

EEOC: Employers Now May Take Employees' Temperatures

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 updated March 18

(https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm). 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 on March 12, 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.

But, he said, "be super careful about taking temperatures, in part because what does it really tell you? Plenty have contagion who do not have a [high] temperature."

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 and the person administering the temperature check should be trained on the procedure, Nowak said. 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 six 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.

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.

[*SHRM Resource Spotlight: Communicable Diseases* (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)]

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.

"That's all well and good if someone can actually get tested," Fram said in an interview with *SHRM Online*. "Right now, that's a challenge." So, until more tests for coronavirus are available, if an employer can't get such alternative documentation, it will have to consider how much risk it's willing to take if the employee can't prove he or she is free of the virus, he said.

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.

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