

How Do Reopening Businesses Screen Employees for COVID-19?

by Laura I. Bernstein - Monday, May 04, 2020



As employers begin strategizing about reopening their workplaces questions arise as to how to ensure the safety of returning employees while not violating employment discrimination laws. Can employers screen employees for COVID-19? And what types of testing can employers use?

Whenever an employer requires an employee to undergo medical testing it raises potential issues under the Americans with Disabilities Act (“ADA”). Under the ADA, employers are generally prohibited from using medical information to make employment decisions.

Direct Threat

However, the ADA does permit employers to make disability-related inquiries and conduct medical examinations if they are job-related and consistent with business necessity, and allows employers to exclude individuals from the workplace if they post a “direct threat.” The EEOC defines a “direct threat” as a “significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

In recently released [guidance](#), the EEOC explicitly stated that the “COVID-19 pandemic meets the direct threat standard” and therefore “employers may take steps to determine if employees entering the workplace have COVID-19” and may “administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.”

Screening Alternatives

Good news from employers wishing to keep their workplaces safe, but what types of tests or screenings are acceptable? The EEOC specifically states that – although they constitute medical examinations – employers may require employees to undergo a daily temperature check before entering the workplace. Employers may also require temperature checks of anyone seeking entry to the workplace. However, employers must still protect the confidentiality of information collected.

Pulse oximeter or oxygen testing is another type of screening gaining traction around the country since studies have shown that COVID-19 can result in low oxygen levels and elevated heart rates. Pulse oximetry measures oxygen levels in blood using a clip-like device attached to a body part, typically a finger or ear lobe. Unlike temperature screenings, pulse oximeter testing has not been expressly approved by the EEOC for COVID-19 testing, but such screenings may be interpreted as a “step” undertaken to determine if employees have COVID-19.

Regardless of the type of screening an employer implements, employers must ensure that all information obtained is treated as a confidential medical record in compliance with the ADA. EEOC guidance specifically provides that medical information related to COVID-19 may be kept in existing medical files. Such information also includes “an employee’s statement that he has the disease or suspects he has the disease, or the employer’s notes or other documentation from questioning an employee about symptoms.” Additionally, since employers must also ensure that any screenings or tests performed are accurate and reliable, training regarding proper administration of any test will be an important consideration.

Bottom Line

Screening will be a critical component of an organization’s reopening plan. We will update you as further guidance is provided.