
Back to Business: Employee Medical Examinations

Video Transcript

A part of our firm's Back to Business Considerations in the Wake of COVID series, we are going to walk you through some of the legal issues that are related to employer inquiries about employees' medical information. As businesses and other organizations reopen their doors, many employers may want to consider a variety of employee medical examinations to ensure that their employees are not introducing a health risk into the workplace.

When people hear the term "medical examination," many think about a trip to the doctor for a physical exam from head to toe, but that's not what we are talking about here. "Medical examination," in a place of employment in the COVID-19 context, means other things, such as taking an employee's temperature before they enter the workplace, maybe requiring employees to be tested for COVID-19 before they return to work, or possibly asking employees to complete a questionnaire regarding possible COVID-19 symptoms that they may have been experiencing recently. Ordinarily the Americans with Disabilities Act prohibits those types of inquiries into employees' medical information, except in cases where an employee has already displayed physical symptoms or is otherwise giving the employer an objective reason to think that that employee poses a risk of harm in the workplace. But these are not ordinary times that we find ourselves in. And that's partly why the Equal Employment Opportunity Commission (EEOC) recently issued a statement declaring that, since we're in the middle of a governmentally declared pandemic, employers are now permitted to implement mandatory medical examinations regardless of whether their employees are showing physical symptoms. And this new guidance from the EEOC really opens the door for employers to require things like mandatory temperature testing, COVID-19 testing (assuming that test is available), or employees to fill out symptom questionnaires, where they write down whether they have been experiencing any COVID-19 symptoms. It's for that reason we're having discussions with a lot of our clients, especially those that are considering whether to reopen their doors soon, about whether they want to implement one or more of these safety measures and these medical examinations, in an effort to ensure that their workplace is safe. Now the fact that the EEOC has issued that new guidance, under which mandatory medical examinations are now okay for all employees regardless of whether they are showing symptoms, doesn't mean that there aren't still some potential legal landmines out there for employers to be mindful of. Here is a quick list of issues that employers should keep in mind in order to stay out of trouble:

- First, we have discrimination. Employers should ask themselves, are all of the employers/employees subject to mandatory temperature checks, or questionnaires, or other medical exams? If the answer is no, what's that employer's legitimate basis for testing some employees but not others? Employers should strive to apply medical inquiry policies on an equitable basis. Employers that make exceptions for some employees might find themselves facing discrimination claims under the ADA or related state and local laws.
- Second, there's confidentiality. Some employers forget to consider that they have an obligation to maintain the confidentiality of medical information. And that term, "medical information," can cover things like the results of their employee's temperature test, certainly the results of their COVID-19 tests, and the employee's responses to a symptom questionnaire. So, employers should establish a plan now for how they're going to receive and store medical information with respect to their employees. They should also consider which managers are going to be granted access to employee medical information, which typically should be granted only on a need-to-know basis.

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- Finally, employers should consider potential wage and hour issues. An employer might want to ask itself whether its employees are spending considerable amounts of time in the workplace waiting to have their temperature checked or waiting to be tested for COVID-19. If the answer is yes, then hourly employees or other employees who are eligible for overtime wages may need to be paid for their waiting time. Whether the waiting time is compensable will depend upon a variety of factors, of course, but employers should note that most states' wage and hour laws tend to provide broader protections for employees compared to federal wage and hour laws. So employers should consult experienced employment counsel about the rules applicable in the jurisdictions in which they operate, and really, at a minimum, employers should be thinking about ways to minimize the amount of time that employees spend waiting for their medical examinations to be completed.

So those are just a few of the medical examination issues that employers should consider as they reopen their doors. We all look forward to that day when it's safe to really reopen the workplace, but in the meantime, if any employers have questions about how to avoid some of the legal risks discussed here, please do not hesitate to reach out to any member of Venable's Labor Employment team. In addition, our firm has more information, in addition to labor and employment, that's available at Venable's COVID-19 resources page at [Venable.com/COVID-19](https://www.venable.com/COVID-19). Thanks and please stay safe.

Links

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