

PAYNE & FEARS

**TEMPERATURE TESTING DURING COVID-19
GUIDANCE FOR BUSINESSES**

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As workplaces have begun to reopen, employers are curious about whether they can conduct temperature screenings of their employees. This guidance will explain if, when, and how employers may conduct temperature screenings of their employees.

I. May/Must Employers Test Employees' Temperatures?

A. EEOC Guidance Allows Employers to Conduct Temperature Tests for COVID-19

Ordinarily, temperature tests of employees constitute a medical examination and are not allowed. However, under EEOC policy, “if pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.”¹

Since the “CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees’ body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.”

B. California Industry-Specific Guidance

California guidance states that “[b]efore reopening, all facilities **must**: ... 2. Train employees on how to limit the spread of COVID-19, including how [to screen themselves for symptoms](#) and stay home if they have them [and] 3. Implement individual control measures and screenings ...”

California has also set forth industry-specific guidance for businesses amidst reopening. This constantly updated guidance includes information regarding temperature testing employees and, when applicable, non-employees. Below is the current information available for required temperature-testing measures in specific industries.²

- **Agriculture and Livestock:** (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”

¹ <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

² <https://covid19.ca.gov/industry-guidance/>

- **Auto Dealerships**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”
- **Childcare**: Based on guidance from the Department of Social Services.³ Childcare facilities must exclude “anyone [with] a temperature of 100.4°F/38°C or higher.” It is recommended that child care facilities (1) “Follow procedures daily for self-screening for all staff, residing family members in a FCCH, and children. This should include taking temperatures before arriving to work or beginning care,” and (2) “tak[ing] children’s temperature each morning only if the facility uses a no-touch thermometer. The no-touch thermometer needs to be wiped with an alcohol wipe after each use.”
- **Communications infrastructure**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”; (4) “Non-employees entering the facility should be restricted to only those classified as essential by management and they must complete a temperature and/or symptom screening before entering. Contractors, vendors, and all others entering the facility are required to wear face coverings”; (5) “For field workers operating in a restricted area or containment zone, organizations should consider: ... Instituting triple wellness checks with mandatory temperature readings at arrival, at mid-shift, and when going off-duty, with a health survey”; and (6) “Contractors or vendors should be screened with a health questionnaire and temperature check before being allowed onsite for deliveries, repairs, etc., and access should be limited to critical activities only.”
- **Construction**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is

³https://www.cdss.ca.gov/Portals/9/CCLD/PINs/2020/CCP/PIN_20-06-CCP.pdf

an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”; and (4) “Non-employees entering the facility should be restricted to only those classified as essential by management and they must complete a temperature and/or symptom screening before entering. Contractors, vendors, and all others entering the facility are required to wear face coverings.”

- **Delivery Services**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “For those delivery workers who first report at a facility prior to starting a shift, provide temperature and/or symptom screenings for all workers at the beginning of their shift. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “For delivery workers who do not report to a physical location prior to starting their shift or if requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows [CDC guidelines](#) ... ”
- **Energy and Utilities**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Nonemployees entering the facility should be restricted to only those classified as essential by management and they must complete a temperature and/or symptom screening before entering. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines, as described in the Topics for Employee Training section above”; (4) “For field workers operating in a restricted area or containment zone, organizations should consider: ... Instituting triple wellness checks with mandatory temperature readings at arrival, at mid-shift, and when going off-duty, with a health survey”; and (5) “Contractors/vendors should be screened with a health questionnaire and/or temperature check and have face coverings on before being allowed onsite for deliveries, repairs, etc. Access should be limited to critical activities only.”
- **Food Packing**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”; and (4) “Non-employees entering the facility should be restricted to only those classified as essential by management and should complete a temperature and/or

symptom screening before entering. Contractors, drivers, and all U.S. Department of Agriculture (USDA) or U.S. Food and Drug Administration (FDA) inspectors, and other regulatory officials entering the plant should wear face coverings.”

