

The Latest COVID-19 Conundrum: Can Employers Institute Temperature Checks at Workplaces?

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Employers across the globe, faced with the need to reduce the risk of workplace transmission of COVID-19, may be contemplating imposing standard temperature screenings on their employees. In many jurisdictions, an employer may need or want to consult with employee representatives (such as Works Councils in Europe or unions where applicable) or limit temperature checks to only those employees who consent. Even if temperature checks comply with local and national laws, instituting such measures may still present risks for employers, such as claims that the employer screened employees in a discriminatory fashion and mishandled the data from a privacy perspective. Temperature screenings may also pose employee and public relations considerations. Nevertheless, employers are now more frequently turning to temperature screenings as an additional—albeit imperfect—measure to slow the spread of the virus by identifying and isolating employees who have a fever, which is one of the common symptoms of COVID-19.

United States

On March 17, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued an [update to its guidance](#) that now expressly acknowledges that employers may implement temperature screening measures in response to the current COVID-19 pandemic. The EEOC noted that “[b]ecause the CDC [Centers for Disease Control and Prevention] and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees’ body temperature.” The EEOC did not condition its guidance on further or future assessments by health authorities, nor is the guidance specific to certain communities in the United States. Rather the EEOC appears to be acknowledging the propriety of implementing such measures nationwide. However, the EEOC cautions employers to “be aware that some people with COVID-19 do not have a fever.” In other words, implementing temperature screenings may identify some employees who have a fever (but not necessarily COVID-19) such that an employer may isolate them or send them home from work, but it is not a perfect screening device that will identify all persons who may be contagious with the virus.

This new EEOC guidance helps clarify uncertainty employers were facing on when temperature screenings would be permissible in their individual communities under the Americans with Disabilities

Act (ADA). It is important for employers to recognize, however, that this guidance clarifies the ability to use temperature screening under the present circumstances of the COVID-19 pandemic, whereas normally such measures would be unlawful under the ADA. Specifically, the EEOC has [previously noted](#) that temperature screenings are considered a medical examination under the ADA, which may not be imposed on current employees unless the examination is job-related and consistent with business necessity. One circumstance meeting that criteria is where the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat due to a medical condition. In the context of a pandemic, the EEOC [previously stated](#) that temperature screenings are justifiable under this “direct threat” standard where the pandemic symptoms become more severe than seasonal influenza or where a pandemic “becomes widespread in the community as assessed by state or local health authorities or the CDC.” This left employers with operations in less impacted parts of the country (but where community transmission is growing) uncertain of the legality of implementing temperature screening in the absence of direct assessments by state and local public health authorities.

The new guidance from the EEOC now alleviates those concerns and will allow employers to more confidently implement temperature screenings where appropriate for an employer’s individual sites and circumstances. The new guidance does not address or sanction broader health screenings beyond temperature checks and inquiring about COVID-19 symptoms, and employers may wish to carefully ensure any additional measures comply with relevant ADA restrictions or are based on public health authority guidance. In addition, employers should continue to monitor [community-specific mitigation guidelines from the CDC](#), some of which specifically recommend screenings of employees and visitors in those communities.

Canada

Similar to other infection testing measures attempted by some employers in the past (HIV tests, for example), temperature testing would very likely be considered a medical or health-related examination. Accordingly, compulsory testing of all employees (whether or not they exhibit observable symptoms or have potentially been exposed) would likely be considered impermissible unless a bona fide occupational requirement could be established.

Of course, as the spread of COVID-19 escalates, safety measures evolve, and taking such precautions may become more commonly accepted. Contextual factors such as the type of industry (health care for example), exposure to the public, the need to work in close proximity with others, and the reliability and the level of intrusiveness of the test, will all likely play a role in any analysis to determine lawfulness.

Employers would also need to consider any applicable privacy laws in their respective provinces regarding collection, storage, access, and use of such information. At the very least, employees would need to provide informed consent to any type medical examination.

Europe

Temperature checks are increasingly observed within Europe as well. The European Union’s General Data Protection Regulation (GDPR) and most other data-privacy laws would generally prohibit employers from conducting temperature scans as GDPR considers health data to be “sensitive personal data” that an employer would need an exception to implement. While country-specific practices vary, temperature checks may be acceptable with the consent or approval of relevant employee consultative bodies (e.g., Works Councils), provided they are self-administered or

conducted by medical staff or reliable automated technology. Employers should consider the additional privacy concerns and any employment contract implications that may result from a unilateral implementation of temperature screening. For example, in the United Kingdom, employers may wish to consider if contemplated screening requirements, if not properly and reasonably implemented based on a genuine need, might constitute a breach of an employer's implied duty not to damage the employee's trust and confidence.

Asia

In the Asia-Pacific region, most countries have implemented data-privacy legislation that treats temperature data as sensitive, and the principles applicable in Europe apply in most of Asia as well. In many countries (e.g., China, Singapore, and Japan), however, temperature checks are government-recommended or required, or at least so common as to be unlikely to be considered an unreasonable intrusion. Accordingly, in some locations a unilaterally-implemented temperature check would not constitute a privacy violation at all, and in others, employers would not have trouble getting employee consent to it.

Global Considerations

In other world regions where the virus's local transmission is less widespread, the temperature-check question may not yet have been addressed. Even in jurisdictions where temperature screenings may be permissible, though, employers considering temperature checks may wish to consider other factors.

Below are some issues to consider when implementing a temperature screen at work:

- Have public health authorities issued local guidance or directives regarding appropriate measures to screen employees and visitors at the workplace? For example within the United States, Ohio's governor has [requested](#) that any employers remaining open take employee temperatures daily.
 - Are there heightened exposure risks in the business, such as food service operations, vulnerable employee populations, close quarter environments with multiple employees, frequent customer interactions, or a limited ability to implement other social distancing precautions?
- Could the employer achieve the same level of compliance and protection through voluntary temperature screenings versus mandatory screenings within the employee population at issue?
- Would implementing temperature screening prompt greater employee concerns or employee relations challenges? For example, would employees excluded from the workplace be placed on unpaid status if they fail the temperature check such that they may be motivated to artificially reduce their fevers with medications?
- Does the employer have a reasonable plan to deal with employees who show a fever through temperature screenings, such as immediate isolation of the employee, sending the employee home and/or for further medical care, and determining whether any confirmatory screening is appropriate (e.g., confirmation through a more accurate oral thermometer if the initial screening is being done with an infrared thermometer)?

- Does the employer have a reasonable plan to deal with employees who refuse to submit to temperature screenings, including denial of access to the workplace, remote work arrangements, or potential disciplinary measures?
- Does the employer intend to keep records of the temperature screening? If so, employers should consider whether such data will be anonymous or could identify a particular employee. Employers should also ensure that records are maintained in accordance with any applicable privacy laws, such as the ADA for U.S. employers, or the GDPR for European employers and U.S. privacy-shield-certified employers.
- Will the employer conduct the temperature screenings with company personnel or engage a third-party healthcare vendor to administer the program?
- Will additional preventative measures or protective gear be required or appropriate for personnel who will be conducting temperature screenings?
- Will the establishment of the temperature screening procedure need to incorporate other social distancing precautions in connection with the checks? For example, where employers anticipate the potential for a queue of employees awaiting temperature screening to get access to the workplace, employers may wish to consider spacing employees out or taking other measures to prevent employees from congregating while awaiting temperature screenings.

Even as they become more commonplace, employers contemplating temperature screens for the first time have much to consider. Potential privacy, discrimination, workplace-safety, and employee-relations concerns are among the issues that may inform an employer's calculus as to whether and how to implement a temperature check.

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