

NOVEL CORONAVIRUS (COVID-19)- EMPLOYEE PRIVACY ISSUES

By Jonathan McNeil Wong and Dawn Newton

The business impact of COVID-19 is widespread as many states and counties have implemented “shelter-in-place” orders. However, businesses that provide “essential services” are permitted to continue operations. These employers may want to take certain precautions, including screening their employees for COVID-19 symptoms before they return to work, as will other businesses when they are permitted to reopen. [California Department of Fair Employment and Housing](#) recently issued guidance titled [DFEH Employment Information on COVID-19](#) (the “DFEH Guidelines”) to address this. [The U.S. Equal Employment Opportunity Commission](#) (“EEOC”) has also provided guidelines on this issue. Here are some key takeaways:

During a pandemic such as COVID-19 may an employer take employee’s temperature to determine whether they have a fever?

Yes. Employers may measure employees’ body temperature for the limited purpose of evaluating the risk the employee’s presence may pose to others in the workplace as a result of the COVID-19 pandemic, per current guidelines issued by the Centers for Disease Control and Prevention (“CDC”) and public health agencies. This is a change from the normal rule that measuring an employee’s body temperature is a medical examination that may only be performed under limited circumstances.

If an employee reports feeling ill at work, can an employer ask employees if they are experiencing COVID-19 symptoms, such as

fever, chills, or loss of taste and smell?

Yes. Employers may ask employees if they are experiencing COVID-19 symptoms. Employers must maintain all information about employee illness as a confidential medical record.

What information may an employer reveal if an employee is quarantined, tests positive for COVID-19, or has come in contact with someone who has the virus?

Employers should not identify any such employee by name in the workplace to ensure compliance with privacy laws. If an employee tests positive for or is suspected to have COVID-19, the employer will need to follow the most current local, state, or federal public health recommendations. Employers should take further steps at the direction of the local public health department that may include closing the worksite, deep cleaning, and permitting or requiring telework.

Employers may notify affected employees in a way that does not reveal the personal health-related information of an employee. For example, the employer could speak with employees or send an email or other written communication stating: “[Employer] has learned that an employee at [office location] tested positive for the COVID-19 virus. The employee received positive results of this test on [date]. This email is to notify you that you have potentially been exposed to COVID-19 and you should contact your local public health department for guidance and any possible actions to take based on individual circumstances.”

Employers may not confirm the health status of employees or communicate about employees' health.

When an employee returns to work, can the employer require a doctor's note certifying their fitness for duty?

Yes. According to the EEOC, such inquiries are not prohibited by the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an email to certify that an individual does not have the pandemic virus.

During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic. The employer must furnish the equipment at no cost to the employee. In addition, where an employee with a disability needs a related reasonable accommodation (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should ordinarily provide these unless doing so would constitute an undue hardship. Undue hardship is a high standard, and employers should not rely on undue hardship without first consulting with legal counsel.

Do employers need to give a notice about the personal information that they collect from employees?

It depends. In the U.S., unless an employer is a "covered business" under the California Consumer Privacy Act ("CCPA"), employers are not required to give notice to employees about the personal information that they collect from

the employees. If an employer is a covered business, then the employer is required to provide a written notice to the employees about the personal information collected from them at or just before the time of collection.

Are there any laws governing security breaches of employee information?

Yes. Employers that maintain personally identifiable information and health information about their employees in computerized form are covered by most security breach notification laws. Most states have such a law. Further, if an employer is a covered business under CCPA, breach of such employee information may entitle employees to statutory damages ranging from \$100-\$750.

If you need help in instituting best practices with respect to employee privacy, have questions, or need any other assistance, please do not hesitate to reach out to us. Donahue Fitzgerald's [employment](#) and [privacy](#) attorneys are committed to providing your business with our best guidance and advice during these changing times.



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