- **Hotels and Lodging:** (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”
- **Life Sciences:** (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Nonemployees entering the facility should be restricted to only those classified as essential by management and they must complete a temperature and/or symptom screening before entering. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”; and (4) “In areas where physical distancing is difficult to maintain, employees should have increased symptom screenings including temperature, visual, and verbal checks.”
- **Limited Services (Laundromats, Dry Cleaners, Car Washes, Landscapers, Pet Grooming, etc.):** (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”
- **Logistics and Warehousing Facilities:** (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the

establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”;

- **Manufacturing**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”; and (4) “Non-employees entering the facility should be restricted to only those classified as essential by management and they must complete a temperature and/or symptom screening before entering. Contractors, vendors, and all others entering the facility are strongly recommended to wear face coverings.”
- **Mining and Logging**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; and (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening.”
- **Outdoor Museums (Inclusive of Botanical Gardens)**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”
- **Office Workspaces**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”
- **Ports**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel

entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”; and (4) “Non-employees entering the port facility should be restricted to only those classified as essential by management and they must complete a temperature and/or symptom screening before entering. Contractors, drivers, and all others entering the plant should wear face coverings.”

- **Public Transit and Intercity Passenger Rail**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”; and (4) “Non-employees entering the facility should be restricted to only those classified as essential by management and they must complete a temperature and/or symptom screening before entering. Contractors, vendors, and all others entering the transit facility are required to wear face coverings.”
- **Real Estate Transaction**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”
- **Retail**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; and (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”

California has also set forth similar industry-specific guidance for sectors that are **not yet permitted** to open statewide but may be open in certain counties that have received state approval.⁴

⁴ <https://covid19.ca.gov/roadmap-counties/>

- **Dine-in Restaurants**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”
- **Shopping Centers**: (1) Train employees to conduct “[s]elf-screening at home, including temperature and/or symptom checks using [CDC guidelines](#)”; (2) “Provide temperature and/or symptom screenings for all workers at the beginning of their shift and any personnel entering the facility. Make sure the temperature/symptom screener avoids close contact with workers to the extent possible. Both screeners and employees should wear face coverings for the screening”; (3) “If requiring self-screening at home, which is an appropriate alternative to providing it at the establishment, ensure that screening was performed prior to the worker leaving the home for their shift and follows CDC guidelines ...”

C. San Diego Executive Order

San Diego’s Public Health Order,⁵ last updated on May 9, 2020, states that “each essential business and reopened business shall: ... conduct temperature screening of all employees prohibiting employees with a temperature of 100 degrees or more from entering the workplace. Symptom screening (prohibiting employees from entering if they have a cough, shortness of breath or trouble breathing or at least two of the following: fever, chills, repeated shaking with chills, muscle pain, headache, sore throat or new loss of taste or smell) may be used only when a thermometer is not available.”

D. CDC’s Recommendation for Santa Clara County

“Due to widespread transmission in Santa, Clara, [sic] CA, CDC recommends expanded and laser focused community mitigation activities to help slow the spread of respiratory virus infections including the novel coronavirus SARS-C0V-2, the cause of the disease COVID-19.” One of the approaches in the released guidance includes employers conducting “[r]egular health checks on arrival each day (e.g., temperature and respiratory symptom screening) of staff and visitors entering buildings.”⁶

⁴ <https://covid19.ca.gov/roadmap-counties/>

⁵ <https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/HealthOfficerOrderCOVID19.pdf>

⁶ https://www.cdc.gov/coronavirus/2019-ncov/downloads/Santa-Clara_Community_Mitigation.pdf

II. Notice Requirements

A. Notice to Employees Being Tested

Employers are subject to the California Consumer Privacy Act (“CCPA”) if the business (1) is for-profit; (2) collects consumers’ personal information, or on the behalf of which such information is collected; (3) determines the purposes and means of the processing of consumers’ personal information; (4) does business in California (e.g., has one or more locations, employees, customers, suppliers, etc., in California); and (5) meets any of the following thresholds: (i) has annual gross revenue in excess of \$25 million; (ii) alone or in combination, annually buys, receives for the business’s commercial purposes, sells or shares for commercial purposes the personal information of 50,000 or more consumers, households, or devices; or (iii) derives 50% or more of its annual revenues from selling consumers’ personal information.⁷

The CCPA, which became effective on January 1, 2020, requires that employers provide a “prominent and robust” notice to consumers at or before data collection. In addition, the business “shall not sell personal information” without giving the employee the “opportunity to exercise the right to opt-out.”⁸

Such notice requirements should be taken seriously, as class actions have already been filed under the new law. For example, on March 31, 2020, a class action suit was filed in the Northern District of California when various news outlets revealed how Zoom’s customers’ personal information was shared with third parties, including Facebook.⁹

B. Notice to Workforce When an Employee is Sent Home

The Department of Fair Employment and Housing released guidance on March 20, 2020 regarding what information an employer may reveal if an employee is quarantined, tests positive for COVID-19, or has come in contact with someone who has the virus. This guidance is applicable to employers who provide notice to their workforce when an employees is sent home having COVID-19 symptoms (e.g., a fever). For more information, please see section V.B. Privacy Concerns of this guidance.

