

Employer Record-keeping Obligations during the COVID-19 Pandemic

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Matthew Feldman

Partner

✉ mfeldman@feldmank.ieffer.com

☎ (716) 852-5875

On May 11, 2020, Governor Cuomo [announced](#) that the first phase of reopening would begin on May 15, 2020 in several regions of New York State. As a part of the reopening process, all New York State businesses, including those that were designated as essential under the [Empire State Development Essential Business Guidance](#), were directed to develop a written Safety Plan detailing the measures they will be taking to prevent the spread of COVID-19 workplace. As essential businesses, all small medical practices in New York State must adopt compliant Safety Plans to prevent the spread of COVID-19 in the workplace.

As medical practices eagerly progress through the reopening process, providers are tirelessly working to protect the health of their employees by implementing compulsory screening procedures to monitor and prevent the spread of COVID-19 among employees in the workplace. Now more than ever, careful record keeping of private employee health information is critical to ensure compliance with all relevant federal and state laws and to mitigate potential liability during the COVID-19 pandemic.

CDC Recommended Screening Protocols For Healthcare Workers

The U.S. Centers for Disease Control Prevention (“CDC”) has issued [guidance](#) detailing several recommended strategies for preventing exposure of at-risk patients and staff to symptomatic COVID-19 positive healthcare workers. The “in-person active” strategy for monitoring healthcare workers involves requiring all healthcare workers report for an in-person evaluation of symptoms and fever prior to each shift. If symptoms consistent of COVID-19 are reported or observed, healthcare workers are provided with immediate follow-up actions.

According to the CDC, “standardized medical assessments” should be used to document daily screening, along with “movement and monitoring forms.” The CDC recommends that employers designate employees to collect standardized medical assessments; a separate staff member should be responsible for movement and monitoring forms. This CDC’s guidance is offered to “decrease workload,” but careful attention to be taken to ensure that the allocation of duties do not threaten the practice’s efforts to comply

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Erie County
110 Pearl Street • Suite 400
Buffalo, New York 14202
Call: (716) 852-5875

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Onondaga County
5740 Commons Park
East Syracuse, New York 13057
Call: (800) 572-0179

NEW YORK METRO

Westchester County
170 Hamilton Avenue • Suite 310
White Plains, New York 10601
Call: (800) 572-0179

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8 Westwind Drive • P.O. Box 218
Dewittville, New York 14728
Call: (716) 852-5875



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with federal and state record keeping laws. As detailed below, employers must maintain documentation of information collected during the screening process in a separate location from records compiled to demonstrate compliance with health screening protocols. Generally, it is advisable to designate one personnel as a point person to collect documentation. However, if two personnel are required, it is crucial that each person responsible for implementing screening protocols at your practice is aware of the various state and federal record keeping requirements to safeguard employee health information.

New York State Safety Plans Records of an Employer's Review of Employee's Daily Screening

To comply with the New York State's Safety Plan, medical practices must implement daily compulsory screening procedures to monitor and prevent the spread of COVID-19 among employees in the workplace. Pursuant to the Safety Plan, all practices must – at minimum – screen employees before the start of work each day to determine whether the employee has had (1) COVID-19 symptoms in past 14 days, (2) a positive COVID-19 test in past 14 days, and/or (3) close contact with a confirmed or suspected COVID-19 case in past 14 days. In addition to the screening questionnaire, New York State authorizes medical practices to administer daily temperature checks for employees. Employers must then review all responses collected by the screening process on a daily basis and maintain a record that the review was completed. As detailed below, documentation of each employee's daily screen must be maintained pursuant to U.S. Equal Employment Opportunity Commission ("EEOC") guidelines.

Each practice must designate a central point of contact responsible for receiving and attesting to having reviewed all screening questionnaires. To comply with Safety Plan, your practice must document that you have reviewed daily results of temperature screens and the questionnaires completed by your employees. We recommend recording only the names of employees who did not pass the screening, and the reasons why the employee did not pass. For those employees sent home, employers should be sure to document: (1) the and (4) reason for sending the employee home (e.g., "temperature over 100.4," "contact

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with suspected COVID-19 case”, etc.). If no employees were sent home, you can simply document that all employees were screened and no one was sent home for COVID-19 related reasons. Note that this documentation should be kept in a separate, confidential location accessible only to those who are required to implement risk protocols.

