# Employee Screening and Return to Work

With respect to the COVID-19 pandemic, the Equal Employment Opportunity Commission (EEOC) recommends employers follow the advice of the CDC and state/local public health authorities regarding information on having employees come to work. Fortunately, the EEOC, CDC and other agencies have issued guidance relating to several issues, including temperature screenings and medical questions.

Normally prohibited under the ADA, an employer may ask employees questions about their medical condition as it relates to COVID-19 under the [direct threat exception](https://www.xperthr.com/employment-law-manual/disabilities-ada-federal/2707/#fitness-for-duty-threat). According to the guidance provided by the [EEOC's Pandemic Preparedness In The Workplace And The Americans With Disabilities Act](https://www.eeoc.gov/facts/pandemic_flu.html), the direct threat exception applies during this pandemic since an employee may pose a direct threat of harm to others by spreading the virus. These questions should be directly related to protecting employees and the public from COVID-19. Questions that employers may ask include:

* Whether they have been diagnosed with COVID-19 by a medical professional based on a test or symptoms;
* Whether they have COVID-19 symptoms (e.g., fever of 100.4° F or greater, shortness of breath, cough, chills);
* Whether they have had "close contact" (e.g., within six feet for 10 or more minutes) with someone who has diagnosed with COVID-19 within the last 14 days; and
* Whether they have traveled or had a layover in a country with a CDC Level 3 travel notice.

Also, an employer may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms. An employer may send home an employee with COVID-19 or symptoms associated with it. Also, if employee is unwilling to answer questions, an employer may refuse them entry to the workplace.

In addition, an employer may take employees' temperatures during this health crisis. While measuring an employee's body temperature is considered a medical examination, which is generally not allowed under the ADA, the CDC and state/local health authorities have acknowledged community spread of COVID-19. As a result, the EEOC's Pandemic Preparedness Guidance provides that employers may implement temperature-screening measures for employees and those entering the establishment.

If an employer chooses to take employees' temperatures, certain measures should be taken:

* Refrain from taking an employee's temperature in a public setting;
* Implement a consistent and safe process for temperature screenings, e.g., testing of all those who enter the workplace, not only employees;
* Train and educate personnel on measuring body temperatures, including how to protect themselves and those being screened during the process;
* Provide prior notice to those who will be screened;
* Urge employees to self-monitor for symptoms and not to come to the workplace if experiencing any; and
* Prepare a plan for handling the results, e.g., documenting results, sending ill employees home immediately, sharing results on a strict need-to-know basis.

As with medical inquiries addressed above, an employer can also send home an employee who presents a fever.

Information about an employee's temperature and other symptoms must be kept confidential in accordance with the ADA.

Also, time spent [waiting](https://www.xperthr.com/employment-law-manual/hours-worked-federal/363/#waiting-time-and) and/or [being screened](https://www.xperthr.com/employment-law-manual/hours-worked-federal/363/#medical-attention) may count as compensable working time under wage and hour laws.

It is also important to remember that some people with COVID-19 do not have a fever and some people with a fever do not have COVID-19.

Employers should not require employees to provide a health care provider's note to validate the employee's diagnosis or to return to work, as health care providers and medical facilities may be extremely busy and not able to provide such documentation in a timely manner. Employees should remain at home until they are no longer experiencing COVID-19 symptoms.

For those considered [critical infrastructure workers](https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce) (e.g., essential workers), the CDC issued guidance that relaxes the return-to-work standard in order to "ensure continuity of operations of essential functions." Critical infrastructure workers may be permitted to continue working following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community, such as:

* Employers:
	+ Measure the employees' temperatures and assess symptoms prior to them starting work, ideally before entering the facility; and
	+ Routinely clean and disinfect all areas, such as offices, bathrooms, common areas and shared electronic equipment.
* Employees:
	+ Self-monitor for symptoms;
	+ Wear a face mask at all times while in the workplace for 14 days after last exposure (employers can issue face masks or can approve employee-supplied cloth face coverings in the event of shortages); and
	+ Maintain six feet of distance as work duties permit.

