



HR QUESTION OF THE MONTH: EMPLOYEE TEMPERATURE-TAKING POLICY: WHEN AND HOW?

Question: What is the best way to implement an employee temperature-taking policy? Should it be required of everyone or should it be used only for employees who are returning to work after being sick, or other times? What type of thermometer is best? When, where and how should the temperature be taken? What are the actions an employer should take based on the resultant number?

Answer: At present the CDC's guidance indicates that only employees who are returning from travel to countries that have a Level 3 Travel Health Notice (where there is widespread, ongoing transmission) need stay home for 14 days from the time they left such area and practice social distancing. Puerto Rico is not among the areas presently at Level 3. As such, it does not appear that the subject employee would be required to self-quarantine as a result of this trip pursuant to the present guidance from the CDC. We recommend that you review the CDC's guidance on this issue directly at "[Travelers Returning From High Risk Countries](#)" which contains additional links. If, however, there are other risk factors ([Click here](#) for the CDC's risk assessment guidance), then certainly the employer should take additional and appropriate precautionary measures to protect the health and safety of its workplace and those who work or visit it.

As for a doctor's note, the US Department of Labor's current guidance addresses this as follows: "May an employer require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?"

Yes. However, employers should consider that during a pandemic, healthcare resources may be overwhelmed and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious. During a pandemic health crisis, under the Americans with Disabilities Act (ADA), an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work. Specifically, an employer may require the above actions of an employee where it has a reasonable belief – based on objective evidence – that the employee's present medical condition would impair his ability to perform essential job functions (i.e., fundamental job duties) with or without reasonable accommodation, or, pose a direct threat (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace." [See COVID-19 and the Family and Medical Leave Act Questions and Answers.](#)

The EEOC's guidance is similar but acknowledges the current strain on the healthcare system:

"When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?"

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. 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. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.*" See ["What You Should Know About the ADA, the Rehabilitation Act, and COVID-19"](#).

The CDC takes a stronger and more direct approach to the issue given the current pandemic and burdens facing healthcare institutions at present: "DO NOT require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way." See ["Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)"](#). That said, the CDC also advises in this guidance that employer should "[a]ctively encourage sick employees to stay home," and that "employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F [37.8° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants). Employees should notify their supervisor and stay home if they are sick."

Thus, while there is some legal support for employers that require a fitness for duty statement before an ill employee returns to work, there appears to be none as to employees who are otherwise healthy; and regardless, the agency guidance is consistent in that employers should seek to minimize the burden on the healthcare system in making these types of demands. Of course, the employer has an enduring duty to ensure the workplace is safe, healthy and free from hazards (including in cases where employees perform work on client sites). Employees who present a direct threat to themselves or to the workplace, or who have other risk factors (see link above), can and should be required to self-isolate or self-quarantine and additional measures may be necessary to be taken before they can safely resume their duties. That said, we do not recommend that the employer require the subject employee to burden the healthcare system by requiring that she produce a doctor's note regarding her fitness to return to work based solely on the fact that she recently traveled, and particularly if she has no upper respiratory symptoms (see [CDC information regarding symptoms](#)) or other risk factors present per the CDC's risk assessment (see above).

Given the recommendation (and in some cases, the requirement) that individuals practice social distancing, the employer should consider the propriety of continuing to have employees travel to worksites in close quarters in the same vehicle. As advised by the CDC, the employer should instead consider having employees driving individually to work sites and maintain a distance of 6 feet from

one another while they are there to best protect the transmission and spread of the virus. The CDC's guidance for employers in the face of the COVID-19 pandemic is particularly helpful and we recommend that you receive it online from the CDC's [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#)

The COVID-19 pandemic is a fluid situation for all employers, and the landscape is changing constantly. We make a wide range of resources, which are frequently updated, available for employers on our website, which you can access through your portal.

The EEOC released [COVID 19-related guidance](#), which directly addresses the topic of taking employee temperatures at Questions A.3, B.1., and B.2. Specifically it provides that "employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever." It also addresses employer obligations to maintain confidentiality if it does so. We recommend reviewing this guidance as a part of any effort to take employee temperatures. We also note that the CDC has issued guidance that references integration of temperature monitoring under certain circumstances, which can be viewed at [Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission](#) and is also a helpful resource.

From an employment law standpoint, it does appear that employers do have limited flexibility to take the temperature of employees (although as noted above, the EEOC authorizes such medical examination at the present time), but please note that the federal Americans with Disabilities Act (ADA) imposes a duty of confidentiality upon employers and this is unchanged in view of the current pandemic. If an employer proceeds with taking the temperature of its personnel, it must do so in a confidential way and ensure that any documentation (including as to the results, which are similarly confidential) is specific to each employee and maintained properly in a separate medical file in accordance with ADA guidelines.

While we are not aware of specific guidance as to "where and when" employee temperatures should be taken, if the employer proceeds with this undertaking, presumably the employer would seek to take employee temperatures at the outset of any shift and in an isolated area so that no employees are permitted to enter common areas and/or perform work until such time as there is confirmation that they do not have a fever. The employer would do well to avoid making assumptions that an employee with a fever has COVID-19 (although certainly any such employee should be sent home. See the CDC's guidance for employer instructions as to sick employees at [Plan, Prepare and Respond to Coronavirus Disease 2019](#)). The employer must also ensure that if it proceeds with taking employee temperatures, it does so in a manner that is not unlawfully discriminatory or retaliatory. The employer cannot and should not seek only to test employees who are older, or have known or perceived disabilities or are otherwise in a protected class. This can expose the employer to additional claims.

Given the recent outbreak of COVID-19 and the concern of contraction through close human-to-human contact, employers should carefully consider the propriety of proceeding with having one or more employees take the temperature of co-workers, particularly if using an oral or ear-based thermometer. If, however, the employer seeks to utilize an infrared or similar touchless thermometer, which presumably minimizes human-to-human contact, this may lessen the risk associated with virus transmission or other contamination. If the employer proceeds it should ensure a uniform and consistent application of this policy, communicated in advance to personnel. Those employees

charged with taking temperatures should receive appropriate and adequate training, including the use and care of the requisite equipment (thermometer) as well as their obligation to maintain appropriate confidentiality of test results. They should also be provided with the requisite personal protective equipment (PPE) – along with instruction as to their proper donning, doffing and disposal -- to ensure they are not unnecessarily exposed to a heightened risk of virus transmission while undertaking such examinations. The employer may wish to consider having employees take their own temperatures, or have a trained healthcare worker do so, as an alternative. We also recommend contacting your insurance carrier(s) for further information before undertaking any permissible medical examination, i.e., taking employee temperatures, in your workplace.

While employment law issues are relevant here and are referenced above, to be sure, what constitutes the correct method through which to take another person's temperature, or how to do it in the safest manner, are not matters controlled by federal or state employment laws. We recommend that employers contact their local public health department and/or the [local office of the federal Occupational Safety and Health Administration](#) for specific guidance on how the employer may implement a safe and accurate method of doing so.