



Employment Screening Services

Workplace Medical Screening: During and After a Pandemic

Things to consider before requiring screening for a return to work

Employers that wish to require their employees to undergo screening for COVID-19 in order to remain at or return to the workplace should take the following information into consideration before enacting any new policies. The failure to carefully and thoughtfully enact new screening policies could cause employers to run afoul of federal and state employment laws, as further described in this document.



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During the Pandemic

Screening employees for COVID-19 qualifies as a “medical examination” under the Americans with Disabilities Act of 1990 (ADA). As a general rule, the ADA prohibits employers from requiring medical examination of employees, except under limited circumstances. Medical examinations include screenings such as:

- Screening for tangible symptoms of the virus, including taking the employee’s temperature;
- Asking the employee whether he or she has been tested for the virus; and
- Requiring the employee to be tested for current or past infection.



According to the ADA, employers may only conduct or require medical examinations if:

1. An employee’s ability to perform essential job functions will be impaired by a medical condition; or
2. An employee will pose a **direct threat** due to a medical condition or to the health and safety of others.

The EEOC states that, at this time, “based on guidance of the [Centers for Disease Control or CDC] and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard.” This assessment may change as the CDC and other public health authorities change their assessment of the spread and severity of COVID-19.



Health experts say serological tests may play an important role in managing the pandemic.

Enthusiasm for serology tests as a way to help get people back to work is rooted in the belief that if you have antibodies for the virus in your system, you may be immune from catching it again.



Returning to Work

As a general matter, an employer may require one or more of the following from an employee who is out sick with COVID-19 before returning to work:

- Provision of a doctor's note clearing the employee to return to the workplace;
- Submission to a medical examination; or
- Requiring the employee to be tested for current or past infection.¹

An employer should treat all employees the same. If testing is required of one worker under one circumstance, then it should be required of all workers under the same circumstances. Before imposing a return-to-work requirement, a prudent employer will amend its employee handbook to articulate the policy and then distribute that amendment to its employees. The following is a sample policy:

As a condition to returning to Company's workplace during and immediately after a pandemic disease, employees will be required to submit to a medical examination to confirm they are fit for duty and do not pose a direct threat to the health and safety of others. Fitness for duty may include, but is not limited to, demonstrating a negative test result for the disease and/or the presence of antibodies showing a degree of immunity to the disease. All examinations will be conducted consistent with the Americans with Disabilities Act and applicable state and local laws. Company provides reasonable accommodations to qualified individuals with disabilities arising out of contracting the pandemic disease. Company will keep all medical-related information confidential in accordance with the requirements of the ADA. All Company-required medical examinations are paid for in full by Company.

As noted in the foregoing policy, an employer will generally need to keep confidential the results of any medical testing. Since the employee will already have been absent from the workplace for some time, there should be no need to inform his or her coworkers of a "failed" fitness-for-duty test. The employer will need to keep these confidential medicals records in a file separate from the personnel file.

¹ See, 29 C.F.R. § 825.312, *Fitness-for-duty certification*.



Additional Resources for HR Professionals:

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act

https://www.eeoc.gov/facts/pandemic_flu.html

Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Guidance on Preparing Workplaces for COVID-19

<https://www.osha.gov/Publications/OSHA3990.pdf>

ESS Return to Work Resource Center

<https://www.es2.com/COVID-back-to-work>



After the Pandemic

When COVID-19 loses its pandemic status, employers may lose the automatic presumption that medical screening is permitted under the ADA. At that time, employers will need to look to updated guidance from public health organizations and the EEOC to assess whether COVID-19 remains a direct threat to public health before they start or continue medical screening in the workplace. Factors that will contribute to determining whether the virus continues to be a direct threat include:

- The duration of the risk involved;
- The nature and severity of potential harm;
- The likelihood that potential harm will occur; and
- The imminence of the potential harm.



Although vaccines are currently not available for COVID-19, several labs are racing toward quick development. Assuming one becomes available, some employers may want to explore the feasibility of mandating employee vaccinations. There are several circumstances where requiring vaccinations may be both legal and appropriate, such as for employees in the healthcare sector; however, be aware that the EEOC has consistently argued that requiring vaccines for employees in other employment settings may violate their rights to privacy and other individual freedoms. As the CDC and the EEOC continue to publish guidance on how employers should react to the disease, we may gain more clarity on the question of whether COVID-19 vaccines can be required as a condition of employment.

If an employer desires to pursue mandating employee vaccinations, it must be aware of the exemptions employees will be able to assert. Such exemptions include those requested as “reasonable accommodations:”

- Based on an employee’s sincerely held religious beliefs pursuant to Title VII; or
- Those requested pursuant to the ADA because a complication arising from suffering COVID-19 resulted in a disability.

As always, employers should consult with legal counsel and review their rights and obligations under federal and state laws before enacting any new employment policies.

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