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Frequently Asked Questions when taking employee temperatures as a COVID-19 precaution in the United States

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As retail, food service, and other industries continue to adapt to the ever-changing business environment, employers are implementing new screening programs to help ensure the safety of their workforce and customers during the COVID-19 crisis. Indeed, some form of employee screening is becoming mandatory in a number of cities and counties around the country.

Faced with the current outbreak, many employers—particularly those in food service or other customer-facing retail operations—are considering taking the temperatures of their employees before the employees are allowed to begin work. This bulletin seeks to answer some of the questions that employers, particularly retailers, might have when implementing such programs during the COVID-19 crisis. Note that the guidance is based on the current global pandemic and state of emergency related to COVID-19, and much of this guidance would not apply outside of that context.

1. Is it even legal to take an employee's temperature, and to instruct employees to stay home if they have symptoms associated with COVID-19?

We covered this in our **March 18, 2020 Bulletin**, but, generally, the short answer is, "Yes, and Yes." The Equal Employment Opportunity Commission recently clarified that in light of the current COVID-19 pandemic, employers may measure their employees' body temperatures. The EEOC also says that employees with symptoms associated with COVID-19, including a fever, may be sent home from work.

2. Do any states require employers to take their employees' temperatures?

Some states, Kentucky as an example, are now requiring businesses to conduct temperature checks for their employees. Others are encouraging employers to take the temperatures of their employees.

In addition, some cities and counties have issued orders that impose certain obligations on employers to implement a temperature check system. For instance, Tift County, Georgia, instructs employers to "make every effort to take the employee's temperature and record the same." Likewise, an order in Dallas County, Texas, instructs employers "to the greatest extent possible



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and when equipment becomes available” to take the temperatures of their employees. We expect other cities and counties to follow suit, particularly as part of the phase-in approach for business reopening plans.

3. If I want to take my employees’ temperatures, where do I begin?

Employees should be given notice that the company will be implementing a temperature-taking program. This can be done via an email to all employees or posting a notice inside the facility. The notice should say something to the effect of, *“To ensure the safety of all of our employees and customers, starting on [DATE], we will begin to take the temperatures of all persons entering our facility. This will be done through a no-touch infrared scanner thermometer. Per the CDC guidelines, if your reading is 100.4 or above, we will not be allowing entry to our facility. We will provide instructions to you on next steps at that time.”* By providing notice, you avoid surprising your employees and give them an opportunity to raise any concerns that they may have. Further, some jurisdictions require employers to provide such a notice in order to comply with state privacy laws.

4. I don’t have an infrared scanning thermometer. Will a minimal touch forehead thermometer work?

There is currently no guidance from the Centers for Disease Control and Prevention as to the type of thermometer that an employer should use when taking its employees’ temperatures. The CDC says only, “Employers should measure the employee’s temperature and assess symptoms prior to them *[sic]* starting work.” Although minimal contact forehead thermometers may work, touchless infrared scanning thermometers are relatively inexpensive and preferred. No matter what type of thermometer is used, the individual conducting the screening should follow the manufacturer’s sanitization protocol between uses and should be trained on its use so that the results can be comfortably relied upon.

There is no need to conduct multiple tests of the same employee or otherwise question the results of the thermometer so long as the individual conducting the test understands what he or she is doing.

5. Who should conduct the screening?

Ideally a qualified third party would perform this screening, but, where not possible or practicable, we recommend the temperature checks be administered by management personnel or, if possible based on the device being used, self-administered.

6. Besides a thermometer, what else do I need in order to conduct the screening?

You will need to obtain hand sanitizer and personal protective equipment for the individual performing the screening. Such PPE may include disposable gloves, masks, and any other supplies needed to sanitize or operate the thermometer according to the manufacturer’s specifications. Employees being checked should also wear masks if available.

7. Where do I conduct the temperature checks?

You should make every effort to perform the testing before employees access the main areas of the facility. Ideally, the location would offer the individuals some privacy so that others (colleagues or customers) would not be able to observe or hear the results of the temperature check. The location should, if possible, allow individuals to remain six feet apart from one another. If your facility is relatively small, consider staggering start

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times to minimize the chance that lines will form and employees will congregate in a confined area.

8. At what temperature should an employee be sent home?

The CDC currently recommends that if an individual has a temperature of 100.4 degrees or higher, he or she should not leave the home (and therefore should be sent home after the test). Dallas County requires that a worker with a temperature above 99.6 degrees be sent home. Unless your jurisdiction instructs otherwise, defaulting to the CDC recommendation is advised. Note, however, that a fever does not mean that an individual has COVID-19, and the absence of a fever does not mean a person does NOT have COVID-19. As such, you should make sure employees don't relax other good practices, such as proper and frequent handwashing, social distancing, etc., in reliance on temperature checks.