EEOC Guidance for Maintaining Employee Screening Records

Before the pandemic, an employer would generally not be authorized to take employees’ temperatures on a daily basis, nor allowed to request information about an employee’s physical symptoms. Under the Americans with Disabilities Act (“ADA”), a temperature check is a “medical examination” and symptom screening would be a “disability-related inquiry.” However, the Equal Employment Opportunity Commission (“EEOC”) has issued detailed guidance stating that, based on the current COVID-19 pandemic as assessed by the U.S. Centers for Disease Control Prevention (“CDC”) and other public health authorities, an employer may measure an employee’s body temperature as a screening method during the pandemic and request information about the employee’s symptoms. The EEOC opined in its updated guidance on April 23, 2020 that employers can administer COVID-19 tests to identify the presence of the virus during the pandemic.

The EEOC advises that all information regarding the medical condition or history of an employee during the course of COVID-19 screenings must be collected and maintained on separate forms, in separate medical files, and be treated as a confidential medical record. It is critical that employers only document information that is directly relevant to the employee’s risk of spreading COVID-19. In recording daily temperature checks, employers should avoid documenting exactly what an employee’s temperature was at a specific date and time. Rather, practices should simply record “no” (meaning the employee’s temperature is under the appropriate threshold) or “yes” (meaning the employee has a fever at 100.4 degrees or above). The employee’s exact temperature at a specific date or time is not important to document, but you should document whether the employee has a fever, which is a symptom of COVID-19. Conducting screenings in this manner will ensure that your practice does not inadvertently maintain an employee medical database. As noted above,

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110 Pearl Street • Suite 400
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5740 Commons Park
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New York State requires employers to review all responses collected by the screening process on a daily basis and maintain a record of such review; at the same time, New York State prohibits employers from retaining employee's temperatures.

Under the ADA, medical practices must store medical information about employees separately from the employees' personnel files. Such medical information must remain confidential with the following exceptions: (1) supervisor[s] and managers may be told about necessary restrictions on work duties and about necessary accommodations; (2) first aid and safety personnel may be told if a disability might require emergency treatment; (3) government officials may access the information when investigating compliance with the ADA; (4) employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws; and (5) employers may use the information for insurance purposes. 29 C.F.R. §§ 1630.14(b)(1)(i)–(iii), (c)(1)(i)–(iii); 29 C.F.R. pt. 1630 app. § 1630.14(b).

Additional Reasons to Maintain Accurate Screening Documentation

Maintaining accurate documentation of employee COVID-19 screening assessments will prevent potential liability under anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967 ("ADEA"), and Title I of the Americans with Disabilities Act of 1990 ("ADA"). Uniform application of policies for screening and taking temperatures of employees avoids disparate treatment based on an employee's protected class (e.g., race, age, gender, national origin, etc.). Documentation that screening was provided to all employees without disparate treatment will prevent claims that screening decisions are not made uniformly.

Similarly, documentation of thorough COVID-19 screening can be useful to defend the practice should you receive a complaint from the Occupational Safety and Health Administration ("OSHA"). OSHA requires employers to "provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm."

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However, OSHA stated that if “an employer has made attempts to comply in good faith, Area Offices shall take such efforts into strong consideration in determining whether to cite a violation.” OSHA will be less likely to cite you for any potential violations if your office is able to provide accurate documentation of employee COVID-19 screening and tests. Practice accurate documentation of employee COVID-19 screening and tests.

Practices should also maintain screening documentation for employees who require leave under the Families First Coronavirus Relief Act (“FFCRA”) in order to claim a tax credit for reimbursement of any paid leave provided to employees. The U.S. Department of Labor [published guidance](#) clarifying that an employee may be eligible for FFCRA leave if the employee is sent home to self-quarantine while waiting for the results of a COVID-19 test. Maintaining concise records will produce documentation sufficient to claim a tax credit.

Please contact Matthew Feldman at mfeldman@feldmankieffer.com with any employment law questions throughout the pandemic.

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