
Back to Business: HIPAA

Video Transcript

As companies begin to consider returning to full operation in the wake of COVID-19, they will need to adapt to the new realities imposed by the global pandemic. As part of our ongoing series Back to Business: Considerations in the Wake of COVID, we will be exploring issues related to privacy surrounding the screening of employees for COVID-19 as they re-enter the workplace.

We have received numerous questions about whether employers may ask their returning employees questions or, better yet, take temperatures and test returning employees to determine whether they may have COVID-19 and therefore introduce a health and safety risk to the workplace. In another segment in this series, Venable partner Nick Reiter addresses the permissibility of these inquiries under the Americans with Disabilities Act and (spoiler alert), generally, they are permissible during this national emergency.

The follow-up question we quickly hear from our clients is whether the results of these inquiries are subject to HIPAA. First, if the employer is asking the questions or taking the temperature checks, those answers and temperature recordings are not subject to HIPAA. Generally speaking, only healthcare providers that enter into certain electronic billing and payment transactions and health plans are subject to HIPAA; an employer acting in its employer role is not. However, when the COVID-19 tests become more readily available and employers use them to screen employees, it is likely that employers may hire a healthcare provider to administer and interpret those results. In that case, the healthcare provider may be a covered entity subject to HIPAA. If that's the case, in order to release those results to the employer, the healthcare provider may need to obtain written consent, known as an authorization under HIPAA, from the employee to release those results to the employer. While generally an authorization or consent must be voluntary, much like a report regarding fitness for duty, it seems likely that the employer will condition continued employment on receiving that authorization. While the answers to these inquiries regarding COVID-19 symptoms, temperature checks, and COVID test results are not subject to HIPAA in the hands of the employer, they are sensitive and should be kept confidential and secure by the employer under the ADA. A related question we then often hear is, what does an employer need to do if an employee has tested positive for COVID-19? Among other things, the employer should follow the CDC guidance on contact tracing. Individuals who may have been exposed to the employee who tested positive should be informed and told to monitor themselves for symptoms, and in some cases even quarantine themselves. However, there should be little need to disclose the identity of the employee who tested positive to those exposed. An effort should be made to preserve the privacy of the individual who has tested positive.

And then, an employer quickly asks about obligations to report to the local public health department if an employee has tested positive. Recent EOC guidance does permit, but does not require, the employer to notify the local public health department. Before providing that notice, the employer should consult local law and see if it is indeed required to make the notice under local law. If not, the employer should carefully consider whether to make the voluntary disclosure. Likely the healthcare provider who administered the test or the lab that ran the report may already be a mandatory reporter under that local law. Conducting some form of screening for COVID-19, whether in the form of questions, temperature checks, or actual testing, will likely provide some basic assurances to employees returning to the workplace. And while HIPAA may not apply to the results of those inquiries, temperature checks, and COVID test results in the hands of the employer, they are sensitive, and both the ADA and good common sense would require employers to keep them confidential and secure.

Venable is actively monitoring these issues and working with clients to evaluate and respond to other emerging business, legal, and operational challenges arising from the pandemic. Visit our COVID-19 resource center at [Venable.com/COVID-19](https://www.venable.com/COVID-19) to explore our extensive collection of analysis, webinars, and other relevant insights. Thank you and stay safe.

Links

[Venable.com/COVID-19](https://www.venable.com/COVID-19)



Thora A. Johnson

Partner

tajohnson@Venable.com

Baltimore, MD | +1 410.244.7742