The guidance states, “[e]mployers should not identify any such employee by name in the workplace to ensure compliance with privacy laws.”¹¹ In addition, the guidance suggests,

⁷ https://oag.ca.gov/system/files/attachments/press_releases/CCPA%20Fact%20Sheet%20%2800000002%29.pdf
http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?law Code=CIV&division=3.&title=1.81.5.&part=4.&chapter=&article=

⁸ http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?law Code=CIV&division=3.&title=1.81.5.&part=4.&chapter=&article=

⁹ <https://www.classaction.org/media/johnston-v-zoom-video-communications-inc.pdf>

¹⁰ https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf

¹¹ *Infra*, V.B. Privacy Concerns; *Id.*

“[e]mployers 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 the employees or send an email or other written communication stating: “[Employer] has learned that an employee at [office location] tested positive for 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.”

III. How Should Employees’ Temperatures Be Tested?

Per CDC guidance, a temperature of at least 100.4 degrees Fahrenheit is a good indicator that a person was infected with COVID-19.¹² However, it seems that for reasons of simplicity, some localities have implemented a plan where employers with a temperature of “100” degrees or over may not enter a workplace. For example, the city of San Diego’s Public Health Order “prohibit[s] employees with a temperature of 100 degrees or more from entering the workplace.”¹³ In addition, certain employers have also adopted such a standard. For example, Walmart has implemented a 6-20-100 plan: Employees should stay six feet apart, wash hands for 20 seconds, and not enter the workplace if they have a temperature of 100 or more degrees.¹⁴

A. Before an Employee’s Temperature is Tested

Per CDC guidance, it is ideal for a person to wait 30 minutes after eating, drinking, or exercising before they have their temperature tested. It is also ideal for a person to wait at least six hours after taking medications that can lower temperature, like acetaminophen, ibuprofen, or aspirin before they have their temperature tested.¹⁵

B. Employees Test Themselves

According to CDC guidance, employers may ask employees to take their own temperature either before coming to the workplace or upon arrival at the workplace.¹⁶ For example, Home Depot has distributed thermometers to all of its store and distribution center employees, asking them to check if they have a fever at home.¹⁷

¹² See, https://www.cdc.gov/coronavirus/2019-ncov/downloads/COVID-19_CAREKit_ENG.pdf;
https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fif-you-are-sick%2Faring-for-yourself-at-home.html

¹³ <https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/HealthOfficerOrderCOVID19.pdf>

¹⁴ <https://corporate.walmart.com/newsroom/2020/03/31/additional-steps-while-taking-for-the-health-and-safety-of-our-associates>

¹⁵ https://www.cdc.gov/coronavirus/2019-ncov/downloads/COVID-19_CAREKit_ENG.pdf

¹⁶ <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>

¹⁷ <https://www.cnbc.com/2020/04/01/coronavirus-home-depot-asks-employees-to-take-their-temperatures.html>

If an employee takes their own temperature before arriving to work, according to CDC guidance, upon the employee's arrival to work, there should still be a person conducting a COVID-19 symptom check. The assigned screening staff member(s) should stand at least six feet away from the employee and (1) ask the employee to confirm that their temperature is less than 100.4o F (38.0o C) and that they are not experiencing coughing or shortness of breath, and (2) make a visual inspection of the employee for signs of illness, which could include flushed cheeks or fatigue.¹⁸

C. On-Site Temperature Testing Using a Thermometer

According to CDC guidance, there are two ways an employer may safely take an employee's temperature: (1) Reliance on Barrier/Partition Controls and (2) Reliance on PPE.¹⁹