9. What records should I maintain and who should have access to them?

Generally, unless your jurisdiction requires it, you are under no obligation to maintain a record of employee temperatures or even document that temperature checks were performed. If you do choose to record and maintain the data, you will need to do that in a way that complies with the confidentiality requirements of the Americans with Disabilities Act, and confidentiality and privacy considerations under applicable state and local laws. In addition, if the temperature checks are performed by a physician, nurse, or other health care personnel or technician, OSHA record-keeping requirements may be triggered.

10. What should I do if an employee's temperature registers at or above 100.4 degrees (or the established CDC threshold)?

The employee should be sent home for the day, at least, and your policies or local requirements may require you to exclude individuals with COVID-19 symptoms for longer. The employer has discretion to determine whether to require that the employee provide a doctor's note before returning to work, but, again, you should have a policy that you consistently follow and ensure your policy is consistent with any federal, state, or local requirements.

11. What if an employee refuses to have his or her temperature taken?

If you are unable to reach a satisfactory resolution with the employee, you should send him or her home if your policy or practice is that all employees must be tested prior to starting a shift.

12. Can I ask the employee about other symptoms?

Yes. In fact, some jurisdictions are requiring that employers "screen" employees by asking about their symptoms, recent travel, and/or whether the individual has been exposed to COVID-19.

13. If an employee informs me that he or she has been exposed to COVID-19, am I required to send that person home?

That depends. Presently, the CDC advises that critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19, provided that they remain asymptomatic and that additional precautions are implemented to protect them and the community. That being said, different states and localities may, depending upon the circumstances, require the individual to self-quarantine for 14 days or

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more following exposure, and employers may adopt, and many are adopting, quarantine requirements, consistent with general obligations to provide a clean and safe work environment for all employees. We would also recommend not requiring an individual to work if a health care provider or governmental agency has instructed the individual to quarantine, as is true in many instances when an individual has been in close contact with a confirmed COVID-19 case.

14. Must I compensate my employees who administer the tests, or for employees' time spent being screened?

Based on the Fair Labor Standards Act, we recommend compensating employees who are not FLSA-exempt at their normal hourly rate for time spent administering the testing, as that is time spent performing an assigned task for the benefit of the employer. Of course, if the employee administering the temperature check is an exempt manager, then the time would be compensated by the manager's regular salary. The compensability of the time spent by the employee having his or her temperature taken is a more difficult issue, and arguments can be made both ways as to whether this time must be compensated. The conservative approach would be to treat the time as compensable; however, an employer with a greater risk tolerance could take the position that the time it takes to have your temperature taken is not compensable, or if it is, the amount of time involved is so small as to be *de minimis*. Ultimately, this is a decision each employer must make based on its own facts and circumstances and risk tolerance.

Further, you should also consider whether any "call-in" or "reporting pay" laws or predictive scheduling laws are applicable in the jurisdictions where you are operating, including whether those laws require any compensation in this situation. The same is true for more restrictive state minimum wage laws that may define "hours worked" more aggressively".

15. Can I require employees to take their own temperatures before coming to work?

So long as your jurisdiction does not require otherwise, employers may ask employees to take their own temperature before reporting to work. This may be an option for those businesses that lack the physical space, personnel, or equipment to conduct on-site temperature taking; however, we should note that availability of equipment for employees may also be a barrier for some employees, which may affect the overall consistency and effectiveness of this approach. Employers should adhere to the concepts outlined above if they decide to collect or document employee self-temperature checks that are performed at the employee's home.

16. How long should I plan to be taking employee temperatures?

No one knows precisely how long the pandemic will last. Further complicating matters is the fact that some states and localities continue to be "hot spots" while evidence suggests that others might be moving on from the worst the virus has to offer.

As certain states begin to reopen, most are adopting a phased approach as they relax the restrictions imposed upon businesses. Employers should follow the guidance of the state or county where their stores and employees are located. Attention should also be focused on changing guidance from the EEOC. Although the EEOC has clearly stated that the taking of employee temperatures is a permissible response to the current global pandemic, at some point in the future the EEOC may change course on this guidance based on the continued evolution of the pandemic. Outside the context of a pandemic, employers are

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generally limited to conducting medical inquiries and exams that are job-related and consistent with business necessity.

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