



A Guide to Employee Temperature Checks

By Allen Smith, J.D.

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The Equal Employment Opportunity Commission (EEOC) gave employers the green light to take employees' temperatures to try and ward off the spread of the coronavirus in guidance from earlier this year. But will taking temperatures really work?

"Generally, measuring an employee's body temperature is a medical examination," the EEOC stated. The Americans with Disabilities Act (ADA) prohibits medical examinations unless they are job-related and consistent with business necessity.

Because the Centers for Disease Control and Prevention (CDC) and state and local health authorities have acknowledged community spread of COVID-19, the respiratory illness caused by the coronavirus, and have issued related precautions, "employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever," the agency stated. And some people with a fever do not have COVID-19.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

In a National Employment Law Institute (NELI) webcast, David Fram, NELI's director of ADA services in Golden, Colo., noted that if influenza is widespread in a community, temperature taking might be job-related and consistent with business necessity and therefore allowed.

Jeff Nowak, an attorney with Littler in Chicago, added that if employers want to take workers' temperatures, they should pay employees sent home for high temperatures to limit any legal risk, if they can afford to do so.

Employers also should consider what they'd do if employees refuse to have their temperatures taken. Would employers send these workers home without pay?

The temperature reading should be kept confidential, Nowak said, and the person administering the temperature check should be trained on the procedure. He expressed skepticism that a lawsuit would result from taking workers' temperatures.

"If it saves one life, it's worth it," he said.

But ensure that there is social distancing and keep people at least 6 feet apart when they are standing in line to have their temperatures measured. Bear in mind that taking temperatures may not be nearly as effective at preventing the spread of the coronavirus as sheltering in place, where possible.

If employees aren't taking their own temperatures, the person taking temperatures, preferably using infrared digital thermometers, should wear personal protective equipment, said Lori Armstrong Halber, an attorney with Reed Smith in Philadelphia and Princeton, N.J. Christine Walters, J.D., SHRM-SCP, an independent consultant with FiveL Co. in Westminster, Md., cautioned employers against using oral thermometers, which are more invasive than infrared digital thermometers.

Jonathan Segal, an attorney with Duane Morris in Philadelphia and New York City, said there may be an obligation to pay employees for time spent waiting to have their temperatures checked.

Who Should Take Temperatures?

Ideally, employers would have a willing volunteer who takes others' temperatures, said Isaac Mamaysky, an attorney with Potomac Law Group in New York City.

With proper training, personal protective equipment, a no-touch thermometer and an understanding of confidentiality considerations, a nonmedical professional can take temperatures and help keep the workplace safe, he said.

"It's simply not practical or realistic to expect a medical professional to be available to every employer, especially in the midst of a pandemic in which professionals are in such high demand," Mamaysky said.

"Of course, if a company has an onsite nurse or EMT who can take temperatures, that's ideal," he added. "However, if that's not possible, employers can provide personal protective equipment and training so a nonmedical professional can safely take temperatures. For many employers, that's the only realistic option."

Ask the Right Questions

While the EEOC's guidance is clear, Christine Berger, an attorney in New Orleans, noted that it was silent on an important issue: how to take an employee's temperature. "It is not as simple as ordering an infrared thermometer off Amazon," she said.

"Before lining up your employees to scan their foreheads," she cautioned, "consider the safety, privacy and employee relations concerns."

Berger recommended considering the following questions:

- How will an employer select an employee to administer the infrared scan?
- How will that employee be protected from the virus?
- How will the privacy of employees subjected to the infrared scan be protected?
- How will this action affect employee morale?

Protective Clothing

Once an employer has identified who will administer the scan, the employer should provide the administrator with protective clothing, Berger said. Protective clothing may include gloves, masks, eyewear and a gown, she noted.

"These precautions are essential for both employer and employee protection and will appear less extreme in the event an employee's temperature reads in excess of 100 degrees," she said.

Employers should advise the administrator to read the thermometer's instructions and be available to answer any questions. Before beginning, the administrator should perform a test run on himself or herself to ensure he or she doesn't have a fever, Berger recommended.

