

Temperature Screenings: Review State Laws

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Employers considering temperature checks for their employees should start with a look at state law, whose requirements (<https://www.littler.com/publication-press/publication/wont-hurt-bit-employee-temperature-and-health-screenings-list>) vary greatly, from the appropriate threshold that employees' temperatures should not exceed to the industries where screening is mandated. Some employers voluntarily conduct temperature screenings without a state mandate, which continues to raise a host of issues (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-coronavirus-temperature.aspx)—including privacy and record-keeping requirements and questions about who should be screened and whether to screen onsite or allow self-screening at home.

Differences Among States

Check state and local laws, regulations, and executive orders, as well as guidance on temperature screenings from the U.S. Centers for Disease Control and Prevention (CDC), recommended Isaac Mamaysky, an attorney with Potomac Law Group in New York City. "These materials are often industry-specific and have very detailed requirements regarding employee temperature checks and health screenings prior to entering the workplace," he said.

Even the definition of fever can differ. The CDC defines a fever as 100.4 degrees Fahrenheit or greater, and most states use the same threshold, according to Christine Berger, an attorney in New Orleans.

But a few states have lower thresholds for defining fever. Delaware requires high-risk businesses (https://coronavirus.delaware.gov/wp-content/uploads/sites/177/2020/04/High-Risk-Business-List_04.2.20.pdf) such as health care institutions and nursing homes to conduct temperature screening and report temperatures at or above 99.5 degrees.

Texas recommends a fever threshold of 100.0 degrees Fahrenheit or greater, according to Littler.

In Arizona, Colorado, Kentucky, New Hampshire and Vermont, all employers are required to check employee temperatures.

Other states, such as New Jersey and Washington, specify industries that must have temperature screenings. For example, Michigan requires the screenings at:

- Food-selling establishments and pharmacies when employees indicate they recently had close contact with a person with COVID-19.
- Manufacturing and meat and poultry processing facilities.
- Casinos.

Temperature screenings are recommended in numerous other states, including Alabama, Connecticut, Indiana, Kansas, Maryland, Minnesota, New York, North Dakota, Oregon, Pennsylvania, Tennessee, Texas and Virginia, Littler notes. In addition, temperature screenings are recommended for specified employers and industries in other states, including, Illinois, Nebraska, New Mexico, South Carolina, Utah and West Virginia. In Pennsylvania, temperature screenings are required after a confirmed exposure.

Privacy and Record-Keeping Requirements

Kwabena Appenteng, an attorney with Littler in Chicago, said companies need to consider the following privacy requirements when conducting temperature screenings:

- Biometric privacy compliance obligations.
- State data protection laws, including the California Consumer Privacy Act.
- Medical information privacy laws, including the Americans with Disabilities Act.

Screening should be done "in a way that maintains privacy of results and provides an exit path for anyone with a fever that does not bring that person into close contact with others," said Susan Kline, an attorney with Faegre Drinker in Indianapolis.

Limit medical information by recording "no" for employee temperatures under the appropriate threshold or "yes" for temperatures above it, rather than recording specific temperatures, Berger recommended.

Several states have enacted record-keeping requirements, said Mark Goldstein, an attorney with Reed Smith in New York City. For example, the New York State Department of Health has opined that maintaining records of employee health data (e.g., the specific temperature of an individual) is prohibited, but maintaining records confirming that individuals were screened and the result of such screening (e.g., cleared/not cleared) is permitted.

Rather than assuming that the temperature screening is personnel information that must be retained for long periods, HR should carefully consider the minimum amount of time that the company needs to store the information, how the company will collect and store it, and how the information will be destroyed, said Linn Freedman, an attorney with Robinson+Cole in Providence, R.I. Companies should not keep the information longer than needed, as this increases liability risks, she said.

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Who to Screen

Temperature screens should be required only on days when employees are coming to a worksite, not when they are telecommuting, said Carolyn Rashby, an attorney with Covington & Burling in San Francisco.

An employer might be able to defend mandatory screening of manufacturing plant employees or restaurant workers but not people who work primarily from home and only occasionally go into an office, particularly if other COVID-19 mitigation efforts are implemented in the office, said Thomas Gies, an attorney with Crowell & Moring in Washington, D.C.

But in general, businesses should not single out certain groups of employees for temperature screening because such different treatment may result in violations of anti-discrimination laws, Berger said.

Where to Screen

States vary on where to conduct screening.

Alabama recommends onsite testing with a no-touch thermometer as a best practice and self-screening at home as a minimum practice, Littler noted. Colorado requires that employers conduct daily temperature checks at the worksite to the greatest extent possible, or, if not feasible, through self-assessment at home prior to coming to the worksite. Kentucky, where temperature screening also is mandated, lets businesses choose between onsite screenings or self-screenings.

"Requiring temperature screenings at home may be a better approach for many businesses, including for privacy reasons," Rashby said.

"Because not all employees will have a home thermometer, employers should consider providing thermometers or reimbursing for one," she said. "In fact, reimbursement may be required in some jurisdictions."

But self-screening raises credibility concerns, Appenteng cautioned.

If an employer screens at work, it likely would need to pay employees for any time spent waiting line to be screened, Rashby said. In California, at-home screening may be compensable if the procedure employees must follow are detailed, she added.

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