

Temperature Screening: New Guidance From the CDC, FAQs, and Best Practices

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With states beginning to ease stay-at-home orders, employers are formulating plans to return employees to the workplace. As part of this process, many employers are considering implementing regular employee temperature checks in an effort to keep employees safe. While this measure may have seemed unthinkable and fraught with risks even just a couple of months ago, we expect that health screenings, including temperature checks, will become increasingly prevalent in the workplace. In fact, just last week, the Centers for Disease Control and Prevention (“CDC”) issued guidance on how employers and businesses can safely conduct temperature checks. Key portions of that guidance are summarized below, along with a list of common questions and best practices employers should consider before requiring employees to undergo regular temperature checks.

1. Are employers required to screen employees’ temperatures before they enter the workplace?

The answer depends on the state(s) in which the employer operates. Some states are now requiring employers to conduct regular temperature checks on employees. For example, Colorado requires certain critical and noncritical businesses to conduct daily temperature checks and monitor employees’ symptoms, and employers with 50 or more employees at one location must implement stations for symptom screenings and temperature checks. Other states such as Indiana require all employers to implement a COVID-19 response plan, which includes implementing a health screening process for employees that may include regular temperature checks. Additionally, employers may be subject to different temperature check requirements based on industry. For example, Washington requires construction contractors to screen all workers at the beginning of their shift by taking their temperature and asking them if they have symptoms. Any worker found to have a temperature of 100.4 degrees or higher must be sent home. That said, many states currently have no temperature check mandate, including—for now—Illinois (with limited exceptions such as certain health care and long-term care employees), giving many employers some flexibility to determine how best to screen employees for symptoms, if at all. Employers should consult and keep a close eye on ever-changing state and local guidelines to determine if and when temperature checks are required.

2. Even if there is no state or local mandate, can employers still require employees to submit to routine on-site temperature checks as a condition of employment?

Yes, provided that temperature checks are administered safely, consistently and in a non-discriminatory manner. The Equal Employment Opportunity Commission (“EEOC”) has issued guidance confirming that temperature checks are a permissible screening mechanism to use during the COVID-19 pandemic. However, to avoid discrimination claims, employers generally should not pick and choose who is subject to temperature screening unless it is part of a nondiscriminatory plan (e.g., screening only that portion of the workforce where social distancing measures may not be feasible, such as warehouses or manufacturing plants). Note that if employers choose to screen every employee entering a facility, employers may need to conduct such checks on anyone entering the workplace—not just employees—to minimize the risk of discrimination claims and to reduce the risk of transmission.

3. What are the key CDC guidelines for conducting on-site temperature screenings?

The CDC outlines two options for on-site screenings. The first approach relies on barrier/partition controls and personal protective equipment (“PPE”) and the second approach relies exclusively on PPE.

Under the first approach, the screener stands behind a physical barrier, such as a glass or plastic window or partition. Using disposable gloves, the screener checks the employee’s temperature by reaching around the partition or through the window. It is critical that the screener’s face remain behind the barrier at all times during the screening.

Under the second approach, the screener uses a face mask, eye protection (goggles or disposable face shield that fully covers the front and sides of the face), disposable gloves and a gown (if physical contact with an employee is anticipated) when taking employees’ temperatures.

When conducting temperature checks on multiple employees, the screener should use a clean pair of gloves for each employee and ensure that the thermometer is thoroughly cleaned after each use. If the screener is using a disposable or non-contact thermometer (i.e., non-contact infrared thermometers, tympanic thermometers, and thermal scanners) and he or she does not make physical contact with the employee, then the CDC states that the screener need not change his or her gloves after each check.

Under either approach, the CDC confirms that employees found to have a temperature of 100.4 degrees or higher should be sent home immediately and instructed to promptly contact their doctor. Employers should follow up with employees who are sent home with additional information about any available benefits and return-to-work protocol. The CDC further recommends that employees maintain social distancing when waiting for their turn to be screened, and to the extent possible, screening should take place before an employee enters the physical workplace.

The CDC guidance can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>

4. How should the temperature screeners be selected and trained?

An obvious first choice for a screener is often a medical officer or nurse, if such an employee is available and on staff. If not, employers should carefully select an appropriate screener, ensure that the individual is comfortable with the role, and consider providing such individual with additional compensation or hazard pay. Alternatively, there are third-party vendors who now offer these types of services, though such vendors should be carefully vetted. Finally, employers are even turning to robots or robotic arms to conduct screens in order to reduce the risk of exposure during the screening process.

No matter who is selected, screeners should be trained on how to safely complete temperature screens, the proper use and disposal of PPE, and maintaining employee privacy. As a best practice, we recommend that employers retain a medical professional to train screeners on how to safely and effectively conduct a temperature check, or at a minimum, employers should consult a medical professional to provide and confirm such information. We also recommend that screeners sign a document establishing the protocol, requiring confidentiality of employee medical information, and confirming that the individual has been informed of and consents to the risks of serving as a screener.

5. What kind of thermometer should be used?

As a practical matter, we strongly advise that employers use a disposable or no-contact thermometer to prevent the spread of the virus. In fact, without a disposable or contactless device, employers may want to consider abandoning temperature checks altogether (if doing so will not run afoul of state or local law) and instead rely on other screening measures. The risk of inadvertently using a contaminated device may outweigh any potential benefits gained from implementing a screening protocol in the first place.

