

## Maintaining a Safe Workplace: Screening Employees as They Return to Work During a Pandemic

COVID-19 Return to Work Series: Part 2

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*Holland & Knight Alert*

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### Highlights

- As states and local governments phase out their stay-at-home orders enacted in response to COVID-19, businesses will be faced with new challenges regarding the safety of workers, including whether it is permissible to ask employees about symptoms and risk factors, as well as whether employees can be tested.
- Certain types of screening can be required of employees as workplaces reopen. Employers must treat information learned from employee screening as confidential medical information.
- This is part of a series of alerts by Holland & Knight's Labor, Employment and Benefits Group focusing on return-to-work issues during the COVID-19 pandemic.

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### Reducing Workers' Risk of Exposure

To reduce the risk of exposure to COVID-19 in the workplace, employers should develop an infectious disease preparedness and response plan; prepare to implement basic infection prevention measures; develop policies and procedures for prompt identification and isolation of sick people; develop, implement and communicate about workplace flexibilities and protections; implement workplace controls; and follow existing Occupational Safety and Health Administration (OSHA) standards.

Many of the strategies above go hand in hand with U.S. Equal Employment Opportunity Commission (EEOC) guidance on best practices for balancing obligations under the Americans with Disabilities Act (ADA). For example, policies that allow employers to promptly identify and isolate sick people may include measuring an employee's body temperature to check for a fever or other COVID-19 symptoms. Doing so is permitted under the ADA and encouraged under OSHA.

### EEOC's Guidance Regarding Testing Employees

The EEOC has issued and continues to update guidance to employers regarding best practices for balancing obligations under the ADA while still complying with guidelines from the Centers for Disease Control and Prevention (CDC). The EEOC reminds employers that "[t]he ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace" regarding COVID-19.

### Medical Examinations

During the declared pandemic, employers may ask employees who report feeling ill at work, or who call in sick,

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questions about their symptoms to determine if they have or may have COVID-19. Pursuant to CDC guidance, these symptoms currently include fever, chills, cough, shortness of breath, loss of taste or smell, and sore throat. Employers also may measure employees' body temperature before they enter the workplace. The fact that an employee had a fever or other symptoms should be treated as confidential medical information.

## Testing Currently Available to Employers

Types of Employees	Types of Testing Permitted and Authority
<b>Prospective employees or returning furloughed employees</b>	<p><b>No tests or symptom-related inquiries until a conditional offer of employment.</b> An employer cannot take a prospective employee's temperature or ask about symptoms until the prospective employee receives a conditional offer of employment or the furloughed employee is directed to return to work. The employer must take the same measures with all prospective employees and employees returning from furlough entering or returning to the same job title or classification. Notwithstanding the foregoing, if an employer requires all entering its property to have their temperatures checked, such as a hospital or health clinic, then the employer can also require prospective employees to have their temperatures checked before providing them with a conditional offer of employment.</p> <p>An employer may protect those interviewing and interacting with prospective employees by having signs forbidding entrance of those experiencing the symptoms of COVID-19 and requiring all those applying for work to wash their hands, wear masks and practice social distancing.</p> <p>If a prospective employee or a furloughed employee is experiencing symptoms or has an elevated temperature, the employer may either delay the start date or rescind the conditional offer of employment.</p>
<b>Current employees</b>	<p><b>Inquiring about symptoms.</b> During the current pandemic, employers may ask employees if they are experiencing symptoms of COVID-19. This may be done at the beginning of each shift. Employers may require employees, before they enter the workplace, to complete a simple questionnaire that lists each of the</p>

symptoms. If the employer retains information or records about these COVID-related inquiries, the records must be treated as confidential medical information.

**Taking temperatures.** Fever of 100.4 degrees or higher is a symptom of COVID-19. It is permissible and recommended for employers to take the temperatures of employees before the beginning of the work day or work shift (before entering the workplace if practicable) and, ideally, at regular intervals throughout the day, such as after breaks. Any record or log of temperatures must be treated as confidential medical information.

An employer should uniformly apply its policies for taking temperatures of employees and be sure not to engage in disparate treatment based on any protected class of employees. Having a written policy of practices that an employer is taking to prevent COVID-19's spread in the workplace can prevent claims that the practices are not uniformly applicable and help employees know what is being done to protect them and what to expect.

## Healthcare professionals, generally

**Healthcare professionals (HCPs) face additional challenges.** Due to HCPs' interactions with high-risk individuals, it is imperative that healthcare settings take a conservative approach to screening and testing HCPs. In this vein, the CDC has issued guidance on how to properly monitor and screen HCPs.

