



DAVID PARKER FOREWORD TO THE SEYFARTH SHAW FAQs

The Infectious Disease Council (<https://infectiousdiseasecouncil.org>) is an organization of multi-specialty experts dedicated to helping businesses and institutions plan for and weather infectious disease outbreaks—today, COVID-19.

In response to COVID-19, all institutions of higher education have by now developed detailed, science-based plans for screening, isolation and quarantine, as well as social distancing requirements to protect their campus, students, faculty and staff. Comprehensive screening, isolation and quarantine measures will by definition involve limitations on personal liberty and the gathering of highly sensitive health information. Institutions can thus expect challenges to their authority to require compliance with policy and procedures.

These FAQs, prepared for the Infectious Disease Council by the international law firm, Seyfarth Shaw, provide concise and accurate guidance on what public health measures may be required, and the legal bases underlying those measures. They also address how institutions should safeguard the sensitive personal information they collect in managing the onboarding process.

Administrators will want to compare their COVID response plan to these FAQs to determine if they are indeed prepared to respond quickly and accurately to challenges to their institutions' efforts to protect their communities.

David Parker

Past Interim Vice Chancellor and

General Counsel for UNC Chapel Hill + IDC Member





COVID-19 Coronavirus Frequently Asked Questions

*Screening for Symptoms and
Information Use*

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As institutions of higher education plan for bringing students and employees back to campus, they must institute measures to help limit exposure to the COVID-19 coronavirus. As part of an overall mitigation strategy, institutions can screen employees and students for symptoms of COVID-19. This typically combines temperature screening and attestation by an individual regarding (1) whether they have any symptoms of COVID-19; (2) whether they have been in close contact with an individual who has tested positive for COVID-19 or who is experiencing COVID-19 symptoms; and (3) information related to an individual's travel to locations where there is a high incidence of community spread.

This FAQ addresses questions related to:

- What measures institutions may take with respect to screening students and employees for COVID-19 symptoms.
- What are the considerations regarding how institutions should maintain the screening information they collect.
- Which laws should institutions take into account when implementing screening procedures and/or storing screening information.

Institutions that adopt new policies and procedures in response to the coronavirus pandemic are urged to have those measures reviewed for compliance with applicable laws.

1. May an institution take an employee's or student's temperature before allowing them access to campus?

Yes. During the pandemic, and because COVID-19 constitutes a direct threat, the Equal Employment Opportunity Commission has stated that employers may measure employees' body temperature as they arrive for work, and the CDC has addressed the best way to perform temperature checks. [CDC General Business FAQs](#). Some states and municipalities have issued guidelines suggesting or, in some cases, requiring temperature screening of employees.

Institutions may also take a student's temperature before granting them access to campus or certain campus facilities. The CDC has issued "Considerations for Institutions of Higher Education" which can be found here: [CDC Guidance for IHEs](#).

While an elevated temperature is a symptom of COVID-19, it is important to keep in mind that not all individuals infected with COVID-19 have a fever, or even show any symptoms at all, and not all fevers are associated with COVID-19.

2. May an institution require that an employee or student take their own temperature and certify that they do not have a temperature before coming onto campus?

Yes. [CDC General Business FAQs](#); [CDC Guidance for IHEs](#). The benefit of this approach is that institutions do not have to expend resources to conduct the temperature screening.

3. Can an institution ask employees or students whether they are experiencing COVID-19 symptoms?

Yes. [CDC General Business FAQs](#)

4. What symptoms can an institution ask an employee or student about?

Institutions should limit this inquiry to those symptoms identified by the CDC. The CDC updates the symptom list as it learns more about COVID-19. Institutions should regularly review the CDC symptom list to ensure that the questions they ask are consistent with CDC guidance. The most recent list can be found at: [CDC COVID-19 Symptom List](#).

5. Can an institution require students or employees to take a COVID-19 test before they return to campus/work, before participating in classes in person, following an outbreak, or with regularity?

Yes. With respect to employees, the EEOC has stated that employers may require employees to take a test for the virus before returning to the workplace. See [EEOC - COVID-19 FAQ](#), question A.6.

Institutions may also require students to take a COVID-19 test before entering campus or participating in person in classes. [CDC Guidance for IHEs](#). Symptom screening and testing are approved strategies to identify individuals with COVID-19. Screening, testing, and contact tracing can help slow and stop the spread of COVID-19. These strategies must be carried out in a way that protects individuals' privacy and confidentiality and must be consistent with applicable laws and regulations.

6. May an institution ask an employee or student if they have had contact with (i) an individual who has tested positive for COVID-19 or (ii) an individual who is experiencing symptoms of COVID-19?

Yes. Some states and municipalities have issued guidance or laws recommending and, in some jurisdictions, requiring employers to ask these questions of employees before allowing them into the workplace.

