

## CLIENT ALERT: What Employers Should Know About Employee Temperature Checks

Recently, the federal government, several states, and many municipalities have published guidance either suggesting or requiring employers conduct health checks, including temperature checks, before an employee is allowed to work on the employer's premises. For example, effective April 7, 2020, the [Department of Public Health](#) in the town of Brookline, Massachusetts mandated that food establishments in Brookline are required to "increase employee illness surveillance" by taking daily temperature readings of employees at the start of every work shift. As part of the federal guidelines for [Opening Up America Again](#), the White House recommends that employers develop policies to monitor the workforce for symptoms and, specifically, temperature checks. The United States Centers for Disease Control and Prevention ("CDC") has also issued [COVID-19 guidance](#) identifying the use of temperature checks as a strategy to mitigate spread of the virus. As more jurisdictions recommend or mandate temperature checks, and more businesses plan to re-open, employers will be faced with questions as to when and how to conduct temperature checks at work.

In the wake of the COVID-19 pandemic, the Equal Employment Opportunity Commission ("EEOC") has expanded its guidance about the boundaries of employee medical inquiries. Historically, taking an employee's temperature is a medical examination under the Americans with Disabilities Act ("ADA"), and employers could not conduct medical examinations except in limited circumstances. The EEOC's guidance entitled, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), explains that, "Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature." The EEOC cautions, however, that employers should be aware that some people with COVID-19 do not have a fever.

While the EEOC has given the green light to employers to conduct temperature checks, and an increasing number of government agencies are suggesting or requiring them, there has been little guidance from the EEOC, the CDC, or the Occupational Safety and Health Administration ("OSHA") on a safe and effective process for employers to utilize. Temperature checks potentially implicate employee privacy, wage and hour, and workplace safety issues, in addition to discrimination concerns. Employers should be sure to continually review the most recent guidance and information on employee safety and illness prevention as it is provided by the CDC and other agencies. If those agencies provide specific guidance, employers may be able to defend any claims based on their decision to adhere to then-appropriate standards. Where limited guidance is available, it should be followed. As of the date of this alert, Massachusetts [guidelines for state employees and contracted staff](#) working "in a confined space or inside a closed building envelope will have to be temperature screened by a Medical Professional or Trained Individual provided that such screening is out of public view to respect privacy and results are kept private." Similarly, on March 24, 2020, the Ohio Department of Health published, [Screening Employees for COVID-19](#), which addressed, in part, temperature check procedures and recommendations.

In the absence of specific, controlling guidance, employers should consider at least the following when implementing employee temperature checks:

- **Communication**. Inform employees, in advance, that temperature checks will be conducted and provide advance notice about what each employee can expect in terms of the process and consequences of an elevated temperature (e.g. they will not be permitted to enter the workplace). Determine if the employee will conduct a self-check at home or subject an employee to a test at the beginning of a work shift. Employees should also be informed if the temperature check is part of a broader health check process.
- **Consistency**. Employers should not pick and choose who to test; rather every employee entering the workplace, every day, should be tested. Testing should be administered on a non-discriminatory basis. Employers should establish a clear rule on what temperature is considered too high for the employee to enter the facility. (The CDC considers a fever to be a measured temperature of at least 100.4 F.)
- **Safety**. If the test is done on site, ensure proper social distancing by establishing appropriate locations and follow other COVID-19 related precautions (including disinfecting the areas used). If possible, consider engaging with appropriate medical staff or medical service provider to conduct the checks or, if not possible, ensure those conducting the temperature checks are properly trained and have the proper personal protective equipment (gloves, gown, face shield, goggles) and thermometers (non-contact). Use disposable equipment or clean and disinfect equipment consistent with OSHA standards.
- **Confidentiality**. Maintain a log of the results of daily temperature checks but keep it confidential. The ADA requires that an employee's medical information must be stored separately from the employee's personnel file. Medical information related to COVID-19 should be stored in an employee's existing medical file or in a new file. Again, if possible, consider whether to outsource the temperature checks and recordkeeping to a medical services provider.
- **Compensation Compliance**. If an employer requires employees to undergo temperature checks upon arriving on the premises, the time spent waiting in line may be compensable because it consumes significant time and/or is deemed to be integral and indispensable to their job. On the other hand, if the employer requires an at-home temperature check as a condition of working, employers should work with counsel to determine whether the time spent by a non-exempt employee is compensable. Presumably an at-home temperature check only consumes a minute or two, and the actual amount of time would be difficult to record, making it more likely to be considered *de minimis* (and not compensable). For at-home temperature checks, some employers may wish to provide employees with a thermometer or reimburse the employee's purchase as a business expense.
- **Completeness**. The CDC and other public health authorities have made clear that fever is not the only symptom of COVID-19, and it is also possible that a fever is not necessarily indicative of the virus. Sometimes those who test positive for the virus never experienced a fever. Other symptoms associated with the virus, beyond fever or cough, include a new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting. In addition to testing for fever, employers who seek to prevent the spread of COVID-19 in the workplace should consider whether to include symptoms other than temperature as part of the overall

health check.

- **Collective Bargaining Compliance.** Employers with bargaining units should consult with legal counsel over their obligation to bargain with a union over the adoption of temperature checks.

Employers should carefully review the terms of any federal, state or local orders and public health resources requiring or recommending temperature checks. As orders and recommendations continue to develop, employers should also maintain copies of the guidance that was then-available to defend its decisions on temperature checks (as the guidance may thereafter change).

Please note that the above guidance is based on information available as of the date of this publication. As always, employers with questions about the ADA, employee medical testing and other employee illness, or disability and/or medical leave laws should consult with their MBJ attorney.

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