1. Reliance on Barrier/Partition Controls

“During screening, the screener stands behind a physical barrier, such as a glass or plastic window or partition, that can protect the screener's face and mucous membranes from respiratory droplets that may be produced when the employee sneezes, coughs, or talks. Upon arrival, the screener should wash hands with soap and water for at least 20 seconds or, if soap and water are not available, use hand sanitizer with at least 60% alcohol. Then:

- Make a visual inspection of the employee for signs of illness, which could include flushed cheeks or fatigue.
- Conduct temperature and symptom screening using this protocol:
 - Put on disposable gloves.
 - Check the employee's temperature, reaching around the partition or through the window. Make sure the screener's face stays behind the barrier at all times during the screening.
 - If performing a temperature check on multiple individuals, make sure that you use a clean pair of gloves for each employee and that the thermometer has been thoroughly cleaned in between each check. If disposable or non-contact thermometers are used and you did not have physical contact with an individual, you do not need to change gloves before the next check. If non-contact thermometers are used, clean and disinfect them according to manufacturer's instructions and facility policies.
- Remove and discard PPE (gloves), and wash hands with soap and water for at least 20 seconds. If soap and water are not available, use hand sanitizer with at least 60% alcohol.”²⁰

¹⁸ <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>

¹⁹ Id.

²⁰ Id.

2. Reliance on Personal Protective Equipment

“If social distance or barrier controls cannot be implemented during screening, PPE can be used when the screener is within 6 feet of an employee during screening. However, reliance on PPE alone is a less effective control and more difficult to implement given PPE shortages and training requirements.

Upon arrival, the screener should wash their hands with soap and water for at least 20 seconds or use hand sanitizer with at least 60% alcohol, put on a facemask, eye protection (goggles or disposable face shield that fully covers the front and sides of the face), and a single pair of disposable gloves. A gown could be considered if extensive contact with an employee is anticipated. Then:

- Make a visual inspection of the employee for signs of illness, which could include flushed cheeks or fatigue, and confirm that the employee is not experiencing coughing or shortness of breath.
- Take the employee’s temperature.
 - If performing a temperature check on multiple individuals, make sure that you use a clean pair of gloves for each employee and that the thermometer has been thoroughly cleaned in between each check. If disposable or non-contact thermometers are used and you did not have physical contact with an individual, you do not need to change gloves before the next check. If non-contact thermometers are used, you should clean and disinfect them according to manufacturer’s instructions and facility policies.
- After each screening, remove and discard PPE and wash hands with soap and water for at least 20 seconds or use hand sanitizer with at least 60% alcohol.”²¹

D. Employers Should Not Solely Use Telethermographic Systems or Thermal Camera Scanners

In response to the Ebola outbreak, in 2009, CDC released guidance regarding non-contact temperature measurement devices at ports of entry. The guidance stated that “thermal scanner camera devices” and “telethermographic system[s]” (i.e., thermal scanners) should be used in addition to, and not in lieu of thermometers.²² In addition, in April 2020, the Food and Drug Administration released guidance regarding telethermographic system (“thermal scanners”) explaining that it is “intended for *adjunctive* diagnostic screening during the COVID-19 pandemic.”²³

²¹ *Id.*

²²“Non-Contact Temperature Measurement Devices: Considerations for Use in Port of Entry Screening Activities.” *Centers for Disease Control and Prevention*, 2014.

²³ <https://www.fda.gov/media/137079/download>; “Currently regulated telethermographic systems are identified under product code LHQ, and are class I devices subject to premarket notification requirements under section 510(k) of the FD&C Act (21 U.S.C. 360(k)).”

IV. Employer Practical and Legal Considerations

A. What Kind of Thermometer Should an Employer Use?

Thermometers can be broken down into two groups: contact thermometers and non-contact thermometers.

