

Screening Food Industry Employees for COVID-19 Symptoms or Exposure

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Preface

As community transmission of COVID-19 occurs in certain regions and is spreading rapidly to other regions, parts of the food and beverage production system may consider implementing employee screening programs to evaluate staff and visitors for symptoms of COVID-19 or possible exposure prior to entering company facilities. This guidance suggests factors that companies should consider when deciding whether or not employee screening is appropriate and practical, and if it is, how best it can be implemented.

Food and agriculture is considered part of our nation's Critical Infrastructure as recognized by Department of Homeland Security's Cybersecurity and Infrastructure Security Agency's (DHS-CISA) Guidance for Tier 1 Type of Essential Critical Infrastructure Workers¹. Companies should consider how to best protect the health of their employees through appropriate screening, while also being sensitive about exacerbating fear and anxiety within their workforce.

Companies must recognize that screening options are evolving and soon, it may be possible to readily and quickly obtain COVID-19 testing rather than using indirect screening mechanisms such as temperature checks or questionnaires. When this option becomes available, it may necessitate revising this guidance.

Please note that this guidance focuses on federal law considerations. When undertaking screening, please consult applicable state and local law, as well as any collective bargaining agreements or employment agreements that may restrict actions that can be taken. Companies should also understand that the law is changing rapidly in this area, and stay apprised of any applicable changes.

Determining the Appropriateness of Employee Screening

The level of employee screening that is appropriate and practical will differ by situation. There are several factors, including location/regional factors (e.g., state or local executive orders; state or local guidance from health officials), that should be considered by companies as they contemplate the level of screening to be conducted.

- Location the employee works
 - Generally speaking, employees who are teleworking and have not recently come to the workplace need not be screened, and screening such employees is more legally tenuous.
 - Employees coming to the workplace may and typically should be screened in some form.
 - The need for screening increases if the employee works in an environment where the employee must come into contact with many other employees.
- High rates of community transmission
 - In areas where there are high rates of community transmission of the virus, the possibility of employee illness is higher; therefore, screening may be a valuable to

¹ <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce> Accessed March 30, 2020

way to help control the spread. In regions where community transmission is minimal, employee health screening may not provide as much value.

- Employee tested positive
 - [Industry Guidance](#) is available that specifically addresses actions to take when an employee or visitor has COVID-19². Knowing that one or more employees is confirmed positive for the virus—or has symptoms or may have come in close contact with someone who tested positive—increases the need to consider screening.

The level of screening that is appropriate will also differ depending on overall spread of the virus.

Companies should note that employee screening will not necessarily identify individuals who are infected with the virus but are asymptomatic. Additionally, there is variation in the presentation of symptoms of COVID-19, and not all infected individuals may present with fever, for example. Likewise, individuals with fever may not have COVID-19.

If a firm decides that screening is appropriate, consultation with a labor attorney is encouraged to ensure such screening is conducted practically and in accordance with federal, state and local laws, as well as provisions in collective bargaining agreements.

It is recommended to develop a consistent examination process for all similarly situated employees, protect employees' privacy during the examination, maintain results as confidential medical records, and avoid any potential stigma for employees who may show symptoms or test positive for the virus.

Encouraging Employee Self-Monitoring for Symptoms and Exposures

Employers should ask employees who work on-site to self-monitor their symptoms (e.g., cough, fever, or shortness of breath), and could also include employees taking their own temperatures periodically (such as twice a day) and remaining alert for cough or difficulty breathing.

Employees who have symptoms would be advised to self-isolate, limit contact with others, **contact their employer** and seek advice by telephone from a healthcare provider or their local health department to determine whether medical evaluation is needed. The CDC has specific information on identifying symptoms here: <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/index.html> and has created a pamphlet relating to the self-monitoring here: https://www.cdc.gov/coronavirus/2019-ncov/downloads/COVID-19_CAREKit_ENG.pdf.

Conducting On-Premises Verbal Employee Screening

Employers may consider conducting on-premises screening of all employees before they enter the workplace.

The EEOC has (as of March 27, 2020) confirmed that it is permissible to ask workers if they have:

- been diagnosed with or otherwise tested positive for COVID-19³;

² Food Industry Recommended Protocols When Employee/Customer Tests Positive for COVID-19 www.feedingus.org Accessed March 30, 2020

³ Typically, workers are prohibited by the ADA from making “disability-related inquiries” which the EEOC has in the past stated include questions about whether an employee has been diagnosed with an illness. However, because the

- recently displayed any symptoms consistent with COVID-19, (e.g., cough, fever, shortness of breath);
- recently traveled from an area with heightened community transmission; or
- been in close contact with someone with COVID-19 or showing symptoms of COVID-19.

