

WORKPLACE SCREENING FOR EMPLOYEES RETURNING TO WORK DURING THE COVID-19 PANDEMIC

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COVID-19
RETURN TO WORK GUIDANCE

Workplace Screening For
Employees Returning to Work
During the COVID-19 Pandemic

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As businesses in Missouri and other regions begin to open back up and employees return to the workplace, employers are faced with questions regarding what types of testing and screening they can implement to ensure the health and safety of their employees.

Background

The U.S. Equal Employment Opportunity Commission ("EEOC") enforces workplace anti-discrimination laws, including the [Americans with Disabilities Act](#) ("ADA") and the [Rehabilitation Act of 1973](#), which set forth requirements for reasonable accommodation of employees with disabilities and rules concerning medical examinations and inquiries by employers.

Although longstanding ADA and Rehabilitation Act rules limiting an **employer's ability to require employees to undergo medical examinations or answer medical inquiries** still apply, the EEOC has issued guidance making it clear that these rules do not interfere with or prevent employers from following the CDC guidelines regarding COVID-19.

Below is a summary of some of the key provisions of the [EEOC's guidance to employers](#) on how to

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COVID-19 Testing Employees

The ADA permits employers to make health-related inquiries and even conduct some medical exams if job-related and consistent with business necessity. Medical inquiries and exams meet this standard if they are necessary for an employer to exclude employees from the workplace whose medical condition would pose a “direct threat” to the health or safety of others.

What is a direct threat?

A “direct threat” is a threat that poses a significant risk of substantial harm even with a reasonable accommodation. The EEOC has determined that as of March 2020, **the COVID-19 pandemic meets the direct threat standard and that an individual with COVID-19 poses a direct threat to the health of other employees.** Thus, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

What are the obligations of testing your employees for COVID-19?

Employers who choose to have employees undergo COVID-19 testing have an obligation to ensure that the tests are accurate and reliable. Employers may review guidance from the U.S. Food and Drug Administration, the CDC and other public health authorities about what is considered safe and accurate testing.

Further, from a practical standpoint, employers should plan for the possibility of false positives or false negatives and develop a plan on how to address that possibility. Finally, because testing only shows whether the virus is currently present, testing should not replace guidance from public health authorities such as social distancing and regular handwashing.

Temperature Screening

Measuring an employee’s body temperature is generally considered a medical examination and would not be allowed. However, “because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions,” **employers may now measure the body temperature of employees who physically enter the workspace.**

Soliciting Health Information

During this pandemic, **employers are permitted to ask all employees physically entering the premises medical questions** that are relevant to determine whether an employee has been exposed to COVID-19.

Employers may lawfully question employees:

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1. if they are experiencing symptoms common to COVID-19,
2. whether they have been tested for COVID-19, and
3. whether they have come into contact with anyone who has either symptoms or has been diagnosed with COVID-19.

Employers are also permitted to single out an individual employee for an inquiry if the employer has a reasonable belief based on objective evidence that the employee may have COVID-19. For instance, if the employee appears ill and has a persistent cough, the employer may ask the employee to explain the cough or whether the employee has been tested for COVID-19.

Exclusion from the Workplace

Employers are permitted to bar employees who are ill with symptoms of COVID-19 from the workplace. The EEOC has noted that the CDC, as well as other public health authorities, may expand the list of symptoms associated with COVID-19 as medical professionals learn more about the virus. Employers are encouraged to rely on these and other reputable medical sources for guidance on COVID-19.

Confidentiality

Medical information, including a COVID-19 diagnosis, is required to be kept confidential according to the ADA. Therefore, employers need to ensure that all employee medical information related to COVID-19 is only seen by or accessible to those with a need to know the information.

Can I keep this information in my employee's personnel file?

Employers are allowed to keep documentation related to COVID-19 screening such as temperature logs or an employee's statement that he or she has the disease, but **this information should be kept in a file separate from that employee's personnel file in order to limit access to this confidential information.** Employers are permitted to share certain information, including identifying information such as an employee's name, to public health agencies.

Return to Work After Positive Test

Employers should determine their own policies and procedures for integrating an employee who has previously tested positive for COVID-19 back into the physical workspace. Employers are permitted to require a doctor's note from the employee certifying that they are fit to work.

[CDC Interim Guidance for Businesses and Employers](#) As Missouri and other regions begin to open up more businesses, employers should check with the CDC as well as state and local officials for guidance regarding employees returning to work after being diagnosed with COVID-19.

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Changes to COVID-19 Guidance

Finally, employers should be aware that, like almost all other aspects of the current coronavirus crisis, **the standard for allowable and appropriate workplace testing and screening is subject to change.**

For example, if or when the CDC issues new standards or guidance for accurate and reliable COVID-19 testing, employers may need to change the tests that they administer. Furthermore, at such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, the EEOC and employers will need to revisit the issue of whether a direct threat still exists so as to warrant certain workplace testing/screening, including COVID-19 tests.

If you require assistance as you bring your employees back to work, contact [Traci Dale Pupillo](#) or any of the other attorneys in Capes Sokol's [Employment Law](#) Practice Group.

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