



COVID-19 BRINGS NEW FRAUD SCAMS TO THE WORKPLACE



Mary C. Moffatt



Rosalia Fiorello

“According to ... the FBI, the incident cost the company in excess of \$100,000.”

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 not indicate that Davis had been treated for or diagnosed with COVID-19.

The letter eventually made its way to the company’s Human Resources Manager, who observed some indications of fraud, primarily some questionable dates,

Employers have faced numerous challenges throughout the pandemic, including the issue of fake COVID-19 claims by employees seeking to take advantage of paid leave or other benefits.

In one such case an employee in Georgia - Antonio Davis - texted his supervisor advising that he had tested positive for COVID-19, and that he would be sending over the discharge papers with quarantine instructions. Davis later told the plant manager by telephone that he had received a positive COVID test result. The plant manager explained to Davis that if he in fact had COVID-19, the company would shut down the plant for cleaning and would need to notify other employees in close contact with Davis that they would have to be quarantined also. Minutes later, Davis emailed the plant manager a copy of what appeared to be a medical excuse letter, stating Davis had been admitted to a medical center in Atlanta, that he should quarantine for 14 days, and avoid contact with people if possible. The letter did

the fact that the letter was unsigned, and did not appear to be on a formal letterhead. After an investigation, including inquiries and unanswered phone calls to the employee, the Human Resources Manager placed Davis on unpaid suspension status and in several voicemails and text messages, advised Davis that if he did not provide his test results immediately, his employment would be terminated.

Davis never responded to these contacts and never provided documentation of a positive COVID-19 test result. Davis was eventually terminated from his employment but in reliance on Davis’ representations and to protect its employees and the public from serious public health issues, the company closed the plant for thorough cleaning, and paid the salaries of employees who quarantined because they had been in close contact with Davis. According to an affidavit filed in U.S. District Court by a Special Agent with the FBI, the incident cost the company in excess of \$100,000.

Davis was arrested by the FBI in May on federal charges of knowingly devising a scheme to defraud by using false or fraudulent pretenses, representations or promises about a material fact with the intent to defraud and transmitting by wire a communication in interstate commerce to help carry out the scheme to defraud in violation of 18 U.S.C. §1343. (Davis was also charged with violation of 18 U.S.C. §1344, based on bank fraud regarding a fraudulent mortgage application.) Wire fraud includes any number of interstate communication devices - such as a mobile phone, telephone, e-mail, fax, text message or even through social media - and these are interstate communications because they generally cross state lines. On December 14, 2020, Davis pled guilty to the criminal charges; sentencing is scheduled for March 25, 2021 in the U.S. District Court for the Northern District of Georgia.

So... what does all of this mean for employers?

Recently, the EEOC provided guidance on how employers should proceed with various COVID-19 scenarios. The guidance suggests merely asking or requiring an employee

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CAN EMPLOYERS REQUIRE EMPLOYEES TO OBTAIN COVID-19 VACCINATIONS?



Kelly A. Campbell

“Employers need to ensure that requests for accommodation are recognized during the vaccination program administration”

Now that COVID-19 vaccinations are becoming available, employers are considering whether to require employees to be vaccinated against this virus. But is this legal? While the general answer is “yes” in employment-at-will states, there are multiple legal issues involved in the process. Employers should consider various legal requirements, such as State or local laws which may impede employment-at-will status, collective bargaining agreements, and State and Federal laws which require employers to provide accommodations to certain

employees. Employers should also consider the employee morale issue associated with a vaccination mandate, given the prevalence of the anti-vaccine movement and the anticipated push-back from fearful employees.

Thus, the answer is not so simple. Fortunately, the EEOC issued amended guidance on 12/16/2020 to assist employers in assessing their legal requirements and responsibilities in this process.

One of the biggest legal issues associated with the administration of a mandatory vaccination is the Americans with Disabilities Act as Amended (ADA). The ADA requires that employers keep confidential all employee medical information, no matter how obtained. This includes medical information obtained through a COVID-19 vaccination program.