If an employee answers affirmatively to any of these questions, or refuses to answer the questions, the employer may decide to prohibit their entry to the workplace. If, however, an employee is sent home, companies should consider how this directive pertains to their sick-leave policy, employee entitlements to wages for the day, and employee entitlements to any other leave, such as under the Families First Coronavirus Relief Act (effective April 1, 2020), or other applicable federal, state or local law. Consult counsel if a group of employees (or an employee on behalf of others) objects to the test, if an employee demands a religious exemption, or a similar action.

It is generally not acceptable to ask about an employees' family member diagnoses (although you can ask generally if the person has been in contact with *someone* who has been diagnosed). It is also generally not acceptable to ask an employee if the employee has any preexisting conditions that make the employee vulnerable to COVID-19 (however, if an employee reveals such a preexisting condition and asks for an accommodation, you should engage in the interactive process).

Conducting On-Premises Employee Temperature Screening

Some employers may decide to conduct temperature screening of employees. Employers who decide to do so should clearly communicate and consistently implement this practice, both in the nature of the temperature screening and follow-up questions asked of employees.

Companies opting to screen employee body temperature when they report to work may do so as per the [EEOC's Pandemic Preparedness Memorandum](#), which expressly states that a company may take the temperatures of its employees (and visitors) before they enter the workplace.

“Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.”

For further and more detailed information view the [EEOC Coronavirus Guidance](#).

Companies should notify their employees of temperature screenings in advance and inform the employees that the purpose of temperature screening is solely to protect the employees and not to determine if an employee has any other illness, impairment or disability. It must be communicated that the screening is *not* intended to be, nor is it a substitute for, clinical diagnosis.

EEOC has stated that the “COVID-19 pandemic meets the direct threat standard,” constituting a significant risk or substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation, the EEOC has confirmed (on a March 27, 2020 webinar) that an employer may ask whether an employee who works on-site (rather than remotely) has been diagnosed with COVID-19, since employers have a duty to protect their workforce.

Companies should consider the qualifications and training of the individual conducting the screening, as well as the reliability and accuracy of measuring devices. If a company lacks a qualified individual on staff to conduct the screening, it should engage a qualified third-party provider. Companies should also consider how to keep the individual who is conducting the screening safe, including appropriate protective gear, and preferably a non-contact thermometer. Note that recent comments from the FDA indicate potential shortages of supplies of infrared thermometers.

Companies should consider, in **advance** of screening, what action will be taken if an employee has an elevated (>100.4 degrees Fahrenheit) temperature, such as sending the employee home or conducting further screening. It is best to confirm a heightened temperature with a second test, in a confidential manner, and to consider any explanation the employee may offer for a heightened temperature. It may be reasonable to send an employee home who has an elevated temperature (>100.4 degrees Fahrenheit). If, however, an employee is sent home, companies should consider how this directive pertains to their sick-leave policy, employee entitlements to wages for the day, and employee entitlements to any other leave, such as under the Families First Coronavirus Relief Act (effective April 1, 2020), or other applicable federal, state or local law. Consult counsel if a group of employees (or an employee on behalf of others) objects to the test, if an employee demands a religious exemption, or a similar action.

Confidentiality Issues and Informing Others of Infection in the Workplace

Medical information obtained regarding an employee (e.g., COVID-19 diagnosis, elevated temperature, symptoms, etc.), whether obtained through screening or otherwise, must be kept **confidential**, maintained on **separate forms and in separate medical files (i.e., not part of the personnel file)** and treated as a **confidential medical record**, except that:

1. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;⁴
2. First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
3. Government officials investigating compliance with this part shall be provided relevant information on request.

If a company contracts with a third-party entity to administer the temperature screenings, it likely needs to have each employee authorize the third-party to provide the results to the company to comply with privacy laws, such as HIPAA. Even with this authorization, results must be kept as confidential as possible.

