



GUIDANCE FOR RESTAURANT EMPLOYERS

On Premises Workplace Infection Control Practices Impacting Employees

April 4, 2020

1. May Restaurants require employees to provide notes from healthcare providers confirming they can return to work?

A: Generally, even if employers do not require disclosure of medical information, they can require notes confirming employees can return to work without violating the ADA because the request would not be disability related. As a practical matter, however, public health authorities have warned that doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide "fitness-for-duty" documentation. In addition, please note that some jurisdictions, like New York, have laws forbidding employers from requesting notes from asymptomatic employees.

2. May Restaurants require employees to have their temperatures checked every time they show up to work?

A: Generally, measuring an employee's body temperature is a medical examination. However, the EEOC stated on March 18, 2020, that because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may, during this emergency, legally require the measuring of employees' body temperature. Still, employers need to be aware that some people with COVID-19 do not have a fever. If you decide to establish such a policy, consider contacting your insurance carrier for suggestions and retain a contract nurse for the task. Alternatively, perform the task with an employee in a supervisory capacity who will maintain confidentiality of the results to the maximum extent possible. Also, employees waiting to be screened should still be at least six feet apart in line.

3. Is there liability under HIPAA Privacy Rule for Restaurants requiring employees to have their temperatures checked every time they show up to work?

A: When a restaurant is functioning as an employer, it is neither a HIPAA covered entity nor a business associate of a covered entity, although it may sponsor a covered health plan subject to the HIPAA privacy and security rules. Thus, when an employer collects employee temperature functioning as an employer, such as in connection with protecting its workforce and the community during the COVID-19 pandemic, that information is not subject to the HIPAA Privacy Rule. Regardless, the employer should still consider where to conduct the temperature screening and do it in an area preferably separated with at least a screen, if possible.



4. May employers send employees home if they have a fever or develop other symptoms of a COVID-19 infection?

A: Yes. An employer never has to allow a sick employee to remain at work. Procedures should already be in place to handle sending people home if the employer is checking temperatures and a fever is identified. The procedures must be uniformly applied. Also, the CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. The EEOC has stated that advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the EEOC has stated that such actions would be permitted under the ADA if the illness were serious enough to pose a direct threat.

5. May employers require employees to wear cloth face coverings or masks while working?

A: On April 3rd, the CDC updated their guidance to recommend the use of simple cloth face coverings that cover the nose and mouth to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others. Cloth face coverings fashioned from household items or made at home from common materials at low cost can be used at restaurants as an additional voluntary public health measure. Employers may require the use of such face coverings relying on the CDC guidance (unless there is an accommodation request which should be addressed on a case by case basis).

Some local jurisdictions, such as the County of San Diego, California, and the City of Laredo, Texas, are already requiring restaurant employees to cover their nose and mouth with a mask or another form of cloth face covering. In jurisdictions where it is required, restaurants that wish to remain open must ensure the use of the mandated face coverings by its employees. Please note that the cloth face coverings and masks recommended for restaurant workers are not the same as surgical masks or N-95 respirators. The CDC does not recommend surgical masks or N-95 respirators be used at restaurants as those are critical supplies that must continue to be reserved for healthcare workers and other medical first responders.

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