

Reopening a Safe Workplace: To test employees temperatures or not?

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As the economy reopens and restrictions on businesses are eased, the question at the top of mind for many employers is how to keep their workplaces and people safe. There are several measures employers can take, including rearranging the workplace to ensure social distancing, sanitizing high-touch areas, asking employees to self-report symptoms of COVID-19 and to stay home if they are ill. In addition, many employers are considering implementing temperature screening when employees enter the workplace, and others have already begun doing so.

Testing temperatures before permitting employees to report to work may be an aid in screening for sick employees and preventing the spread of COVID-19 within the workplace. However, it may also expose employers to risks under applicable human rights and privacy law.

This article sets out a series of considerations for employers concerning the implementation of temperature screening as part of their reopening plans, and, in particular, the return of employees to the physical workplace. Please note that this article considers governmental and public health announcements and guidelines available as of June 2020.

The Efficacy of Temperature Screening

According to the World Health Organization and the Public Health Agency of Canada, one of the most common symptoms of COVID-19 is a fever. A fever is indicated by a temperature over 38°C or 100.4°F. While fevers are not exclusive to individuals with COVID-19, they do provide an objective symptom to test for, unlike other screening measures that are highly reliant on employee self-reporting. Temperatures can be taken through non-invasive methods such as touchless infrared scanners. Therefore, temperature testing may be useful in increasing the safety of the workplace.

Employers' Duty to Provide a Safe Workplace

Employers in Ontario have a general duty under the *Occupational Health and Safety Act* ("OHSA") to take every precaution reasonable in the circumstances for the protection of a worker. The potential consequences for failing to comply with OSHA include charges by the Ministry of Labour, Training and Skills Development. The maximum penalty that a corporation may face is \$1,500,000.

In anticipation of workplaces reopening, and to support employers, the Government of Ontario has provided [sector-specific guidelines](#) to help prevent the spread of COVID-19 in workplaces. Among other things, the guidelines recommend avoiding contact with potentially infected

people and ensuring that workers stay home if they have symptoms. Temperature screening may help employers to follow these recommendations in a generally non-invasive manner.

Potential Impact of Temperature Screening on Human Rights

Employees are also protected against adverse treatment due to illness or disability (whether perceived or actual) under applicable human rights legislation. During the 2003 SARS outbreak, the Ontario Human Rights Commission published a statement clarifying that the ground of “disability” covered diseases such as SARS, and that differential treatment of persons who had or were perceived to have SARS, for reasons unrelated to health and safety precautions prescribed by medical and public health officials, was prohibited under the Ontario *Human Rights Code*. While there have not yet been any cases expressly stating that COVID-19 falls under the ground of disability, it will likely be treated similarly to SARS.

Human Rights Commissions in various provinces including Ontario have recently posted policy positions stating that under the unique circumstances created by the COVID-19 pandemic, temperature screening may be permissible. They qualify this by adding that temperature screening does not permit discrimination against persons with disabilities (*i.e.*, COVID-19), and employers still have an obligation to ensure privacy is maintained. Nonetheless, the Commissions generally acknowledge the importance of the employers’ rights and obligations for employees’ health and safety at work.

Currently, larger cities like the City of Toronto are encouraging employers to step up employee screening efforts. Employers are not being told to mandatorily conduct temperature testing, but there is certainly a growing view that employers can help stop the spread through enhanced screening.

While we have not yet seen any human rights cases involving temperature screening, human rights cases have arisen in similar circumstances in connection with workplace requirements implemented by employers. For example, *Wheatley v. Emergency Health Services Commission (No.3)* (“*Wheatley*”)¹ concerned a human rights complaint made shortly after the SARS outbreak in connection with an employer’s implementation of a respiratory protection program for paramedics. The program required the paramedics to be clean shaven in order to be fitted with an N-95 protective mask. The applicant asserted that he had a skin condition that was irritated by shaving, and he requested a costly respirator as a form of accommodation (which did not require him to shave his beard). The applicant was generally uncooperative in the process and ultimately his request was not accepted. While the British Columbia Human Rights Tribunal ultimately found that the applicant’s skin condition was not a disability for the purposes of the British Columbia *Human Rights Code*, it went on to state that even if the applicant *had* a disability, the employer’s respiratory protection program was a *bona fide occupational requirement*, as it was a reasonably necessary measure instituted to accomplish a legitimate

¹ 2009 BCHRT 106 at para. 195.

work-related purpose – in this case, protecting paramedics and the public from SARS and other airborne diseases.