Specifically, the [CDC created a chart](#) identifying high, medium and low-risk categories for HCPs. Those HCPs in the high or medium-risk categories should undergo active monitoring, including restriction from work in any healthcare setting until 14 days after their last exposure. If they develop any fever *or* symptoms consistent with COVID-19, they should immediately self-isolate. Low-risk HCPs should self-monitor for 14 days, which includes recording the HCP's temperature twice a day.

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## Employees with Religious Reasons for Refusing Testing

As COVID-19 testing becomes more widespread in the workplace, it is inevitable that requests for religious or medical accommodations will also increase. The [EEOC's guidance](#) does not specifically address situations where an employee refuses COVID-19 medical testing on religious grounds. Employers are not required to satisfy a religious accommodation request by an employee if such request would result in more than a *de minimis* burden. But COVID-19 represents a direct threat to workplace safety. Accordingly, it is likely that the direct threat posed by COVID-19 will allow an employer to disregard religious objections to testing posed by employees. However, employees may be entitled to religious accommodations related to the manner or location of the testing if the accommodation would not impose more than a *de minimis* burden on the employer.

## Practicalities of Screening

Having employees wait in line to be screened for COVID-19 symptoms may prove logistically challenging. Employers should avoid large numbers of employees waiting because this could pose challenges for maintaining social distancing. To address this concern, employers may wish to stagger shift start times or provide multiple screening stations.

Another practical challenge is finding individuals to conduct the screening. Employers should use management personal to conduct the screenings because they will be handling confidential medical information. The screeners will need to be trained on how to handle the information they receive from employees. But using managers may be cumbersome and burdensome. Employers may consider using third-party medical providers. One possibility is to use school nurses or nurses at medical providers who currently are furloughed.

## Who Must Pay for Testing?

The EEOC guidance was silent on the issue of who bears the cost of administering COVID-19 tests. Employers are advised to reimburse the employee or pay the provider directly for required tests. Under the ADA, if an employer requires that an employee be tested by a medical professional of the employer's choice, then the employer is obliged to pay for the cost of such medical examination.

The Families First Coronavirus Response Act (FFCRA) generally requires group health plans and health insurance issuers to cover COVID-19 diagnostic testing, including the related costs of physician office, urgent care, emergency room and/or telehealth visits in order to receive testing. Thus, for those employers providing private employer sponsored group health insurance, the cost of testing should be covered under these plans through the end of the public emergency period.

## Must Employees Be Compensated for Time Spent Testing?

When setting up a testing requirement in a return-to-work program, employers must determine whether the time spent related to testing is compensable under federal and state wage and hour laws. An employee may be entitled to compensation for time spent undergoing a COVID-19 medical test, particularly if the employee is tested during normal work hours. If an employer requires temperature checks at the beginning of shifts or after breaks, this time will be compensable time for employees. Time spent waiting in line may be considered compensable time under certain state laws (e.g., California and Colorado).

## Conclusion

To reduce the risk of exposure to COVID-19 in the workplace, employers should develop an infectious disease preparedness and response plan that includes testing employees for the symptoms of COVID-19. Employers can implement questionnaires regarding symptoms and exposure, temperature checks at regular intervals and

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implementing testing for COVID-19. To ensure that all employment and local laws are followed when implementing these plans, consult with Holland & Knight's [Labor, Employment and Benefits Group](#).

## About This Series

States are easing or phasing out their stay-at-home orders. Nonessential businesses will begin to reopen and their employees will return to work. Many essential businesses that have continued to operate likely will see an increase in the number of employees returning to the workplace. But concerns about transmission of COVID-19 remain. Many states have or can be expected to impose significant obligations on employers to ensure that their workplaces remain safe and that the risk of COVID-19 transmission is minimized. This laudable objective presents many challenges to all employers.

As shelter-in-place orders are being lifted and employers are permitted to reopen their workspaces, they will need to do so with caution while wading through a patchwork of local, state and federal requirements and understanding what guidance or recommendations are mandatory.

To assist companies in their efforts, Holland & Knight has created a series of alerts focused on return-to-work issues. In addition, as state and local governments continue to issue new orders for May, Holland & Knight provides [updated summaries of state and local orders](#) to help companies keep track of regulations and requirements that are essential to all businesses.

Previous alerts in our COVID-19 Return to Work Series can be viewed below.

- **Part 1: [Considerations and Practicalities for Returning Employees to Work During a Pandemic](#)**

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DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the authors of this alert for timely advice.

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