The CDC also has recommended that institutions establish policies requiring students, staff and faculty to stay home when they have had close contact (i.e., less than 6 feet for 15 minutes or more) with a person who has COVID-19. [CDC Guidance for IHEs](#).

7. May an institution ask student/employees to identify where they have been on campus or the work-site and who they came into contact with while on campus or the work-site?

Yes. For purposes of contact tracing in the event of exposure or virus contraction, such questions are permissible. [CDC Guidance for IHEs](#). Contact tracing is an effective and permissible disease control strategy, which should be coordinated with expectations of state and local health officials.

8. May an institution ask an employee or student whether they have traveled to certain locations?

Yes. Many states are now requiring individuals who have traveled out of state (internationally and domestically) to self-quarantine for 14 days after the individual has returned. Asking about travel and requiring employees and students to self-quarantine if they have traveled out-of-state or to particular locations is an important mitigation measure. The CDC maintains a list of locations that have been heavily affected by COVID-19. Institutions should regularly check the CDC website for the most up-to-date information ([CDC International & Domestic Travel](#)) as well as any state/local travel guidance and/or restrictions.

9. Can institutions prevent students from accessing campus, or require employees/students to self-quarantine or isolate, if they have tested positive for COVID-19, have COVID-19 symptoms or been exposed to a person who has tested positive or who is experiencing symptoms of COVID-19?

Yes. See [CDC Guidance for IHEs and CDC Guidance for Businesses & Employers](#). Institutions may require students to comply with policies, such as those described above, that are narrowly tailored and designed to assist with slowing and stopping the spread of COVID-19. Institutions of higher education are encouraged to implement or amend their policies to express expectations clearly and outline appropriate consequences to incent adherence.

Frequent testing can be part of a comprehensive strategy to combat COVID-19, in conjunction with promoting behaviors that reduce spread (including staying home or self-isolating when indicated), maintaining healthy environments and operations, and preparing for isolation when someone gets sick.

In accordance with applicable federal, state and local laws and regulations, higher education institutions should notify local health officials, faculty, staff, and students immediately of COVID-19 cases, while maintaining the individual's confidentiality in accordance with the Americans with Disabilities Act.

10. Does an institution have an obligation to measure an employee or student's temperature or ask them about symptoms, exposure to COVID-19, or travel before allowing them on campus?

Although none of these measures are required on a federal level, they are currently recommended by the CDC and many state and local public health authorities. [CDC Guidance for IHEs](#). The CDC's guidance states that, if feasible, institutions should conduct daily health checks or ask faculty, staff, and students to conduct self-checks (e.g., temperature screening and/or symptom checking).

Some state and local health authorities require some type of health screening and employers should ensure that they are complying with those requirements. For example, as of July 1, 2020, California, Colorado, Connecticut, Georgia, Chicago, Indiana, Kentucky, Michigan, Minnesota, Missouri (certain counties/cities), New Hampshire, New Mexico, New York, Ohio, Philadelphia,

Rhode Island, Nashville, Texas (certain cities), Utah, Vermont, Wisconsin (Dane County, Milwaukee), and Wyoming all require that employers screen employees for symptoms of COVID-19.

In terms of federal recommendations, the CDC has issued Interim Guidance for Businesses and Employers Responding to Coronavirus Disease: [CDC Business & Employer Guidance](#). That Guidance recommends that employers consider conducting daily in-person or virtual health checks, including temperature and symptom screening. Likewise, [CDC Guidance for IHEs](#) recommends testing and temperature screening for students on campus.

11. Can employers face liability if they do not conduct temperature and/or COVID-19 symptom screening?

The Occupational Safety and Health Administration (“OSHA”) regulates safety and health hazards not covered by a specific standard through the Occupational Safety and Health Act’s “general duty clause” that applies to “recognized hazards that are causing or are likely to cause death or serious physical harm” in the workplace. The courts have interpreted OSHA’s general duty clause to mean that an employer has a legal obligation to provide a workplace free of conditions or activities that either the employer or industry recognizes as hazardous and that cause, or are likely to cause, death or serious physical harm to employees when there is a feasible method to abate the hazard.

In the COVID-19 context, OSHA will look to an employer’s adherence to applicable CDC and other health-authority recommendations to determine whether the employer has fulfilled its general duty under Section 5(a)(1). Accordingly, while OSHA does not directly require any particular COVID-19 risk-mitigation measures per se, failure to implement feasible CDC recommendations, or other measures that are recommended or required by a state or county, could create OSHA liability. As noted above, the CDC currently recommends that institutions conduct such screening for all students, faculty and staff.

In addition, employers may face workers’ compensation claims if employees contend that they have contracted the COVID-19 virus while at work. Accordingly, employers should follow CDC and other state and local guidance to help limit employee exposure.