An employee's medical information should not be revealed to others except for company officials with a need to know (e.g., human resources). In particular, companies should not reveal the identity of any individual who has a COVID-19 diagnosis, an elevated fever, or the like. If an individual is determined to have contracted COVID-19, companies should alert individuals who have come into close contact with the affected individual that an individual has tested positive, but are prohibited from revealing the identity of the individual. Companies should also contact a state or local health agency (without revealing an individual's identity) to obtain guidance on next steps.

Depending on the circumstances (and guidance from the state or local health agency), the company should consider alerting the entire workplace (again, without revealing an individual's

⁴ For example, supervisors should be informed that an individual who was asked to leave work due to COVID-19 will not be at work, but should not be told the reason is that the individual has COVID-19.

identity) if an infected individual has been in the workplace. Additionally, depending on the circumstances, a company should consider similar notifications if an individual who was infected or exposed to COVID-19 was in the workplace (again, without revealing an individual's identity).

Screening Visitors

It is generally acceptable to screen visitors before entering a facility (or to simply prohibit visitors altogether). Companies are encouraged to distribute an email, or other communication, to regular visitors, suppliers, and delivery companies explaining your COVID-19 management policy and asking that no persons enter their building unless their visit is "essential." It is recommended to communicate with the appropriate regional regulatory agencies as well, so they are prepared if an inspection is needed.

Non-essential visitations to facilities should be minimized and postponed; however, any visitors to company offices and production facilities should be immediately informed upon arrival that the company has implemented precautionary procedures for your employees' and all visitors' protection. These procedures could include conducting the same screening procedures as above for employees, e.g., verbal questions and temperature checks, and exclude visitors accordingly.

Protecting the Evaluator/Screeener and Other Staff

To protect the individual(s) who is taking the temperature, it is recommended to first conduct an evaluation of reasonably anticipated hazards and assess the risk to which the individual may be exposed. The most conservative assumption is to assume the evaluator/screeener is going to potentially be exposed to someone who may be infected. Based on that anticipated exposure, you must then determine what mitigation efforts can be taken to protect the employee by eliminating or minimizing the hazard, including use of physical barriers or personal protective equipment (PPE). Further, the evaluator/screeener could have a face shield in case someone sneezes or coughs. Further information can be found at OSHA's website, which provides guidance for healthcare employees (which includes recommendations on gowns, gloves, approved N95 respirators, and eye/face protection). If you are using a qualified third-party provider to conduct the screening, you should confirm they have a protocol in place to ensure their safety.

Procedural Considerations of Screening Staff or Visitors

When staff or visitors are waiting to be screened, they should avoid close contact as recommended by CDC.⁵ Managing the volume of individuals waiting to be screened can also be managed by having staggered shifts. The time(s) that individuals should be screened should also be considered. Additional considerations should include:

- Can screening occur prior to entry into the facility?
- Are employees paid for the time spent waiting to be screened? (This may be required by federal or state law, depending on the circumstances.)

⁵ The U.S. Centers for Disease Control and Prevention (CDC) has defined close contact as: being within approximately 6 feet (2 meters) of a COVID-19 positive individual for a prolonged period of time; close contact can occur while caring for, living with, visiting, or sharing a healthcare waiting area or room with a COVID-19 or having direct contact with infectious secretions of a person with COVID-19 (e.g., being coughed on). Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019 (COVID-19) Exposures: Geographic Risk and Contacts of Laboratory-confirmed Cases. <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>. Accessed March 26, 2020.

- How can the operation avoid everyone reporting for screening at the same time?
- Should screening be conducted more than once per day? If so, how often?
- How will an employee who is asked to leave the workplace be treated? Will they be required to walk back through the line, or will there be an additional route to take to maintain their confidentiality while they are leaving the workplace?

Though not a preferred option, some companies may consider establishing temperature check stations for voluntary use. This should be done with caution. A clear protocol to disinfect thermometers or other devices between users would need to be implemented. Clear instructions on how to use any instruments, such as a thermometer, should be provided, as well as actions that must be taken if an elevated temperature is found.

Additional important resources:

–Equal Employment Opportunity Commission:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

–CDC:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

–FDA:

<https://www.fda.gov/food/food-safety-during-emergencies/food-safety-and-coronavirus-disease-2019-covid-19>

–Hogan Lovells Coronavirus Topic Center:

<https://www.hoganlovells.com/en/knowledge/topic-centers/covid-19>

–Hogan Lovells' Employment Law Blog:

<https://www.hlemploymentblog.com/>

