
AS THE ECONOMY STARTS TO REOPEN, EMPLOYERS HAVE OPTIONS TO MAINTAIN A SAFE WORKPLACE WITH MEDICAL EXAMS

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As states start to lift “stay at home” orders, employers need to understand how to avoid litigation claims when bringing the workforce back to a safe environment. Employers will need to understand the dos and don’ts under the [Americans with Disability Act \(ADA\)](#), when it comes to performing medical exams for new hires or existing employees.

As businesses move forward to reopen, we have received many questions regarding whether an employer can perform medical exams on its employees prior to allowing the employee to enter the workplace. One important aspect that makes this question different today compared to the same question asked six months ago is that we are currently in a pandemic. As a result, a contagion becomes more of a priority, which provides more leeway for employers to perform medical exams on employees.

Medical exams are procedures or tests for an employer to learn an employee’s physical or mental impairment or simply their overall health. And because we are in a pandemic, employers performing medical tests on their employees are “job related and consistent with business necessity” under the ADA. More importantly, employers performing medical exams on their employees during a pandemic will ensure that employees are not infecting other employees in the workplace. At the same time, the employer will want to ensure that the testing is reliable, including setting up additional procedures to identify any probability of false negatives. The employer should also follow the [Food and Drug Administration guidelines](#) on testing. These measures will assist employers in returning employees to a safe environment to continue their operations.

I. APPLICANTS AND NEW HIRES

When hiring during a pandemic, an employer can certainly test an applicant for symptoms; however, the test should only be conducted after a conditional offer has been made to the applicant. If during a medical exam, the applicant has symptoms related to COVID-19, the employer has a few options. If the employer needs the individual to start work immediately and cannot postpone the hiring in accordance with the [CDC recommended guidelines](#), the employer can then simply withdraw the job offer. The reason the employer is allowed to withdraw the job offer is because the ADA cannot interfere with the CDC guidance, which provides that individuals with COVID-19 symptoms cannot safely enter a workplace. If the employer can accommodate the waiting period, the employer can simply delay the start date until after the applicant’s symptoms are gone. Once the applicant returns, the employer can perform the medical exam for COVID-19, and if negative permit the new hire to enter the workplace.

II. EXISTING EMPLOYEES

As employers start to return employees to the workplace, they will want to create and implement temporary employment policies. These temporary policies should include

performing medical exams on employees who are returning to the workplace. In addition, an employer's policy should include language stating that all employees are subject to medical exams while in the workplace during a pandemic.

Although testing employees' temperature before they enter the workplace has been very popular, a high temperature is only one of many symptoms of COVID-19. Therefore, employers will want to create a checklist that contains all of the [COVID-19 symptoms](#) to make sure that its employees are not experiencing any of the symptoms prior to entering the workplace. Further, even though COVID-19 symptoms can also be associated with numerous other illnesses, an employer should instruct any employee who is experiencing any of the COVID-19 symptoms to get tested for COVID-19 prior to returning to work. An employer will also want to be very flexible on what documentation an employee must bring back when returning to work. With doctors and healthcare workers being too busy to supply documentation for an employee, an employer should accept alternative verifications for the employee's fitness for duty prior to returning to work.

III. CONFIDENTIALITY

Employers must also understand that when conducting medical exams on applicants or employees the results of those medical exams must be kept confidential. And as always, any medical records being collected based on the medical exams must be kept in a separate medical file. In addition, if an employer maintains a chart to track the employees' medical exam results must also be kept confidential. If an employee does test positive in the workplace, the employer will need to inform other employees in the workplace who may have been exposed to COVID-19, while continuing to maintain the confidentiality of the employees name.

As the United States continues to slowly open back up after COVID-19, employers will want to be vigilant on performing medical exams on employees. Employers will also want to continue to allow flexibility to employees during this time and set up safe guards to make sure employees feel safe as they return to work.

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