

Employee Privacy Issues During Covid-19

Privacy and Cybersecurity Bulletin



Employers who are continuing operations during the current COVID-19 pandemic are obligated to take reasonable steps to protect the health and safety of their workers. In order to do this, employers may need to ask employees some personal questions about their health status or conduct health assessments. However, privacy laws continue to apply in spite of the ongoing public health emergency, and employers should be mindful of how privacy laws may limit what can be asked of employees.

This bulletin is intended to provide general information about various privacy law issues that may arise when employers request personal health information from employees. In all cases, legal advice that is specific to the privacy legislation that applies to the employer should be sought. Different privacy legislation will apply depending on whether the employer is federally or provincially regulated, public or private sector, union or non union, where their employees are located, and the industry and type of employer.

1. Can I ask employees if they have any COVID-19 symptoms?

From a privacy law perspective, asking employees if they have any COVID-19 symptoms should generally be avoided if they are not displaying any symptoms. If, however, an employer has reasonable grounds to suspect that an employee potentially has COVID-19, then asking the employee if they are exhibiting any symptoms of the illness may be reasonable and appropriate. Different rules may apply depending on the type of workplace (e.g. long-term care homes where the health and safety of others is at greater risk).

Employers may want to consider implementing a communicable illness policy that requires employees to disclose if they have, or live with someone who has, COVID-19 symptoms. Under this policy, an employee meeting that criteria should be expected to inform their employer of symptoms through a confidential process, self-isolate at home, follow the advice of the relevant public health agency on treatment and recovery, and keep the employer updated.

2. Can I ask employees to provide a medical note from their doctor?

An employer is legally entitled to request a doctor's note to justify sick leave

(subject to statutory restrictions in some provinces), but because the average doctor's office is currently not equipped to test for COVID-19, a doctor's note may have little to no value at this time.

Similarly, for an employee who has already tested positive for COVID-19 or was previously symptomatic, a doctor's note could indicate if they are no longer experiencing symptoms, but not whether they are free of COVID-19. The doctor's opinion would also be based on limited information since individuals who have or recently had symptoms of COVID-19 are being advised not to attend their doctor's office, meaning that it is likely the employee would not have been physically examined.

3. Can I ask employees to get tested before reporting to work?

Employers generally cannot force employees to undergo testing, and COVID-19 testing is not available on demand. Different rules may apply for certain employers in the healthcare sector.

If an employer has reasonable grounds to suspect an employee potentially has COVID-19, the employer may ask the employee to leave work and request that the employee contact the relevant public health agency and follow their directions on whether testing is appropriate.

4. Can I take employees' temperatures (for purposes of determining if they have a fever) before allowing them to attend work?

Taking employees' temperatures may potentially be a breach of the privacy rights and dignity rights of workers under applicable human rights and privacy legislation.

However, occupational health and safety (OHS) laws are important public welfare legislation. In some cases, the OHS laws may have a superseding provision that allows protecting the lives, health, and safety of both workers and members of the public to prevail over the competing values of privacy rights and dignity rights of employees.

Taking employees' temperatures may also be permitted if there is a *bona fide* reason, such as a demonstrated outbreak of COVID-19 in the workplace or in the community immediately surrounding the workplace, or depending on the nature of the industry (for example – food production).

Legal advice should be sought regarding whether and how best to proceed with temperature screening. Notice should be given and the tests should be done in accordance with an established protocol in order to minimize the intrusion on employees' privacy rights as much as possible.

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