The ideal type of thermometer to use for testing COVID-19 is a non-contact infrared thermometer. Non-contact infrared thermometers work by holding the thermometer between 1.2 and six inches away from the body—most often pointing at the middle of an individual's forehead. Non-contact infrared thermometers are preferable to contact thermometers because they are “as accurate as contact thermometers,” “low cost,” “easier to use than contact thermometers,” and require “resetting” less often.²⁴ Please remember that a no-touch thermometer should be wiped down with an alcohol wipe after every use.²⁵

Contact thermometers are more often used when an employee is conducting self-temperature checks at home.²⁶

B. Where Will the Screening Take Place?

CDC guidance recommends that screenings “of employees take place before they enter the facility.”²⁷ One way employers have already implemented this process is through “drive-thru” screening. For example, Kroger (parent company of numerous grocery chains, including Fred Meyer and Ralphs) has created a system with 30 drive-thru testing locations across Colorado, Indiana, Kentucky, Michigan, Ohio, and Tennessee, where employees, who meet CDC criteria, are tested free at these sites.²⁸ Employers who wish to create their own drive-thru testing site should ensure that appropriate traffic controls are put into place (e.g., exits are not blocked by cars).

If it is not possible to test employees before they enter the facility, then screening should occur close to the entrance. If screening is occurring in person, extra precautions should be taken to avoid crowding. Such precautions may include, staggering testing times or by marking the floor (e.g., painter's tape) in six-foot distances.

Either way, “[t]o prevent stigma and discrimination in the workplace [and protect privacy rights], [employers should] make employee health screenings as private as possible.”²⁹ One way to accomplish this goal is to avoid screening all employees at the same time and in the same place.

C. Who Will Conduct the Screening? What PPE Should They Use?

Employers may have third-party contractors with healthcare backgrounds or employees conduct the temperature testing. If an employer chooses to have employees conduct the testing, then the employer should appoint a person with proper training—ideally an on-site medical staff person or other medical professional (e.g., R.N., P.A.). If it is not possible to appoint a person with medical training, employers should appoint a human resources personnel staff member to conduct the testing rather than the employees' supervisor.

²⁴ (21 CFR 880.2910)

²⁵ https://www.cdss.ca.gov/Portals/9/CCLD/PINs/2020/CCP/PIN_20-06-CCP.pdf

²⁶ https://www.cdc.gov/coronavirus/2019-ncov/downloads/COVID-19_CAREKit_ENG.pdf

²⁷ <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

²⁸ <https://www.cnbc.com/2020/05/04/kroger-starts-offering-free-coronavirus-testing-to-its-employees.html>

²⁹ <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

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The person appointed to conduct the screenings should be provided with specific training on how to administer the tests, use PPE, and uphold strict confidentiality standards as explained in this guidance under V.B. Privacy Concerns.

OSHA has stated that those providing “medical exams” should wear “National Institute for Occupational Safety and Health (NIOSH)-approved, N95 filtering facepiece respirators or better.”³⁰

D. What if Employees Refuse Testing?

There are three common scenarios in which an employee would refuse to be tested: (1) A single employee may refuse to be tested without providing a reason. In such a scenario, the employer may bar the employee from physically entering the workplace—though the EEOC advises employers to ask employees why they're refusing to answer. (2) A group of employees collectively refuse to be tested. These employees may be engaging in protected concerted activity under the National Labor Relations Act. Employers with union-represented workforces should be prepared to address these issues with their employees' collective bargaining representatives. (3) A single employee refuses to be tested based on religious grounds. In such situations, if possible, employers should provide a reasonable accommodation that would only be a de minimis burden. For example, instead of conducting a temperature check, ask the employee about their symptoms. If not possible, (e.g., a public-facing employee refuses to wear a face covering) the employee may be excluded from work as COVID-19 presents a direct threat to workplace safety.³¹

E. An Employee Has a Temperature Indicating a Fever. Now What?

Employers may want to administer a second test. If an employee definitely has a fever, then the employee should be removed from the workforce quickly and privately.

Notice should be provided to the workforce as explained in this guidance under II.B. Notice to Workforce When an Employee is Sent Home and V.B. Privacy Concerns.

The incident should be documented as explained in this guidance under IV. G. Documentation.

The employee's privacy rights should be protected as explained in this guidance under V. B. Privacy Concerns.

³⁰ <https://www.osha.gov/Publications/OSHA3990.pdf>

³¹ <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar>

When an employee arrives to work, is tested with a fever, and is sent home, whether or not that employee is paid for the day depends on the employee's status. Exempt employees would be paid for the day unless they use bona fide sick or vacation leave. There is currently no guidance on whether non-exempt employees must be paid for the day; however, sending an employee home after they have arrived to work may implicate "reporting time pay" regulations under the Industrial Wage Commission.³² For this reason, it is recommended that employers provide employees who are sent home due to a fever (or other COVID-19-related symptoms) with pay.

