

**Professional Perspective**

# **Tech's Legal Risks For Employers During Covid-19**

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# Tech's Legal Risks For Employers During Covid-19

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Covid-19 presents unprecedented challenges for employers as they try to ensure the safety of employees and customers while still efficiently and productively operating their businesses. Since the pandemic began, a cottage industry has popped up with innovative technology designed to help slow the spread of Covid-19, flatten the curve, and manage compliance with guidance from the Occupational Safety and Health Administration and the Centers for Disease Control.

This technology comes in a variety of forms, each promising to address a specific aspect of the crisis. While many of these technological solutions hold promise and seem poised to help employers manage daily challenges, they also carry legal risks that could outweigh any benefit they profess to provide. In light of this, employers should balance the likelihood of true benefit from these technological solutions against the downside risks before introducing them into the workplace.

## New Tech Solutions

It is often said that necessity is the mother of invention. That has rarely been more true than in recent months. The number of technological solutions available to employers to address the workplace challenges created by Covid-19 has exploded, leaving many employers wondering if they should spend their limited funds to try out these new tools. Temperature scanning devices, social distance monitoring apparatus, wearable devices, and contact and immunity tracing systems are just a few examples in this new arsenal of workplace options.

Employee temperature monitoring has become, and will likely continue to be, a fixture in the workplace, at least for the short term. Innovative companies are capitalizing on this new workplace norm by developing products to streamline the temperature-check process. These new products include paraphernalia, such as rings that track and record the wearer's temperature, kiosks that perform close-range, hands-free temperature scans, and cameras that perform long-range temperature scans.

Technological developments have also appeared to enforce social distancing rules in the workplace. These include surveillance cameras that alert management when employees break social distancing protocol, and wearable devices that flash, vibrate, or emit sounds when an employee comes within a certain proximity of another employee.

Contact and immunity tracing by public health officials also has become widely used to help stem the spread of the virus, and is the catalyst for similar systems to facilitate contact tracing in the workplace. These systems include applications that track locations visited and people contacted by employees, and databases that contain information on employees and others who have contracted and recovered from Covid-19.

These tools and devices can provide employers with streamlined solutions for dealing with the new workplace challenges posed by Covid-19. However, as with any new, untested technology, it is unclear how much benefit they actually provide, and their use presents a number of legal risks that employers should consider. Ultimately, the efficiencies gained through use of this technology may be greatly outweighed by the legal uncertainty they create.

## Employee Privacy Concerns

While emerging technology may streamline processes in the workplace to accommodate safety concerns from Covid-19, many of these new technologies also have raised significant privacy concerns among employee advocates. Some of the products use facial recognition software and location data tracking, and many create and store sensitive information in employee profiles.

For example, thermal cameras, social distancing cameras, and temperature kiosks may include a facial recognition component, linked to an employee profile for data storage and ease of tracking. Contact tracing technology may use employee location data and accumulate broad-based information about an employee's movements, whereabouts, and who they associate with. Temperature checking technology may store information considered confidential medical information under the Americans with Disabilities Act. See [42 U.S.C. § 12112\(d\)](#). All of these functions raise privacy considerations that employers implementing this technology need to grapple with.

Employers should ensure appropriate steps are taken to safeguard the data that is collected and to ensure it is confidentially and securely stored. Significant steps should be considered to prevent the collected information from being compromised. This can create particular challenges for employers that do not regularly collect this type of sensitive data, or that do not already have robust security and information technology controls in place. The cost to protect this type of data, and the risk of not doing so, may far outweigh any efficiencies gained by the technology.

Additionally, employers should be careful to limit who has access to the information that is collected. Strict policies should be put in place to restrict use of the information beyond its intended Covid-19 purposes. Information about who employees have been in contact with can raise concerns around associational discrimination when hiring managers and employment decision-makers are privy to such information.

It is also important to note that federal, state, or local law may require employee consent before collecting, storing, or using certain types of employee data. In some instances, certain information may not be lawful to collect at all, or may require certain disclosures or advanced written consent. Employers will need to be familiar with these requirements before embarking on the use of technology that collects private data.

## Discrimination and Harassment Claims

In addition to privacy risks, employers should not lose sight of more traditional risk factors associated with the use of new Covid-19 monitoring solutions. This is particularly true with temperature and symptom-checking technology. Given the now-common practice of taking an employee's temperature or inquiring about symptoms, it is easy to forget that taking an employee's temperature is a medical examination under the ADA and subject to a variety of restrictions. See [42 U.S.C. § 12112\(d\)](#) and updated [guidance](#) from the Equal Employment Opportunity Commission.

The EEOC permits employers to perform temperature checks on employees during the pandemic. This is because the agency has determined, based on CDC guidance, that individuals with (or who have symptoms of) Covid-19 pose a direct threat to those in the workplace. It is important for employers to monitor this guidance because it could evolve in ways that no longer support temperature screenings in the workplace. As such, employers that require employees to wear temperature-gauging devices, use temperature kiosks, or install thermal cameras to track employee temperatures should be prepared to alter how those items are used when public health officials signal that the pandemic is over—the timing of which may not be clear-cut.

Additionally, employers implementing temperature scanning devices must ensure that proper steps are taken to avoid discriminating against employees in violation of the ADA. See [42 U.S.C. § 12112\(b\)](#). For instance, an employer that expels an employee with a high temperature from the workplace may violate the ADA if the employee's high temperature is due to a long-term health condition that substantially limits one or more of the employee's major life activities.

For this reason, employers should implement procedures that account for the possibility that an employee's high temperature is due to a long-term health condition and not Covid-19. Likewise, employers that perform temperature screenings must take steps to protect the results of those temperature screenings to maintain confidentiality of the information.

If, for example, an employee's temperature reading is visible for other employees to see, or if the employee whose temperature is higher than the employer's protocols permit is walked out of the workplace in front of his co-workers, the employer may be found not to have taken proper protocols to protect medical information under state and federal law. Likewise, an employer who does not protect the identity of employees who test positive for Covid-19 also runs the risk of disability discrimination claims.

The mandatory use of social distancing devices also may present ADA concerns. Social distancing wearables or devices that beep, buzz, flash, or vibrate may exacerbate certain health conditions such as epilepsy or anxiety. Requiring affected employees to wear such devices may run afoul of the ADA if the employer fails to account for these contingencies and make necessary reasonable accommodations where warranted.

Beyond disability discrimination concerns, wearable technology and immunity tracing systems can also present religious harassment and discrimination risks. See [42 U.S.C. § 2000e-2\(a\)](#). For example, an employee may object on religious grounds to wearing a temperature scanning or social distancing device, or submit to a Covid-19 antibody test for purposes of immunity tracing. In such instances, the employer may have an obligation to accommodate those objections, and could

run afoul of the law if it discharges, or otherwise punishes or disadvantages the employee for refusing to wear a device or submit to testing, despite religious objections.

Employers, like all of us, are in uncharted territory as companies work to navigate the unprecedented challenges stemming from the global pandemic. Innovations in technology can seem like the golden ticket for struggling businesses looking for ways to more efficiently and safely reopen their workplaces. But the potential legal ramifications of those new technologies are largely yet to be seen and understood. For these reasons, employers should proceed with caution and be thoughtful about weighing the pros and cons of any technological solutions they adopt.