

SAFETY DIRECTOR BULLETIN

November 2020

GUIDANCE FOR COMPLYING WITH EXECUTIVE ORDER 192

BACKGROUND

On October 28, 2020, Governor Murphy issued Executive Order No. 192 ("EO 192"), which became effective November 5, 2020. EO 192 imposes on employers several new minimum mandatory health and safety protocols designed to prevent the spread of COVID-19 in the workplace and apply regardless of whether an employee's presence at the worksite is mandatory or voluntary. This Bulletin addresses the specific requirements of paragraph 1, section (f) of EO 192, which states that:

Prior to each shift, conduct daily health checks of employees, such as temperature screenings, visual symptom checking, self-assessment checklists, and/or health questionnaires, consistent with CDC guidance, including latest CDC guidance regarding COVID-19 symptoms, consistent with the confidentiality requirements of the ADA, NJLAD and any other applicable laws, and consistent with any guidance from the Equal Employment Opportunity Commission ("EEOC") and the New Jersey Division on Civil Rights

WHAT ACTION IS REQUIRED BY EMPLOYERS REGARDING HEALTH CHECKS?

Employers must ensure that daily health checks in compliance with the most recent CDC guidance are conducted before any employee's shift and ensure that all information gathered is protected under federal and State confidentiality requirements. Although the above language provides a list of the types of health checks that may be used, EO 192 ultimately gives an employer the discretion to adopt and implement the specific type, method, and manner of conducting health checks that meet the needs of the workplace.

MUST THE EMPLOYER CONDUCT THE ACTUAL HEALTH SCREENING?

No. Neither EO 192 nor the CDC guidance requires that the employer conduct specific health screening. Instead, an employer may require that the employee conduct a self-assessment each day before entering the workplace and confirm in writing to the employer that they have completed the self-assessment and are not disqualified from coming to work.

WHAT ARE THE OPTIONS FOR HEALTH SCREENINGS?

Based on EO 192 and current CDC guidance, employers have the option to implement one or more on-site and/or off-site health screening methods.

On-site screenings conducted by the employer

Employers may administer temperature screenings at a designated access point to check each employee's temperature before entering the workplace. Employers may also conduct visual symptom checking and/or distribute a health questionnaire to be completed by the employee.

- Current CDC guidance states that an employee with a temperature of 100.4 degrees Fahrenheit or higher should not enter the workplace.
- Screenings should be conducted at an access point that minimizes the risk to other employees coming into contact with a potentially symptomatic employee.

Off-site screenings conducted by the employee

Employers may require that employees conduct their temperature checks, a self-assessment checklist, and/or complete a health questionnaire before entering the workplace. This is a viable alternative for employers who lack staffing/funding to conduct on-site checks.

- Current CDC guidance states that an employee with a temperature of 100.4 degrees Fahrenheit or higher should not enter the workplace.
- CDC guidance also states that employees should not enter the workplace if they are under evaluation for COVID-19, are waiting for the results of a viral test to confirm infection, or have been diagnosed with COVID-19 and not yet cleared to discontinue isolation.
- The CDC issued guidance and a suggested employee health questionnaire, which may be found at: <https://www.cdc.gov/screening/paper-version.pdf>
- Another option is for Employees to use New Jersey's health assessment tool located at <https://covid19.nj.gov/forms/self>
- Some payroll services now provide a health assessment tool that employees may utilize at a cost to the employer. The payroll service confidentially maintains the data on behalf of the employer.

Workplace Safety Precautions

Public employers have the following duties and responsibilities concerning employees:

- Make sure employees maintain a social distance of six-feet from one another while at work.
- If social distancing is not possible, employers are required to install physical barriers between workstations "wherever possible."
- Face coverings are mandatory for employees unless there is a medical reason the employee cannot wear a mask. If employees do not have a mask, the employer must provide one. Employees are permitted to remove their face coverings at their workstations. Employers may deny entry to the worksite to any employee who declines to wear a face mask.
- Hand sanitizers must be readily available to employees.
- Ensure that employees practice regular "hand hygiene," particularly when they frequently interact with the public. This includes providing break times for employees for repeated handwashing.
- Routinely clean and disinfect all high-touch areas per CDC guidelines.
- Immediately separate and send home employees who appear to have symptoms. Clean and disinfect all workspaces after an employee tests positive.
- Promptly notify all employees of any known exposure to COVID-19 at the worksite, consistent with the ADA and HIPAA confidentiality requirements.