As for employee testing, the EEOC states that an[employer may test employees](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm) to see if they have COVID-19 before they enter the workplace "because an individual with the virus will pose a direct threat to the health of others." The EEOC advises employers to:

* Ensure that tests are accurate and reliable by reviewing guidance from the [Food and Drug Administration (FDA)](https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2), the CDC and other public health authorities, and then periodically checking for updates;
* Consider the incidence of false-positives or false-negatives associated with a particular test;
* Remember that accurate testing only reveals if the virus is currently present, and that a negative test does not mean the employee will not acquire the virus later; and
* Continue to require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

As always, employers should keep up with the ever-evolving guidance issued by the CDC, OSHA and other appropriate agencies as it relates to employees returning to work.

## OSHA Compliance

Employers covered by the Occupational Safety and Health Act (OSH Act) are required to comply with certain requirements, including those relating to recording and relating work-related injuries and illnesses and inspections.

OSHA has deemed COVID-19 a recordable illness and, as a result, a covered employer must record it on OSHA 300 and 300a forms if it meets the required criteria:

* The worker has a *confirmed* diagnosis of COVID-19;
* The case is work-related; and
* The case involves one or more of the general recording criteria, such as days away from work or loss of consciousness.

Note that OSHA has issued [guidance](https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19) stating that, unless there is objective evidence of work-relatedness, it will not enforce the recordkeeping standard against many employers due to the difficulty of determining whether an employee contracted COVID-19 at work. However, health care industry employers, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services) and correctional institutions are still required to record cases of COVID-19 that meet the criteria.

An employer's reporting compliance obligations have not changed. An employer must report a work-related COVID-19 infection if it is fatal or results in the employee being hospitalized in an in-patient facility. Employers must also be mindful of the timing obligations for reporting that must be met. Specifically, a report must be made within the following time period after the employer or its agent(s) learns that the reportable event was the result of a work-related incident: 24 hours for an inpatient hospitalization, an amputation, or a loss of an eye; and eight hours for a fatality. An employer must report a fatality that occurs later, if it occurs within 30 days of the work-related incident.

In light of the heightened risks during this pandemic, OSHA issued an [interim enforcement response plan](https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19) that outlines the agency's priorities for regional administrators and inspectors. This memo directs inspectors to identify potentially hazardous occupational exposures and to make sure employers quickly mitigate those hazards and protect employees. Fatalities and imminent danger exposures related to COVID-19 will be prioritized for inspections, with particular attention given to health care organizations and first responders.

OSHA provided further [guidance](https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during) to employers in recognition of the challenges that employers are facing in meeting OSHA's compliance requirements and standards. Essentially, the memorandum provides that when an employer demonstrates a good-faith attempt, but is unable to comply with certain requirements due to workplace closures, OSHA will take such efforts into consideration in determining whether to cite a violation. However, if an employer cannot demonstrate a good-faith effort to comply, a citation may be issued.

## Safe Remote Work Practices

Since an increasing number of employees are working remotely due a variety of reasons (e.g., shelter-in-place orders, school closures), employers should understand whether their obligation to provide a workplace free of recognized hazards extends to an employee's home workspace. OSHA has been on the record for years that it will not:

* Go to an employee's house to inspect their workspace;
* Hold an employer liable for an employee's workspace; or
* Expect an employer to inspect an employee's workspace.

However, OSHA has also said that employers are responsible for safe working conditions *regardless of location*. While OSHA's guidance on safety and remote working may be a bit muddled, employers should consider taking steps to mitigate some liability risks. For instance, implement a safety reporting system for employees who suffer an injury at home or establish a sort of "safety check in" for employees at predetermined times during the day.

An employer should also communicate expectations to employees who are working remotely by way of a telecommuting policy or telecommuting agreement. However, in light of the rapid speed many employers had to switch their operations to remote work, it is likely that many did not have the opportunity to implement new or updated policies.

Nevertheless, employers should promote and continue promoting safe working practices for those employees working remotely. Employers should urge employees to:

* Have a workspace free of hazards (e.g., tangled loose cords on the floor) and ensure proper lighting and good ventilation;
* Make the workstation as ergonomic as possible to reduce injury, e.g., sit with a balanced head and wrist position, shoulders relaxed and feet flat on the floor or footrest; have adequate lower back support and a computer screen at a comfortable height; and
* Take regular breaks during the workday and incorporate them into the work schedule to help avoid mental and physical fatigue, lower risks of aches and pains, and increase blood and oxygen circulation.

During this highly stressful time, employees should feel free to take breaks during their workday without fear of judgment or reprisal.