Further, employees or students may bring a negligence claim against an institution alleging that the institution had a duty of care to its employees and students and did not use reasonable care to prevent an individual’s contracting the COVID-19 virus. Screening employees and students is one measure that institutions can take to help protect individuals and demonstrate that they used reasonable care to address the COVID-19 threat.

12. Does the law require institutions to retain temperature screening data and other screening forms?

Federal Considerations. There is no federal law requiring employers to retain this data. OSHA has explicitly stated that employers do not have to keep screening forms. However, if an institution chooses to do so, these forms may be considered “medical records” under OSHA’s recordkeeping regulations if they are created by a healthcare professional. Accordingly, if an institution utilizes its

health center personnel or contracts with a third party who uses medically trained personnel, these records may constitute an OSHA medical record and would need to be maintained for the period of the individual's employment plus 30 years. If employees take and record their own temperatures and fill out a screening form or app, these records would not be covered by the OSHA regulations. There are many nuances to whether a document must be treated as a medical record for purposes of OSHA. Accordingly, if an institution is using healthcare professionals to do temperature screening, they should talk to legal counsel to determine whether the OSHA regulations apply.

State/Local Considerations. Some states have passed laws or issued guidance requiring employers to maintain screening information. For example, the state of New York's Reopening Plan requires that New York employers implement a health screening assessment (e.g., questionnaire, temperature check) for employees and essential visitors and that the assessment responses be reviewed and that employers document that they have conducted the required review. The Plan does not specify how long such assessments must be kept or the time frame in which an employer must review the assessments. Institutions should discuss with legal counsel whether there is any state or local guidance related to storing screening information and regularly review guidance related to this topic for any changes.

13. Do data privacy laws apply to information collected during the screening process?

Institutions should consider confidentiality and privacy concerns when establishing protocols to conduct testing and with respect to storage of any screening data.

Many states have added health/medical information to the definition of "personal information" in their state data breach notification laws and unauthorized access to or disclosure of such information could trigger notification to individuals and/or state attorneys general under those laws. Disclosure of such information even within the workplace to employees not otherwise authorized to access health information could trigger reporting obligations under some state data breach notification laws. Accordingly, safe-guarding this information is of paramount importance.

Additionally, institutions in California may be subject to California's Consumer Privacy Act ("CCPA"). The CCPA requires that employers provide not only prior notice to employees before scanning their temperatures, but also that the notice meets the requirements of a Notice of Collection under the CCPA. Specifically, the Notice must explain that the company will collect the employees' body temperature and describe each purpose for which the company will use that information.

Institutions should discuss with legal counsel whether there are any state-specific data privacy laws that may apply to screening information.

14. Does HIPAA apply to screening information provided to institutions by employees or students through a third-party screening tool resulting from self-checks?

No. The HIPAA Privacy Rule is a national privacy standard designed to protect an individual's personal health information (referred to as "PHI"). HIPAA regulates only "covered entities." Covered entities include: (1) health plans; (2) health-care clearinghouses; and (3) health-care

providers that transmit information in electronic form in connection with covered transactions. Accordingly, in the normal course, most higher-education institutions are not covered entities for purposes of HIPAA.

Students

If an institution provides health care to students, such as through its health clinic, it is also a “health care provider” as defined by HIPAA. If an institution also conducts any covered transactions electronically in connection with that health care, it is a covered entity subject to HIPAA. Despite being a covered entity, most educational institutions are not subject to the HIPAA Privacy Rule because the only health records they maintain are “education records” or “treatment records” of eligible students, both of which are excluded from coverage under the HIPAA Privacy Rule.

While COVID-19 screening information regarding students is not covered by HIPAA, it will be considered part of a student’s educational record and will be subject to the Family Educational Rights and Privacy Act (“FERPA”) (discussed below). More information about the applicability of HIPAA and FERPA can be found at <https://www.hhs.gov/hipaa/for-professionals/faq/ferpa-and-hipaa/index.html>.

Employees

With respect to employee screening information, institutions that are not health-care providers are not covered entities for the purposes of HIPAA. Even if an institution is also a health-care provider under HIPAA (as discussed above), HIPAA does not apply to health information contained “in employment records held by a covered entity in its role as an employer.” Accordingly, COVID-19 screening information collected from employees by an institution to determine the employee’s fitness for duty is not covered by HIPAA.

15. Does FERPA apply to the screening information provided to institutions by students?

An educational agency or institution’s use and storage of a student’s personally identifiable information (PII) that is health-related generally is considered an “education record” regulated under FERPA.¹ Accordingly, COVID-19 student screening information maintained by an institution would be covered by FERPA.

FERPA does not require that institutions store any particular information. Instead, FERPA governs an eligible student’s rights to have access to his or her education records, the right to seek to have the records amended, and the right to have control over the disclosure of personally identifiable information from the records.