In *Vasey v. St. Michael's Hospital* (“Vasey”),² a registered nurse with a chronic lung disorder was forced to stay home from work when the hospital she worked at implemented an N-95 mask requirement during the second SARS outbreak. She was unable to wear an N-95 mask because of her disability. The Ontario Human Rights Tribunal found that there was nowhere the applicant could have worked at the hospital, given the workplace-wide mask requirement, and by requiring her to stay home, she was not singled out on the basis of her disability, or treated differently from any other employee who could not wear an N-95 mask.

The issues that arise in cases like *Wheatley* and *Vasey* demonstrate that medical tests or related employer workplace requirements in the context of COVID-19 may potentially have an adverse impact on employees with other disabilities. To avoid this, employers should only get information from medical screening that is reasonably necessary to the employee’s fitness to perform on the job and any restrictions that may limit this ability, while excluding information that may identify a disability (perceived or otherwise). Among other things, to minimize exposure to human rights claims, employers should ensure that the temperature screening policy is applied uniformly to all employees. This is consistent with an employer’s obligation to keep the workplace free from discrimination on the basis of prohibited grounds like disability.

Potential Impact of Temperature Screening on Privacy Rights

In general, Canadian employers must justify any rule, policy, or program that involves an invasion of privacy by balancing the effectiveness of the policy or program in achieving a legitimate workplace goal, against the impact on the privacy interest of employees. A “greater good” must result from the policy or program’s application in comparison to the harm done towards employee privacy.

Privacy laws vary by jurisdiction. Federally regulated corporations are subject to the *Personal Information Protection and Electronic Documents Act*. Privacy legislation also exists in British Columbia, Alberta, and Quebec. In Ontario, the common law governs privacy for provincially-regulated employers. For example, the tort of inclusion upon seclusion was recognized in Ontario in the 2012 decision, *Jones v. Tsige*.³ A finding for this cause of action requires the following elements: (1) the defendant’s conduct must be intentional or reckless; (2) the defendant must have invaded, without lawful justification, the plaintiff’s private affairs or concerns; and (3) a reasonable person must regard the invasion as highly offensive, causing distress, humiliation, or anguish.⁴ In the context of COVID-19, assuming that an employer has implemented a proper policy and procedure concerning temperature screening, the risk of a successful tort action in this respect is likely low, given the relative sensitivity of the information collected, and the high threshold of “intentional or reckless” conduct on the part

² 2011 HRTO 1257.

³ 2012 ONCA 32.

⁴ *Jones* at para. 71.

of an employer. Additionally, if a healthcare practitioner is collecting the information on behalf of an employer, the Ontario *Personal Health Information Protection Act* may apply to the collection, use and disclosure of such information.

There are several steps employers may consider taking to minimize potential infringements on employee privacy rights in connection with temperature screening. Employers should provide an employee-facing notice that informs employees of the collection, use and disclosure of their personal information, including the COVID-19 temperature screening. Adequate security safeguards should be implemented to protect the information, such as minimizing the amount of people with access to employee temperature data, and anonymizing data where possible. Additionally, employers should securely retain the personal information in accordance with any applicable legislation.

Temperature screening should also be conducted in a private area. Employers should discreetly direct individuals with high temperatures away from the workplace – for example, an employer should avoid having an employee who is sent home with a fever walk past a line of his or her colleagues.

Conclusion

The idea of temperature screening has evolved recently as a result of the increased risks to the health and safety of workplaces brought on by COVID-19. In these evolving circumstances, it remains important for employers to implement appropriate screening procedures in order to mitigate existing human rights and privacy risks. Lastly, it is important to acknowledge that temperature screening may not capture asymptomatic carriers of COVID-19 and depending on how the screening is conducted, it may not accurately capture people with a fever. In short, an employee with an elevated temperature does not necessarily have COVID-19 or any other respiratory illness, and individuals may in fact have COVID-19 and not have an elevated temperature. This is one of the reasons why pairing any temperature screening with, for example, a self-assessment questionnaire/declaration is generally recommended.