaining to the signs and symptoms that have been determined to be indicative of potential COVID-19 infection, including flushed cheeks, fatigue, coughing, and shortness of breath.
- **Employees Who Fail Health Screenings:** Employers should develop a protocol for handling employees who fail their health screenings that safeguards their privacy and confidentiality. As part of this protocol, employers should advise employees of the process that has been implemented for failed health screenings, which can be accomplished through the use of a COVID-19 Employee Health Screening Privacy Notice given to all employees who fail their health checks.
- **Health Certification Requirements for Returning to Work:** Employers may also choose to require employees who fail health checks to submit a self-certification stating they are no longer ill before being allowed to return to work, which can be accomplished through the use of a COVID-19 Employee Self-Certification to Return to Work form.
- **Privacy Policies & Notices:** Employers should ensure their privacy policies adequately address necessary matters relating to employee health screenings, such as the type(s) of employee information collected and the purpose(s) of such collection. In addition, employers should also provide written notice to employees of the employer's COVID-19 health screening program *prior* to the time any screenings are conducted. Both of these critical issues can be addressed through the use of a tailored COVID-19 Employee Health Screening Program Privacy Policy & Notice.

- **Data Security:** Employers should ensure that they have reasonable data security measures in place to safeguard employee health data collected through health screenings from unauthorized access, disclosure, or acquisition. At the same time, employers should periodically address their current security measures and make any modifications as necessary to address and neutralize any new or evolving threats.
- **Disclosures:** In the event an employee is later diagnosed with COVID-19, employers should inform co-workers who have been identified as having recently been in close contact with the diagnosed employee of their potential exposure to the virus. Importantly, however, employers must ensure that 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 information that would allow others to ascertain the employee's identity.
- **Recordkeeping:** Employers should also ensure compliance with the ADA's recordkeeping requirements when conducting employee health screenings. This requires all employee health records to be treated as confidential medical records and the retention of employees' written health information in separate medical files that are independent from employees' main personnel files.
- **Consult With Experienced Counsel:** Finally, before implementing any new employee health screening programs or making any substantive modifications to existing programs, it is critical that employers first contact experienced labor and employment counsel to ensure that any action taken complies with the current state of workplace privacy law. At the same time, employers should also consult with experienced privacy counsel to ensure that the employer's 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 obtained through health screenings.

## Conclusion

As employees return to work, health 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 the proper documentation when necessary (as described above), employers can conduct effective daily employee health screenings in a fashion that maintains compliance with the law and minimizes the scope of their potential liability exposure.