Thermal Imaging Systems In The Workplace: Panacea Or Problem?

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Employers are looking for better ways to monitor whether individuals entering their workplaces have been exposed to or are infected with COVID-19 – and the use of more sophisticated thermal scanning cameras or similar systems that can process many people quickly has emerged as a possible solution. Before implementing such technology in the workplace, however, you should consider the pros and cons of using them and the logistical hurdles required for implementing them.

What Are Thermal Imaging Systems?
Thermal imaging systems utilize infrared cameras to detect skin temperature from a distance and without actual contact to the skin. They have generally been in limited use in some industries for almost 20 years. Currently, they are being used in governmental and military applications, in transportation, food processing, and manufacturing plants.

What Are The Legal Limitations?
Before you rush to use thermal imaging systems, you should consider the applicability of current and even future laws regulating their use. First, under the Americans With Disabilities Act (and similar state laws), measuring the body temperature of an employee is considered a medical examination and thus is subject to certain limitations. Along these lines, the Equal Employment Opportunity Commission (EEOC) recently approved checking temperatures of employees and even suspending job offers to individuals who have a temperature in excess of 100.4 degrees. The EEOC justifies the use of such measurements now because of the "direct threat" of COVID-19 as a worldwide pandemic, but it is but unclear how long that justification will remain valid.

Second, some states and municipalities have laws that regulate biometric testing and/or facial recognition. For example, states such as California, Illinois, Texas, and Washington have laws regulating the collection and use of biometric identifiers, including fingerprints, handprints, retinal and/or facial scans and voiceprints. Additionally, local ordinances in Massachusetts prohibit the use of facial recognition technologies by government entities. Whether these laws may be used to regulate thermal imaging depends on the language of a particular statute.

Third, you need to consider common law or statutory privacy laws and take precautions not to violate them. Fourth, if your employees are represented by a union, you should consider whether you are permitted by the applicable collective bargaining agreement to implement such new technologies.

You should consider whether you have a duty to bargain with the union representing your employees about such tests.

Finally, other laws have been proposed on a federal or state level regulating similar technologies. For example, the Commercial Facial Recognition Act of 2019 would prohibit commercial entities from using facial recognition technologies without the affirmative consent of the person who is being assessed.

Given the dynamic nature of the area, you should consult counsel and check the law in your jurisdiction before deciding to implement these new systems. If you decide to continue pursuing this technology, you should consider the advantages and disadvantages before you make a final decision, as outlined in the following discussion.

What Are The Advantages Of Thermal Imaging Systems?
A primary advantage of thermal imaging is that the person who handles the system is not required to be physically close to the person being evaluated. In fact, the person who handles the thermal imaging system could be in a different area or room. This eliminates the need for personal protective equipment (PPE) and OSHA-required training for temperature takers, such as that required for work around bloodborne pathogens.

Thermal imaging systems generally have been shown to accurately measure someone's surface skin temperature faster than the typical forehead or oral (mouth) thermometer that requires a close distance or physical contact with the person being evaluated. This means that thermal imaging systems are well adapted to triage large numbers of individuals for initial temperature assessment in high throughput areas, such as ports of entry, airports, train stations, sporting events, and other places where large numbers of individuals need to be scanned in a short time. For employers that operate food processing plants, construction sites, large manufacturing plants, or similar high-traffic businesses, this aspect of the system could be very welcome. It could solve logistical challenges while avoiding the thorny question of whether workers need to be compensated for the time waiting to have their temperatures taken.

Thermal imaging systems can also be an efficient and effective method of complying with requirements to take temperatures that may be imposed by government entities or other third parties, such as the owner of a construction site. For example, in Colorado, New Jersey, and New York City, among others, employers in certain industries have been required to check temperatures of employees in the workplace.

What Are The Disadvantages Of Thermal Imaging Systems?
The main disadvantage is that thermal imaging does not detect whether someone has COVID-19. That's because, among other things, a person with the coronavirus may not have a fever. A more complete diagnostic test must be performed to determine if someone has COVID-19.

Further, the accuracy of these systems depends on careful set-up and operation, and they need to be used in the right environment and location in order to be effective. Because these systems measure surface skin temperature, which is usually lower than a temperature measured orally, thermal imaging systems need to be properly adjusted to correct for this difference in measurements. And of course, the person handling the thermal imaging system needs to be properly trained for the results to be helpful.

Finally, as with many products, variances in quality exist among the available systems available for use. Those interested in using one need to carefully explore the various products on the market to determine which is best for their situation.

What Are Some Practical Tips For Using Thermal Imaging Systems?
If you decide to proceed with a thermal imaging system at your workplace, here are some practical tips you should follow for the best results:

- Identify who needs to have their temperatures checked, why, when, and how, including if such screening is required by local or state order.
- Communicate with employees about the need for and rationale behind the temperature checks.
- Disclose the use of these systems with proper signage, policies and/or acknowledgement forms.
- Obtain consent to the use of these systems from persons being tested. Consent can be express, such as on a signed waiver form, or implied, through unilateral communications such as signs or policies. All should make it clear that access to the facility is conditioned on consent to the temperature check. State and local laws, however, may vary on the method of consent needed.
- The person operating the system should be trained on its use and operation. This includes proper safety training and use of the equipment.
- If applicable, the person conducting or monitoring the test should use proper PPE.
- The person operating the system should follow all manufacturer instructions to make sure the system is set up properly and located where it can measure surface skin temperature accurately.
- The area where the scanning is done should meet the manufacturer's specifications. For example, the environment should meet certain temperature and relative humidity specifications, not have a heat source, draft or fast-moving air flow, and not have excessive light or reflective surfaces.
- Review the current literature on the effectiveness and proper use of such systems.
- Consult with your counsel and make sure you comply with applicable laws at the time the scanning is done.
- Be willing to negotiate, upon request, with any union representing your employees on the terms and conditions of using such new technologies.

- Develop protocols for dealing with temperatures that are out of range and situations where someone is believed to be at risk for the virus.
- Keep the results of scans confidential as required by the ADA and related laws.
- Consider the procedures that would otherwise be applicable to other types of medical inquiries or examinations.

Conclusion

Thermal imaging systems can be an efficient and effective tool under the right circumstances. But employers need to make sure you are aware of the legal and practical limitations before rushing into the use of such systems.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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