> Covid-19 Client Alert

Employers Take Note: NYS Prohibits Retaining Employee Health Data Collected During COVID-19 Screening Assessments

June 9, 2020

Authors and Key Contacts

If you require any additional information about the regional reopening plan for New York State, or any other employment issue related to COVID-19 or otherwise, please contact any of the attorneys listed below.

Jeffrey P. Englander
Partner & Co-Chair
P (212) 735-8720
jenglander@morrisoncohen.com

Keith A. Markel
Partner & Co-Chair
P (212) 735-8736
kmarkel@morrisoncohen.com

Theresa D'Andrea
Associate
P (212) 735-8751
tdandrea@morrisoncohen.com

John B. Fulfree
Associate
P (212) 735-8850
jfulfree@morrisoncohen.com

Christopher W. Pendleton
Associate
P (212) 735-8783
cpendleton@morrisoncohen.com

Our previous client alert discussed the New York State Phase 2 reopening summary guidance and industry-specific interim detailed guidelines, which apply to "non-essential" businesses in regions permitted to reopen, as well as "essential" businesses throughout the State that were previously permitted to remain open during the COVID-19 pandemic.

In terms of screening, the Phase 2 interim detailed guidelines[1] for offices, real estate services, retail business activities, vehicle sales, leases, and rentals, retail rental, repair, and cleaning services, commercial building management, hair salons and barbershops, and outdoor and take-out / delivery food services allow screening assessments of employees (or visitors or vendors depending on the guidelines) to be performed either remotely (*e.g.,* via telephonic or electronic survey) before the employee reports to the worksite, to the extent possible, or on-site. Daily temperature checks *may* be conducted pursuant to the EEOC and NYS DOH guidelines, but are not required by the State.

Importantly, and in stark contrast to the EEOC's approval of allowing employers to maintain medical information of its employees confidentially and stored separately from the employee's personnel file during the COVID-19 pandemic, New York State has recently stated that "**Responsible Parties are prohibited from keeping records of employee health data (*e.g.*, temperature data)**" as part of its Phase 2 industry-specific interim detailed guidelines released to date. Missing, however, is a definition by New York State as to what constitutes "employee health data." It is important also to highlight that the Phase 2 industry-specific interim guidelines make clear that a "Responsible Party" encompasses both the employer "or another party as may be designated by" the employer to perform the screening assessments, which would include vendors retained to perform such screen testing. Thus, it appears that a vendor who is hired by the employer to perform the requisite screening assessment of employees must also purge records of an employee's health data as well.

Thus, the pivotal question remains – considering the Phase 2 interim detailed guidelines require Responsible Parties to review all employee responses collected by the screening process on a daily basis and maintain a record of such review, how does an employer adequately prove compliance and mitigate the risks associated with potential lawsuits or audits conducted by New York State?

[1] New York State employers must read the interim detailed guidelines specific to their industry carefully to ensure that there is no deviation from the guidance discussed in this client alert and considering the interim detailed guidelines continue to be updated by New York State.

As we await further guidance from New York State on this issue, New York City Health's "Restart NYC" FAQs, which was only published as of June 4, 2020, provides some insight. For instance, in the "Restart NYC" FAQs for retail, construction, manufacturing, and wholesale trade businesses, which are Phase 1 industries that have reopened as of June 8, 2020, the FAQ explicitly asks and answers:

"Should I retain the screening health data?

State guidance says that you are prohibited from keeping records of employees' "health data," (such as temperature data) but it also requires you to document the fact that you have reviewed "assessment responses" every day. We understand this to mean that you should keep a record for each day of the fact that you performed screening – for example, stating the names of personnel who performed the screening, but not recording the results for individual employees who were screened. Documentation could indicate how many people were screened, and how many, if any, were asked to leave as a result of the screening process."

Practically speaking, this means that, whether an employee completes an electronic, telephonic, or in-person questionnaire or assessment regarding having, or being exposed to, COVID-19, all responses, which are considered health data, must be deleted, purged, or destroyed after being reviewed by the screener (regardless of whether the screener is the employer or a third-party vendor). As proof that the screening assessment took place in accordance with the industry-specific interim guidelines and requisite Safety Plans, however, employers (or third-party vendors who are screening employees) may only document on a daily basis, the following: 1) the name of the screener; 2) the number of employees who were screened; and 3) how many employees were asked to leave as a result of the screening process. No individualized assessment results, including the health data disclosed by employees to the screener during the assessment, may be recorded and maintained by the employer (or third-party vendor).

This is a surprising departure from the previously issued EEOC and CDC guidelines, which allow such medical information to be kept by employers confidentially and separately from employee's personnel files. The limitation on record retention may also open a floodgate of pro-employee litigation, as employers will not possess contemporaneous documentation to legally defend themselves in the event of future claims, including how the claimant employee answered each assessment question, which specific assessment criteria led to the employee being sent home from the workplace, and, most importantly, proof that the assessment was applied uniformly and consistently to all employees regardless of a protected class or characteristic.

We therefore recommend as best practice that employers follow-up in writing with employees who are sent home for failing screening assessments to ensure that employees will proceed to immediately reach out to their medical service providers for any further testing, to discuss the possibility of any reasonable accommodations such as having the ability to telework, and to also ascertain and obtain proper documentation for paid leave entitlements if the employee is unable to telework, such as under the Families First Coronavirus Response Act (FFCRA). Of course, as the "Restart NYC" FAQs and the EEOC and CDC guidelines mandate, an employer must maintain such medical information disclosed outside of the screening assessment in files that are kept separate from the employees' personnel files and limited to review by select management, such as Human Resources.

As a more general reminder, employers must develop a Safety Plan and post it at the worksite as they reopen. Employers are also required to affirm compliance to New York State that they have reviewed and understand the industry-specific detailed guidelines and that they have implemented such mandates accordingly. The Morrison Cohen LLP Labor & Employment team is here to help navigate these issues as employees start returning to the workplace and employers contemplate, implement, and update specific-industry guidelines and Safety Plans accordingly.

* * * * * *

Morrison Cohen LLP has created the COVID-19 Resource Taskforce, a multidisciplinary taskforce comprised of attorneys with deep expertise in a broad range of legal areas, to assist clients navigating the challenging and uncertain business and legal environment caused by the COVID-19 pandemic. We encourage clients to utilize our capabilities by reaching out to their primary Morrison Cohen attorney contact, who will put you in touch with the appropriate Taskforce person. You may also reach out directly to Joe Moldovan and Alec Nealon, the Taskforce co-chairs:

Joseph T. Moldovan
Chair, Business Solutions, Restructuring & Governance Practice
Co-Chair COVID-19 Taskforce
P (212) 735-8603
C (917) 693-9682
F (917) 522-3103
jmoldovan@morrisoncohen.com

Alec Nealon
Partner, Executive Compensation & Employee Benefits Practice
Co-Chair COVID-19 Taskforce
P (212) 735-8878
C (646) 318-4845
F (917) 522-9978
anealon@morrisoncohen.com