



## Guidance on Reopening/Transitioning Back to the Workplace

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With Utah recently moving from the urgent to the stabilization phase of Governor Gary Herbert's Utah Leads Together 2.0 plan, Utah employers forced to close or substantially alter their operations in light of the novel coronavirus (COVID-19) pandemic are now faced with a number of decisions and obligations as they bring employees back into the workplace now or over the coming weeks. The next phase of response to the pandemic is to ensure your company is prepared while reacting to evolving recommendations or mandates from federal, state, and local officials. Some of the most fundamental challenges employers are facing relate to employee screening, privacy, safety protocols, and discrimination issues. This article focuses on a few key considerations employers should focus on as employees return to the workplace.

### Employee Screening

Before the pandemic, conducting temperature checks, diagnostic testing, or asking daily screening questions of employees would have been incomprehensible and unadvisable in light of the legal risks of performing the same. Now, some of these steps have been recommended by the Centers for Disease Control and Prevention ("CDC") and blessed by the Equal Employment Opportunity Commission ("EEOC") and other state and local agencies. Each of these screening options presents unique challenges for employers and should be well-thought-out in order to avoid headaches in the future.

#### 1. Temperature Checks

We expect the most common screening procedure implemented will be conducting temperature checks before employees enter the workplace. The CDC has issued guidelines for conducting daily temperature checks for critical infrastructure workers to screen for a high temperature (100.4° or higher). The EEOC has confirmed that daily temperature checks of employees is permissible during the duration of the pandemic. In March 2020, the Utah Department of Health began recommending that management screen employees, on a daily basis and at the beginning of each shift, for symptoms consistent with COVID-19. Governor Herbert's phased risk guidelines indicate that fitness centers or gyms, and dine-in restaurants must check employee temperatures before every shift.

Each employer required or intending to implement temperature checks should establish a protocol for conducting the checks, which should be applied consistently to all employees. However, there are some important legal and logistical issues that should be considered before screening begins:

- Employees should be notified that temperature checks will be conducted and what to expect during the temperature check process;
- Those administering the temperature check should be trained on how to conduct the screening and what they should or should not communicate to employees during the process;
- Personal protective equipment for those administering temperature checks should be provided;

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- All temperature checks should be conducted in a manner that protects the privacy of the individual;
- Process for denying entry of employees with a high temperature and for dealing with refusals should be established;
- Documentation relating to the results and any related medical information should be maintained as confidential medical information and not be kept in personnel files; and
- Only those employees within the company who need the health-related information to combat the threat of COVID-19 in the workplace should have access to the screening results.

## 2. Diagnostic Testing

On April 23, 2020, the EEOC updated existing COVID-19 guidance on medical inquiries and examinations of employees. The EEOC made clear that an employer “may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.” According to the EEOC, current circumstances surrounding the COVID-19 pandemic make testing of all employees job-related and consistent with business necessity. Therefore, testing employees for COVID-19 does not conflict with the Americans with Disabilities Act (“ADA”) during the duration of the pandemic.

While it's clear employers can legally conduct widespread COVID-19 testing of employees before reentering the workplace, a number of practical and legal issues must be considered. The most obvious hurdle for most employers will be obtaining test kits in light of ongoing competition for the limited supply. Even if your organization is able to obtain test kits, the EEOC's guidance requires employers to ensure that the tests they administer are “accurate and reliable.” The EEOC points employers to guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities.

Employers that choose to conduct testing should also address potential privacy and confidentiality issues related to test results, and possible wage and hour considerations for the time spent testing depending on how testing procedure takes place. Employers that enlist a third-party service provider that is covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) may also need employees to execute HIPAA-compliant authorizations in order for the results to be shared. Some have also inquired about the possibility of testing workers for antibodies in hope that a positive result would suggest some level of immunity to COVID-19. Setting aside the issue of whether someone who previously had the virus can actually develop immunity, the EEOC's April 23, 2020 guidance does not address testing employees for the presence of antibodies and employers may face challenges establishing that antibody testing is job-related and consistent with business necessity. If the employer were unable to show that, the testing would be impermissible under the ADA.

Finally, although the ADA generally prohibits employers from sharing results of a medical examination or a health-related inquiry, the EEOC has taken the position that employers can release the names of employees diagnosed with COVID-19 to health authorities. Internally, however, only those employees who need to know the employee's diagnosis in order to prevent the direct threat of COVID-19 in the workplace should be made aware of the results.

