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Benefits**Employment Question of the Day: April 30, 2020****Legal Update**

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**Question****What are some best practices for conducting employee screening in response to COVID-19?****Answer**

Although the EEOC has confirmed that the ADA and Rehabilitation Act continue to apply during the pandemic, it also has stated that these laws do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC and other state/local public health authorities regarding COVID-19. Because authorities and states are regularly updating their return to work orders and guidance, it is critical that employers monitor all issued guidance to ensure they have the most current information.

Under guidelines issued on April 23, 2020, the EEOC indicated that COVID-19 testing, including temperature taking, is permissible for all employees during the duration of the pandemic. Per EEOC guidelines, an employer also may ask an employee who is entering the workplace whether he or she is experiencing the symptoms of COVID-19. In addition, as states lift work restrictions, workplace screenings may even be a condition of conducting business. **Certain workplaces, such as healthcare settings and meat packing plants, may have additional screening requirements.**

It is likely that new testing options will become available to employers. However, per recent EEOC guidance, any test administered by an employer must be "accurate and reliable." Before utilizing any test, employers should confirm that the tests they plan to use are approved by the FDA, as well as in compliance with guidance from the CDC, and local health authorities.

As an initial step, an employer should have a policy to prevent sick workers from entering the workplace, which should be communicated to employees. The policy should communicate the type of screening or testing that will be done and the reason for the screening (i.e., to test for COVID-19). The policy should address

issues such as which positions will be screened, what the employer will do if an employee refuses to cooperate with screening (e.g., will the employee be sent home without pay?), and indicate what symptoms will result in an employee being sent home as well as the employer's requirements for return to work. **Employers must update their policies as necessary to comply with executive orders or public health guidance.**

When conducting any screening for COVID-19 in the workplace, an employer should consider following these best practices for doing so:

- Best practice is an across the board screening that is done consistently for those who enter the workplace. Employers should ensure that they are not screening employees based on protected characteristics (e.g., national origin). Per EEOC guidelines, if an employer decides to ask only one employee about symptoms, the employer must have a "reasonable belief" based upon "objective evidence" that the employee might have the disease. A reasonable belief might exist if the employee displays one of the COVID-19 symptoms identified by the CDC such as a persistent, hacking cough.
- Because taking employee temperatures is a medical examination, employers should have the temperature screenings conducted by a qualified medical professional. If that is not possible, the person taking the temperatures, at a minimum, must be trained on proper procedure. If an employer retains a third-party provider to conduct employee screening, the employer must ensure that provider follows all applicable laws including those regarding the protection of employee medical information. If employees are conducting the screens, the employer should provide PPE for those administering the tests.
- If taking temperatures, avoid using oral thermometers to conduct testing, which are more invasive and harder to sanitize/sterilize between screens; opt for an infrared digital thermometer instead.
- Screening should be done before employees enter the worksite, if feasible, to help with source control. Keep in mind that employers may have an obligation to pay employees for time spent waiting to have their temperatures checked under state and federal wage/hour laws. Have a plan in place for ensuring hourly employees are paid for all compensable time.
- All results or information obtained from screening *must* be kept confidential. Conduct temperature screenings in a private area where other employees will not be able to discern the results of co-workers. The ADA states that employee health information must be maintained in a file separate from the employee's personnel file. Notes about an employee who might have COVID-19 or that describe symptoms also must be kept confidential. Likewise, temperature logs must be maintained as confidential.
- Although employee medical information must be kept confidential, recent EEOC guidance indicates that if an employee has symptoms of or is suspected to have COVID-19, the employer may take action as required by the CDC and local health authorities. An employer should be aware that the disclosure of the identity of an employee who has COVID-19 is a disclosure of protected health

information.

- Ensure that any employees waiting in line to have their temperatures measured are practicing social distancing by standing at least six feet apart.
- Employers should designate an employee to be responsible for monitoring CDC and state/local health authorities' recommendations and guidance, as well as other new tools or developments to aid in employee screening. For example, on April 29, 2019, the Minnesota Department of Employment and Economic Development (DEED) announced a new tool that is now available to help businesses enter non-personal health information and make a determination about the people entering their facilities.

### Takeaways

Screening employees, as well as customers and vendors, entering the workplace is an important and, in some cases, required measure to help prevent the spread of COVID-19 and keep workers safe. But the practice is also ripe for potential claims of discrimination, breaches of privacy or other violations of law. Accordingly, employers are wise to have carefully considered policies in place that have been clearly communicated to employees and other affected individuals in advance.

Contact your Fredrikson & Byron employment and labor attorney for help developing a policy and form documents for conducting and tracking employee screenings.

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