However, if Illinois employers use a sophisticated device, including a robot, to screen employees’ temperatures, they should be aware of yet another potential legal pitfall. Some devices and robots rely on artificial intelligence, including in some cases, facial recognition capabilities. Such equipment could implicate the Illinois Biometric Information Privacy Act (“BIPA”), which has strict notice, disclosure and consent requirements. Employers should discuss these risks with counsel before using any such devices.

6. If employees are required to undergo a temperature screening before clocking into work, must the employer compensate them for that time?

In most cases, yes. While the answer to this question may depend, in part, on state law, we generally recommend that employers compensate employees for any time spent waiting to be screened and participating in the screening process in order to comply with the Fair Labor Standards Act (“FLSA”) and state wage and hour laws. Running afoul of these laws by not paying employees for otherwise compensable pre-shift activities can be much more costly in the long run than paying employees for the time spent in the screening process itself.

7. What are the privacy concerns related to temperature checks?

The Americans with Disabilities Act (“ADA”) requires employers to maintain the confidentiality of all information obtained through disability-related inquiries and medical examinations. Temperature screening is a medical examination under the ADA. Accordingly, any information collected as part of the screening process must be treated as a confidential medical record and maintained separately from the employee’s personnel file. It may be disclosed only in limited circumstances. Employers should also consider how to best protect the privacy of those employees who are found to have an elevated temperature and need to be sent home (e.g., allowing for an inconspicuous exit, private screening, drive-through screening, etc.).

8. What if an employee refuses to participate in on-site temperature checks?

As a general matter, employees can be required to undergo temperature checks as a condition of employment, and those who refuse to do so should be sent home. Employers should communicate the requirements for temperature checks and the consequences for failing to cooperate in a clearly written notice or policy that is distributed to all employees in advance of the implementation of the screening protocol. Employees who refuse to adhere to those requirements may be disciplined, provided that any such discipline is administered in a consistent and nondiscriminatory manner. However, for a variety of reasons (including employee morale), employers should consider whether discipline is truly necessary. The better option may be to simply send the employee home or deny them access to the workplace. When in doubt, employers should consult counsel before implementing discipline.

9. Is fever alone a reliable indicator of COVID-19?

According to the medical community, no. Unfortunately, an elevated temperature is not a definitive indicator of the illness, and an employee may be contagious even without a fever. For that reason, and as discussed further below, employers should consider implementing other screening mechanisms either in lieu of on-site temperature screening (if allowed under applicable law) or in addition to temperature screening.

10. If fever is not a reliable indicator of COVID-19, why are employers implementing temperature screening?

Employers are looking for concrete steps they can take to reduce the risk of exposure in the workplace. Unlike most COVID-19 symptoms, body temperature can be objectively screened and verified. While temperature screening will not effectively identify asymptomatic cases, it still has the ability to catch positive cases and help prevent a potential outbreak in the workplace. In many instances, employers are implementing temperature screening in an attempt to alleviate employee anxiety. Some employers are reporting that employees actually want to have temperature checks in place to know that their employer is taking meaningful, proactive steps to keep them safe. In other words, temperature screening may be as much of an employee relations (and public relations) tool as it is a prevention mechanism. In weighing the decision to implement on-site screening, employers should consider whether employees will be comforted by the process of temperature checks or if it will instead stoke fear and panic.

11. How should employees be notified of on-site screening measures?

We recommend that employers provide employees with advance, written notice of temperature checks and any other screening measures. The notice or policy statement should explain the basis and method for conducting the screening, the steps the employer is taking to protect employee safety and privacy, and the consequences for failing to comply. To avoid a false sense of security, the notice should also make clear that just because someone does not have a fever does not necessarily mean that the person does not have the virus. The notice should explain that many people who test positive for COVID-19 are asymptomatic, and that employees should continue to take appropriate precautions and self-monitor and report to the employer the presence of any other symptoms.

12. What are the alternatives to on-site temperature screening?

As discussed above, on-site temperature screening presents potential logistical and legal issues that may steer some employers away from taking such measures. As an alternative to on-site temperature screening, many employers are instead considering and implementing some type of employee self-assessment or self-monitoring protocol. This can be accomplished through completion of daily self-assessment and/or certification forms in which the employee is asked to self-report temperature, other symptoms, or potential exposure events. Other employers are relying on a one-time policy document whereby employees acknowledge and agree that by reporting to work each day, they are certifying that they have no symptoms. Some employers are even incorporating the daily certification into timekeeping software (without disclosing medical information).

According to the CDC, it is reasonable to ask employees to take their own temperature before arriving to work. This helps reduce the risk that those who are experiencing symptoms of COVID-19 will expose others to the virus by traveling to or reporting to work. Therefore, some employers may opt to have employees conduct their own temperature checks before arriving at work, which alleviates some of the logistical and legal concerns. However, note that employers in some states, like California and Illinois, may need to foot the bill for supplying employees with thermometers needed to complete any such self-assessment.

Regardless of the approach taken, we believe that employers should implement some type of symptom screening mechanism, even if it is not an on-site temperature check. And if an employer does decide to conduct on-site temperature screening (or is required to do so by law), we believe temperature checks should be used in conjunction with other screening efforts such as requiring employees to identify other symptoms or potential exposure incidents. In other words, temperature screening should be just one of many potential tools in the employer's arsenal to combat COVID-19 in the workplace.

For assistance in preparing your return-to-work protocol or for implementing a thoughtful and compliant screening procedure, please contact **Cara J. Ottenweller** at +1 (312) 609 7735, **Michelle T. Olson** at +1 (312) 609 7569 or any Vedder Price attorney with whom you have worked.

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