An employee should be "[e]xclude[d] from work until: At least three days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and at least 10 days have passed since symptoms first appeared."³³

F. Can I Test Job Applicants? What If They Have a Fever?

"Any medical exams are permitted after an employer has made a conditional offer of employment." If the job applicant has a fever, an employer may delay the start date as an "individual who has COVID-19 or symptoms associated with it should not be in the workplace." An employer may even withdraw a job offer from a symptomatic applicant if they needed the applicant to start immediately.³⁴

G. Documentation

Documentation concerning COVID-19 testing should be retained as confidential medical records according to the ADA's requirements as defined in 29 CFR § 1630.14.³⁵

There is no hard rule on what documentation needs to be collected at the time of screening. It seems that policy is leaning toward only documenting the temperatures of the employees who were sent home due to COVID-19 screening. Documentation may include: (1) the employee's name and position, (2) manager or supervisor's name, (3) name and position of person who conducted the testing, (4) the date and time of the screening, (5) the result of the temperature screening, (6) any additional reason the employee was sent home (e.g., shortness of breath), and (7) the employee's best contact information.

³² *Herrera v. Zumiez, Inc.*, No. 18-15135, 2020 WL 1301057 (9th Cir. Mar. 19, 2020).

³³ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html>

³⁴ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

³⁵ <https://www.law.cornell.edu/cfr/text/29/1630.14>;

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

V. Other Considerations

A. Compensability

In California, time spent waiting in line and receiving the testing would be compensable time. Thus, employers must pay employees for time spent waiting for and being tested. If it is impossible to determine how long an employee will spend waiting for and receiving a temperature check, employers may pay employees based on an average amount of time and have a process where employees can notify a supervisor/manager if the actual time exceeded the average amount of time. Alternatively, employers may have employees clock in prior to the screening.

On a federal level, according to 29 C.F.R. §785.43, “[t]ime spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.” Temperature screening, however, has not yet been defined as “medical attention.”

B. Privacy Concerns

The Health Insurance Portability and Accountability Act (HIPPA) will probably not apply to temperature testing for two reasons. First, HIPPA applies only to covered entities (i.e., health plans, health care clearinghouses, and health care providers). Second, this information is received in the employer capacity, comparable to an employee providing a doctor's note. Any information that an employer received through a group health plan is covered by HIPPA and should not be disclosed without consent other than for treatment, payment, or operational purposes. An employer should not review its group health plan records to determine which employees may have been tested for COVID-19.

As stated above, however, documentation concerning COVID-19 testing should be retained as confidential medical records according to the ADA's requirements as defined in 29 CFR § 1630.14.³⁶ “The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this [confidential information](#). An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.”³⁷

In addition, if an employee exhibits COVID-19 symptoms or is diagnosed with COVID-19, their name cannot be released to the workforce. If employers wish to provide notice to the workforce of a COVID-19 positive case, then they must speak broadly as to not reveal the identity of the employee (e.g., there was a COVID-19 positive case on the 5th floor of this building). As discussed in this guidance under II.B. Notice to Workforce When an Employee is Sent Home.

³⁶ <https://www.law.cornell.edu/cfr/text/29/1630.14>;
<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

³⁷ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Lastly, staff member(s) designated to perform COVID-19 temperature or symptom checks or any other position involving medical information, should be specifically trained about confidentiality and privacy issues.

C. Discrimination

To prevent claims of discrimination, employers should adopt a uniform testing method based on objective data.²⁸

Employers should also be aware that in addition to DFEH and Title VII claims, employees are likely to bring claims under the Genetic Information Nondiscrimination Act. Under the Genetic Information Nondiscrimination Act, Employers are prohibited from asking employees questions about their genetic information and asking employees questions about their family's genetic information or medical history. Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future.³⁹

VI. Conclusion

As businesses begin to reopen, temperature testing will only become more prevalent. Not only is temperature testing allowed, in certain jurisdictions, it is required. As employers begin to implement temperature testing in their workspace, they should ensure that the tests are conducted in a uniform and objective manner.

Employers should also remember that temperature testing is only one way to prevent a COVID-19 outbreak in their workforce, and they should remain vigilant in abiding by all federal, state, and local health protocols.

³⁸ <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

³⁹ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>



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