In order for an institution to share PII, including COVID-19 student screening information, with a third party, it must obtain the student’s prior consent unless an exception to the FERPA disclosure rule applies. With respect to COVID-19, institutions may be required to provide certain information

¹ The term “education records” is defined as those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution, or by a party acting for the agency or institution.

to a public health agency or other third party. FERPA includes a “health or safety emergency” exception, which allows an institution to disclose PII from student education records to a public health agency if the public health agency’s knowledge of the information is necessary to protect the health or safety of students or other individuals.²

For more detailed information about how FERPA applies to disclosure of student PII related to COVID-19, see the US Department of Education Student Privacy Policy Office’s publication, FERPA & Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (FAQs): [FERPA & Coronavirus Disease 2019 \(COVID-19\) FAQs](#).

As a best practice, institutions should obtain FERPA-compliant authorizations as part of its COVID-19 screening process so that it may share this information with public health agencies and/or clinical providers, when warranted.³

16. Does the Americans with Disabilities Act require that screening information be stored in any particular way?

The ADA requires that all medical information be kept confidential (42 U.S.C. § 12112(d)(3)(B) and 12112(d)(4)), including information related to symptoms of COVID-19 or a diagnosis of COVID-19. This includes all test results, temperature screening logs, questionnaires, and other medical information being solicited from employees. Institutions should ensure employees and third parties, such as vendors or other visitors to the workplace, understand that such information must and will be kept confidential and that only people with a “need-to-know” will have access to the medical information.

Information regarding the medical condition or history of an employee must be collected and maintained on separate forms in separate medical files and be treated as a confidential medical record—it should not be included or kept in employee personnel files, and should be handled consistently and not in a discriminatory or retaliatory fashion.

17. Are there other laws that institutions should be aware of in using a third-party screening tool for screening employees or students for COVID-19?

Institutions acting as employers are governed by a variety of federal, state and local anti-discrimination laws including:

- Title VII of the Civil Rights Act which prohibits discrimination based on race, color, religion, sex (including sexual orientation and gender identity), pregnancy and national origin;

² Pursuant to established FERPA exceptions, it may be permissible, e.g. given an institution’s legitimate interest in safety, to share information relating to a student’s reported fever, without requiring prior consent, with security within the control of the university to ensure that student does not gain improper access. 34 CFR 99.31.

³ COVID-19 screening consent forms should accommodate students (generally but not always first-year students) who are younger than 18. For those students, a parent or guardian must authorize the institution or its agent to obtain such information from the underage student and to disclose the information to the institution or, where appropriate, the health care entity providing a clinical training experience.

- The American's with Disabilities Act which prohibits discrimination against individuals with disabilities; and
- The Age Discrimination in Employment Act which prohibits discrimination against employees who are 40 years of age and older.

Accordingly, institutions need to ensure that their screening protocols, including use of any screening tool, are non-discriminatory. Employees and students should be treated consistently regardless of the individual's protected status.

Institutions must also guard against establishing policies that, while well-meaning, may have a discriminatory effect on a particular protected class. For example, although individuals who are over 65 are more likely to experience significant adverse health consequences if they contract the COVID-19 virus, employers should not screen older employees or students differently than younger employees. Similarly, employers should not develop different screening protocols for employees with particular disabilities or for employees who are pregnant.

The EEOC Chair has also issued a statement regarding discrimination and harassment of Asian Americans and other people of Asian descent related to COVID-19. In that statement, the Chair reinforced that the EEOC will be enforcing the nation's anti-discrimination laws during the pandemic.

18. What laws might apply to records related to screening employees or students, including test results or other information provided by a student/employee from a health care provider, that are maintained by an institution?

OSHA - OSHA has explicitly stated that employers do not have to keep screening forms or information related to employee screening. However, if an institution chooses to do so, these forms may be considered "medical records" under OSHA's recordkeeping regulations *if they are created by a healthcare professional*. Other information provided by a student/employee from a health care provider relating to COVID-19 consultations are as well.

ADA - Under the ADA, screening information and other information such as test results are considered a medical record and must be kept confidential. This means that an institution must take steps to safeguard this information, provide access only to those individuals within the organization who have a legitimate need to view this information, and securely store this information separately from an employee's personnel file.

HIPAA - With respect to employees, COVID-19 screening information maintained by an institution to determine an employee's fitness for duty is not covered by HIPAA. Screening and test-related information regarding a student is considered an education record for purposes of FERPA and is also not subject to HIPAA.

FERPA – Screening and test-related information regarding a student that is maintained by an institution will be considered part of a student's education records. Accordingly, institutions must get prior consent before sharing this information with a third-party such as a public health agency, unless an exception to the disclosure rule applies.

State equivalents of the foregoing laws may also apply.