## 3. Screening Questionnaires

Questioning employees about exposure and symptoms is another opportunity to screen for the virus. While information provided by employees regarding their symptoms or exposure will not definitively establish whether an employee has contracted COVID-19, they may quickly identify a potential direct threat and help prevent the spread of the virus. Further, they may elicit more information about the likelihood that the employee has the virus than temperature screenings alone do.

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Any questions to employees bearing on the likelihood of COVID-19 infection must tie directly to the threat posed. Accordingly, employees should only be asked about risk factors that show a strong correlation to COVID-19. Otherwise, there is a risk that the questions will be viewed as an impermissible disability-related inquiry under the ADA. The EEOC has indicated that employers can ask whether the employee has symptoms associated with COVID-19 infection, such as fever, cough, shortness of breath, or sudden loss of smell and taste. Employers may also ask if the employee has been diagnosed with COVID-19 or whether the employee has been in close contact for any notable period of time with anyone diagnosed with COVID-19. Employers can also ask whether the employee has been directed to self-isolate by a public health authority or healthcare provider due to their potential exposure to COVID-19. However, in light of the Genetic Information Non-Discrimination Act, employers should generally avoid asking questions regarding whether the employee's family members in the same home have symptoms related to COVID-19.

Employers should also consider implementing a policy requiring employees to inform the employer promptly if they test positive for, or are diagnosed with, COVID-19, or if any of their answers to the COVID-19-related questions is in the affirmative. Employers should have employees complete the screening questionnaires on a regular basis. Employers should also be mindful of potential wage and hour implications of requiring employees to complete questionnaires and whether such time is compensable.

### Face Coverings

The CDC has recommended that everyone wear a cloth face covering that covers the nose and mouth in any place of public accommodation, including retail establishments and grocery stores, and whenever social distancing is not possible. Utah's reopening guidelines for all employers indicate that face coverings should be worn in settings where other social distancing measures are difficult to maintain. The guidelines also require face coverings for employees during the Moderate Risk phase for the following businesses: restaurants, food service establishments, bars, food trucks, convenience stores, retail, hospitality, tourism, lodging, personal services, gyms and fitness centers.

Employers should provide appropriate face coverings to employees for use in their job, especially if the use of face coverings is required in your workplace. Employers should also stand ready to engage in the interactive process to the extent an employee makes a request to wear a face covering for disability-related reasons.

Note, face coverings are not the same thing as surgical masks or N95 respirators. Most N95 respirators are manufactured for use in construction and other industrial type jobs that expose workers to dust and small particles. Some N95 respirators are specifically intended for use in a health care setting. The CDC does not recommend that the general public wear N95 respirators to protect themselves from respiratory diseases. Those are critical supplies and must continue to be reserved for health care workers and other medical first responders.

### Discrimination Issues

According to a recent survey conducted by Littler Mendelson of over 900 employers related to COVID-19, 44 percent were extremely or moderately concerned, and 39 percent were somewhat to slightly concerned about unintentionally discriminating against members of a protected class giving rise to discrimination claims. However, the issue ranked lowest in the list of concerns posed to the respondents and 17 percent indicated they were not concerned at all about discrimination issues. The fact that discrimination issues ranked so lowly on the list of concerns suggests it is something that may require more consideration by all employers as the pandemic evolves.

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In addition to being mindful of potential discrimination issues that could arise based on employee screening programs, the EEOC has also issued guidance reminding employers to engage with employees in the interactive process with respect to pre-existing disability or accommodation needs or those with disabilities that have been exacerbated due to COVID-19. The EEOC has also made clear that an employer may not postpone the start date or withdraw a job offer to an employee because they are age 65 or older or are pregnant, even though both categories face a higher risk from COVID-19. Finally, EEOC Chair Janet Dhillon recently issued a message urging employers to be mindful of instances of harassment, intimidation, or discrimination in the workplace and to take action to prevent or correct this behavior in light of reports of mistreatment and harassment of Asian Americans and other people of Asian descent during the pandemic.

### Conclusion

Employers should carefully consider these and various other issues as they reopen or expand operation of their businesses as the pandemic continues. While various risks exist in this ever-changing environment, with careful planning those risks can be maintained at a comfortable level as we take the first steps toward recovery.

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