Privacy

While logistics may dictate taking an employees' temperature upon arrival at work, Berger said, privacy concerns suggest otherwise. She explained: "Employers should avoid employees lining up and waiting for their temperature to be taken." Instead, the administrator should take an employee's temperature as privately as possible and keep the identity of any employees with fevers confidential, she said.

But in April 8 guidance, the U.S. Centers for Diseases Control and Prevention (CDC) said, "Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility."

Halber said employers shouldn't take temperatures in front of other employees and shouldn't announce if someone has a temperature before co-workers. She said instead employers should screen in a private room or in a tent outside the facility.

Are Temperature Checks a Good Idea?

"Temperature checks are an imperfect measure," said Joseph Deng, an attorney with Baker McKenzie in Los Angeles. He said that they "should be just one of a variety of tools that a company can use to prevent and control the spread of COVID-19 in the workplace." But in some places and industries, temperature screenings are required (<https://www.littler.com/publication-press/publication/wont-hurt-bit-employee-temperature-and-health-screenings-list>).

He noted that other measures include asking employees and visitors if they are exhibiting any symptoms of COVID-19 (e.g., fever, coughing, shortness of breath) or if they have any other high-risk factors as described by the CDC. Such factors include spending time in close quarters with a person with COVID-19 or having traveled to a high-risk area, as defined by the CDC, in the past 14 days.

Self-Screening

Other employers may choose for employees to take their own temperatures before coming to work and require them not to come in if they have a fever.

Jonathan Mook, an attorney with DiMuro Ginsberg in Alexandria, Va., recommends that employers give workers self-screening forms to complete each workday indicating whether they have a fever or COVID-19 symptoms (<https://www.cdc.gov/quarantine/air/reporting-deaths-illness/definitions-symptoms-reportable-illnesses.html>). Workers would e-mail the completed form to the company, he said, or, if that is not feasible, would call this information in to HR.

There's an administrative burden to this approach, but the priority should be to make sure that employers have a safe workplace, said Amy Epstein Gluck, an attorney with FisherBroyles in Washington, D.C. Just as nonexempt employees must be paid for time waiting for their temperatures to be taken or to answer questions about COVID-19 symptoms at work, they must be paid for the time it takes to fill out these forms.

For Mook, employers taking temperatures raises many thorny questions, including identifying who will take the temperatures, keeping employees 6 feet apart while waiting to be tested and preventing the spread of the illness when infected people stand in line before they are tested.

On the other hand, self-screening forms rely on employees' honesty and promptness in filling out the forms. Some employees may be tempted to lie when they're ill, and others may resent the added responsibility.

Is Asking About Symptoms Permitted?

During a pandemic, ADA-covered employers may ask employees who call in sick if they are experiencing symptoms of the pandemic virus, the EEOC said in its guidance. For COVID-19, these include fever, chills, cough, shortness of breath and sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Fram asserted that the coronavirus arguably is not a disability covered by the ADA but other respiratory conditions that last longer are. So while asking about coronavirus symptoms is permitted, don't ask about symptoms of other conditions, he cautioned.

Options Other Than Doctor's Notes

When an employee returns to work, under the ADA employers can require a doctor's note certifying his or her fitness for duty, the EEOC said.

Such inquiries are permitted under the ADA either because they would not be disability-related or, in the case of a severe pandemic, because they would be justified under the ADA standards for disability-related inquiries of employees, the EEOC stated. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.

So, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp or an e-mail certifying that an individual does not have the pandemic virus, the EEOC stated.

Other Guidance

The EEOC guidance also provided that:

- An employer may take an applicant's temperature as part of a post-offer, pre-employment medical examination.
- An employer may screen applicants for symptoms of COVID-19 after making a conditional job offer.
- An employer may delay the start date of an applicant who has COVID-19 or symptoms associated with it.
- An employer may withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it. Based on current CDC guidance, the individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer, the EEOC explained.

[How have you adapted to the pandemic? Share your story with SHRM's Government Affairs Team

(<https://shrm.formstack.com/forms/resiliency>) as they educate decision-makers on crafting policies on work, workers and the workplace.]

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