WHAT ABOUT PUBLIC ACCESS TO FACILITIES?

Public employers have the following duties and responsibilities concerning members of the public:

- Establish customer traffic flow patterns that will maintain social distancing in your facilities.
- Face coverings are mandatory for any customers or visitors entering any public buildings or indoor facilities unless there is a medical reason the customers or visitors cannot wear a mask. Signs must be posted at all entryway areas, and employers may deny entry to the worksite to any customer or visitor who declines to wear a face mask.
- Employers may deny entrance to a customer or visitor who declines to wear a mask unless doing so would violate the ADA or NJLAD, where reasonable accommodation may be required. Employers may not ask for documentation of a medical condition upon request of reasonable accommodation. Considering the duty of public entities to protect the health, safety, and welfare of the public, it is acceptable to implement temperature checks at gatherings, such as public meetings held at a municipal building.

- The Safety Director recommends that public employers provide hand sanitizer stations at each entryway for the members of the public.
- Any visitors seeking entry who will be participating in any meetings or conferences in an indoor public facility, conduct a health check of the visitors, consistent with CDC guidelines. This requirement may be accomplished by asking the visitors to sign in and fill out a health questionnaire recommended by the CDC (See link above). The forms should be collected immediately, and the information must be kept confidential.
- If public meetings are scheduled for indoor meeting rooms, the COVID-19 indoor restrictions must be observed.

IS HEALTH SCREENING INFORMATION CONFIDENTIAL?

Public entity employers are not generally considered "covered entities" under HIPAA. However, under the ADA and other applicable federal and State laws, employers who collect health screening information through on-site or off-site screening would be required to protect the confidentiality of that information. For records requests under the Open Public Records Act or common law right of access, health check information would be exempt from disclosure under federal and State law.

A suggestion to help maintain confidentiality is to identify employees by number, rather than name, in health check records and to restrict access to such information by other employees. Employers should also be aware that turning away at an access point after a temperature check could visually inform other employees about that individual's health status. Therefore, efforts should be made to minimize employees' access points and use discretion regarding communication with employees.

WHO IS EXEMPT FROM THE REQUIREMENTS OF EO 192?

The mandates of EO 192 do not apply when they interfere with the discharge of the operational duties of first responders, emergency management personnel, emergency dispatchers, public health personnel, court personnel, law enforcement and corrections personnel, housing and shelter personnel, and governmental employees engaged in emergency response activities.

WHAT IS THE PENALTY FOR NONCOMPLIANCE?

Employers must comply with EO 192 or face fines, penalties, and shut-down for violations. Employees who believe that their employer has failed to comply with EO 192 are encouraged to file a health and safety complaint through New Jersey's Public Employees Occupational Safety and Health (PEOSH) system.

CONCLUSION

Employers must ultimately decide what health check system best enables them to protect their workforce and the public while complying with current CDC guidelines, EO 192, and other applicable federal and State law. Regardless of what options are chosen, it is imperative that employers put written policies and procedures in place to instruct employees as to what is required, so they know what steps they must take. Employers should also document the procedures they have implemented to comply with Executive Order 192 if an issue arises.

Additional Resources

The Safety Director's Office issued several COVID-19 related bulletins that may further assist public employers in complying with the requirements under EO 192. Those bulletins are available at <https://njce.org/covid-19-updates/> and <https://njce.org/safety/safety-bulletins/>.

Also, the CDC has excellent resource guides available as well at the following link:
<https://www.cdc.gov/coronavirus/2019-nCoV/index.html>