

Health Information Compliance Alert

Privacy: Don't Stomp on Employees' Privacy Rights When Testing for COVID-19

Tip: Review both public health and labor updates frequently.

If your organization is seeing patients daily, then you've likely made COVID-19 testing mandatory for employees - and that can be tricky business, especially with public health guidelines changing so rapidly. Read on for tips on how to address both the health and legal obstacles.

Now: As coronavirus infections continue to plague the U.S., federal, state, and local officials are looking for ways to mitigate spread while still encouraging people to venture back out into the world with some semblance of "normal" life. Screening people for symptoms of COVID-19 and performing diagnostic tests has become commonplace, but these short-term goals may have long-term legal implications.

Employee health privacy rights are not diminished by the public health emergency (PHE), and even though employers need to intrude somewhat on employees' privacy, with body temperature and symptoms screenings, for example, they should be careful to not overstep, says **Karla Grossenbacher, JD**, partner in labor and employment at **Seyfarth Shaw LLP** in Washington D.C.



Utilize Federal Guidance and Common Sense in Your Policymaking

There's no question that myriad healthcare workers on the frontlines risk exposure to COVID-19.

Practices that want to protect employees who may be at higher risk for more serious complications from COVID-19 without invading their privacy should let employees self-identify whether they have any conditions that put them in the high-risk category and then honor their concerns, Grossenbacher says.

Although the **U.S. Equal Employment Opportunity Commission** (EEOC) recommends that employers stay abreast of and follow the **Centers for Disease Control and Prevention** (CDC) and other public health agency recommendations, the EEOC outlines some crucial language that employers should be aware of when navigating protecting employees without interfering with their privacy or chancing discrimination.

Federal agency, public health, and professional organization guidance have all encouraged employers to prioritize safety as they pursue a return to business, and screening employees has been recommended consistently. The recommendations from the CDC for healthcare personnel (and others working in medical offices or facilities) have included taking employee temperatures before each shift, as well as running through a symptom questionnaire. The CDC doesn't specify who exactly should be conducting these screenings, though the agency does mention that the screenings should, ideally, occur before employees enter the office or facility.

Evaluate Carefully When Establishing Organization Policy

But employers should think carefully about who is tasked with doing this work - and what happens to protect everyone's physical safety, as well as privacy. Even if the employer is legally taking employees' temperatures, the ways in which the employer conducts this screening could create privacy concerns or even be against the law, Grossenbacher says. While most workers seem grateful for all the precautions organizations are taking to protect them, litigation from disgruntled

employees is always a possibility, especially if employers overstep. Although a staff member who works at the front desk or provides security outside the office may be the most convenient, logistically, a human resources staff member who has the training to prioritize discretion may be a better choice.

Grossenbacher lists these questions as points to consider:

- Are employees' temperatures recorded? Who has access to that information?
- Do staff members wait in a physically distanced line to be screened - but with the possibility of overhearing others' results?
- What happens if someone comes to work and has a fever?
- How is the designated screener protected physically?

Self-screening: One option is to encourage employees to screen themselves, which obviously requires more trust for employers and employees both - and among colleagues.

Even if you've been operating with rather ad hoc protocols, the increasing rate and widespread nature of the pandemic should bring new focus. Make sure you establish procedures and write them down. Keep staff in the loop and keep communication lines open so they can voice their concerns, fears, or even confide personal challenges they may be navigating outside of work that may be affecting their performance.



Know These Particular Guidelines

If you've experienced any staff turnover, there are special labor guidelines that may be pertinent to your hiring situation. The EEOC says that during the public health emergency, and consistent with CDC guidelines, employers may test new hires before their start date, delay anyone who tests positive from starting, and even withdraw a job offer if the potential hire has COVID-19, as they cannot work safely.

However, it is not legal to withdraw a job offer or postpone the start date unilaterally for a potential hire who is older than 65 or who is pregnant, even though these factors may make the person at higher risk for more serious complications from COVID-19, the EEOC says. An employer should instead make accommodations like offering telework, if the role allows such flexibility, or determining whether the individual would prefer to postpone their start date. Some provisions of the Americans with Disabilities Act (ADA) come into play, too, depending on the type of test administered.

Important: Antibody tests for COVID-19 are subject to different rules from the EEOC than the tests that detect the presence of SARS-CoV-2, the virus that causes COVID-19 infection.

"An antibody test constitutes a medical examination under the ADA. In light of CDC's Interim Guidelines that antibody test results 'should not be used to make decisions about returning persons to the workplace,' an antibody test at this time does not meet the ADA's 'job related and consistent with business necessity' standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA," the EEOC says.