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Warming Up to Employee Temperature Checks: Employer Guidance From the EEOC and NYC

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Although many New York businesses are temporarily closed due to the COVID-19 pandemic and the state's stay-at-home orders, employers that remain open and/or intend to reopen shortly are looking for ways to keep their employees and guests safe from the coronavirus. One such method is screening each employee who enters the workplace for an elevated temperature, which is one symptom of COVID-19 (though, notably, some people with COVID-19 may not show a fever).

New York City employers should ensure that they comply with state, local and federal law when implementing temperature checks, training staff to do so and handling the confidential medical information they ascertain.

EEOC and NYC Guidance for Employers

To allay employer concerns about permissible actions employers may take, the Equal Employment Opportunity Commission (EEOC) recently updated its *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act Guidance* (Guidance) to specifically address the COVID-19 pandemic. Included in the Guidance is the EEOC's position on whether employers may take employee temperatures. According to the EEOC, employers who are covered by the Americans with Disabilities Act (ADA) are allowed to take their employees' temperatures to determine whether they have a fever. The Guidance also notes that, if an employee does have a fever, the employer may send the employee home without running afoul of the ADA.

While this was welcome news, employers in New York City were understandably concerned that taking employees' temperatures might still be

prohibited under the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL), which offer broader protections than the ADA. However, the New York City Commission on Human Rights (NYCCHR) recently adopted the EEOC's Guidance and noted that "[i]n general, compliance with the EEOC guidance will satisfy employers' obligations with respect to disability protections under the New York City Human Rights Law as they relate to COVID-19." Although the NYCCHR did not address whether compliance with the Guidance will satisfy employers' obligations under the NYSHRL, because the NYCHRL offers broader protections than the state law, employers who follow the Guidance can be satisfied they are complying with both state and city law.

A final note of caution: as with all medical information, the fact that an employee has a fever is subject to the ADA's, NYSHRL's, and NYCHRL's confidentiality requirements for medical records and such information must be maintained on separate forms and in separate medical files. Moreover, best practices may include not retaining data concerning temperatures. Finally, employers must provide appropriate training and safety practices prior to requiring any employee to take a colleague's temperature in the workplace.

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