

Employer Record-keeping Obligations during the COVID-19 Pandemic

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On May 31, 2020, New York State approved the statewide opening of dental offices for regular dental care starting on June 1, 2020. New York State subsequently issued [Interim Guidance for Dentistry during the COVID-19 Public Health Emergency](#) (“Interim Guidance”) to provide dental offices across the state with precautions to help protect against the spread of COVID-19 as dentistry facilities re-open. This Interim Guidance states that all employers must develop and implement mandatory health screening protocols to prevent employees from spreading COVID-19 in the workplace.

As Western New York eagerly progresses through the reopening process, practices across the region are implementing compulsory screening procedures to monitor and prevent the spread of COVID-19 among employees in the workplace. Now more than ever, careful and informed record keeping of employee information is critical to demonstrate ongoing compliance with all relevant laws and to mitigate potential liability during the COVID-19 pandemic.

New York State Interim Guidance Record of Employer’s Review of Employee’s Daily Screening

Pursuant to the Interim Guidance, all practices must – at minimum – screen employees before the start of work each day to determine whether the employee has had (1) COVID-19 symptoms in past 14 days, (2) a positive COVID-19 test in past 14 days, and/or (3) close contact with a confirmed or suspected COVID-19 case in past 14 days. In addition to the screening questionnaire, the Interim Guidance authorizes dental practices to administer daily temperature checks for employees. Employers must then review all responses collected by the screening process on a daily basis and maintain a record that the review was completed. Notably, the Interim Guidance prohibits employers from keeping records of employee health data (e.g. temperature data); this prohibition relates solely to the record, and not the documentation of the review itself, as required by the interim guidance. As detailed below, documentation of each employee’s daily screen must be maintained pursuant to U.S. Equal Employment Opportunity Commission (“EEOC”) guidelines.

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Each practice must designate a central point of contact responsible for receiving and attesting to having reviewed all screening questionnaires. To comply with Interim Guidelines, your practice must document that you have reviewed daily results of temperature screens and the questionnaires completed by your employees. We recommend recording only the names of employees who did not pass the screening, and the reasons why the employee did not pass. For those employees sent home, employers should be sure to document: (1) the employee's name (2) the date and time of screening, (3) the employee's contact information, and (4) reason for sending the employee home (e.g., "temperature over 100.4," "contact with suspected COVID-19 case", etc.). If no employees were sent home, you can simply document that all employees were screened and no one was sent home for COVID-19 related reasons. Note that this documentation should be kept in a separate, confidential location accessible only to those who are required to implement risk protocols.

EEOC Guidelines – Records of Employee Screenings

Before the pandemic, an employer would generally not be authorized to take employees' temperatures on a daily basis, nor allowed to request information about an employee's physical symptoms. Under the Americans with Disabilities Act ("ADA"), a temperature check is a "medical examination" and symptom screening would be a "disability-related inquiry." However, the Equal Employment Opportunity Commission ("EEOC") has issued [detailed guidance](#) stating that, based on the current COVID-19 pandemic as assessed by the U.S. Centers for Disease Control & Prevention ("CDC") and other public health authorities, an employer may measure an employee's body temperature as a screening method during the pandemic and request information about the employee's symptoms. The EEOC opined in its [updated guidance](#) on April 23, 2020 that employers can administer COVID-19 tests to identify the presence of the virus during the pandemic.

The EEOC advises that all information regarding the medical condition or history of an employee during the course of COVID-19 screenings must be collected and maintained on separate forms, in separate medical files, and be treated as a confidential medical record. It is critical that employers only document information that is directly relevant to the employee's risk of spreading COVID-19. In recording daily temperature

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checks, employers should avoid documenting exactly what an employee's temperature was at a specific date and time. Rather, practices should simply record "no" (meaning the employee's temperature is under the appropriate threshold) or "yes" (meaning the employee has a fever at 100.4 degrees or above). The employee's exact temperature at a specific date or time is not important to document, but you should document whether the employee has a fever, which is a symptom of COVID-19. Conducting screenings in this manner will ensure that an employer does not inadvertently maintain an employee medical database. As noted above, the Interim Guidance requires employers to review all responses collected by the screening process on a daily basis and maintain a record of such review; at the same time, New York State prohibits employers from retaining employee's temperatures.

Under the ADA, employers must store medical information about employees separately from the employees' personnel files. Such medical information must remain confidential with the following exceptions: (1) supervisor[s] and managers may be told about necessary restrictions on work duties and about necessary accommodations; (2) first aid and safety personnel may be told if a disability might require emergency treatment; (3) government officials may access the information when investigating compliance with the ADA; (4) employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws; and (5) employers may use the information for insurance purposes. 29 C.F.R. §§ 1630.14(b)(1)(i)–(iii), (c)(1)(i)–(iii); 29 C.F.R. pt. 1630 app. § 1630.14(b).

Additional Reasons to Maintain Screening Documentation

Maintaining accurate documentation of employee COVID-19 screening tests will prevent potential liability under anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967 ("ADEA"), and Title I of the Americans with Disabilities Act of 1990 ("ADA"). Uniform application of policies for screening and taking temperatures of employees avoids disparate treatment based on an employee's protected class (e.g., race, age, gender, national origin, etc.). Documentation that screening was provided to all employees without disparate treatment will prevent claims that screening decisions are not made uniformly.

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Similarly, documentation of thorough COVID-19 screening can be useful to defend the practice should you receive a complaint from the Occupational Safety and Health Administration ("OSHA"). OSHA requires employers to "provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm." However, OSHA [stated](#) that if "an employer has made attempts to comply in good faith, Area Offices shall take such efforts into strong consideration in determining whether to cite a violation." OSHA will be less likely to cite you for any potential violations if your office is able to provide accurate documentation of employee COVID-19 screening and tests.

Practices should also maintain screening documentation for employees who require leave under the Families First Coronavirus Relief Act ("FFCRA") in order to claim a tax credit for reimbursement of any paid leave provided to employees. The U.S. Department of Labor [published guidance](#) clarifying that an employee may be eligible for FFCRA leave if the employee is sent home to self-quarantine while waiting for the results of a COVID-19 test. Maintaining concise records will produce documentation sufficient to claim a tax credit.

Please contact Matthew Feldman at mfeldman@feldmankieffer.com with any employment law questions throughout the pandemic.

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