The ADA also limits employers’ ability to require medical examinations of an employee. In its recent guidance, the EEOC clarified that the COVID-19 vaccination itself is not a medical examination for purposes of the ADA.

Pre-screening vaccination questions, however, may implicate the ADA’s limitations on disability-related inquiries, if they seek information which may disclose a disability. Any pre-screening questions submitted by the employer to the employee which elicit information about a disability must be job-related and consistent with business necessity. The EEOC guidance states that “to meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions, and therefore, does not receive a vaccination, will pose a direct threat to the health or safety” of the employee or others.

The EEOC guidance describes two circumstances in which disability-related questions can be asked

without need to satisfy the job-related and business necessity requirement. First, if the employer has offered the vaccination to employees on a voluntary basis, the employee’s decision to answer pre-screening questions must also be voluntary. If the employee chooses not to answer these questions, the employer may decline to administer the vaccination but may not retaliate against the employee for refusing to answer the questions. Second, if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA restrictions on disability-related inquiries would not apply to the pre-screening process.

The EEOC guidance also clarifies that requiring an employee to demonstrate proof of receipt of a COVID-19 vaccination is not a disability-related inquiry, as it is not likely to elicit information about a disability. However, subsequent employer questions, such as asking an employee why they did not receive a vaccination, may elicit disability-related information and would be subject to the ADA requirement of being job-related and consistent with business necessity.

The EEOC guidance notes that the ADA allows an employer to have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, if a safety-based qualification, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” Employers are required to conduct an individualized assessment to determine whether a direct threat exists. According to the EEOC guidance, a direct threat conclusion “would include a determination that an unvaccinated individual will expose others to the virus at the worksite.” That individual cannot be excluded, however, unless there is no way to provide a reasonable accommodation that would eliminate or reduce the risk presented by the unvaccinated employee. If the direct threat cannot be reduced to an acceptable level, then the employee can be excluded from physically entering the workplace. However, the employer should then consider other potential accommodations such as allowing the employee to work remotely, using the same steps that an employer takes when physically excluding employees due to a current COVID-19 diagnosis or symptoms.

Employers need to ensure that requests for accommodation are recognized during the vaccination program administration, and that the interactive process is engaged to identify potential reasonable accommodation

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Mary C. Moffatt

“[T]he Goldman Sachs Group and Netflix are both adding rapid, regular on-site COVID-19 testing for all employees as they physically enter the workspace ... ”

employees as they physically enter the workspace, with CVS Health Corp. reportedly providing the tests, which provides results within just a few minutes. Other employers, such as Tyson Foods and Wal-Mart (on a limited basis) have implemented periodic required testing of employees as well.

Employers may require employees to be tested for COVID-19 when such testing is “job-related and consistent with business necessity,” and in accordance with guidance from the CDC and the recently updated EEOC guidance at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other->

IS EMPLOYER-REQUIRED COVID-19 TESTING AN ALTERNATIVE TO THE VACCINE?

As employers consider whether the COVID-19 vaccination should be mandatory for employees, issues arise regarding what to do when employees refuse the vaccine, or when they have legally-protected reasons for declining the vaccine. In addition, while most of the general population awaits access to the vaccine, some employers have implemented alternative measures to mandatory vaccinations. In a recent Wall Street Journal article, it was reported that the Goldman Sachs Group and Netflix are both adding rapid, regular on-site COVID-19 testing for all

employees. Such tests must be accurate, reliable and must be administered in a manner that is nondiscriminatory and consistently applied across the employees who are required to be tested. In addition, employers considering the “COVID-19 test upon entry” must also consider the implications under the Fair Labor Standards Act (as the time employees spend waiting for the test and results is arguably compensable time), medical record confidentiality considerations, and how to address test results. What happens if a positive result later shows to be a false-positive? How much can an employer rely on a negative test result? Employers should also review OSHA’s Guidance on Returning to Work, <https://www.osha.gov/Publications/OSHA4045.pdf>. Employers must also remember that permitted COVID-testing does not include testing for the antibody (which is different from a viral test) because antibody-testing does not meet the “job-related/business necessity” standard.

If an employee’s objection to testing is based on disability/medical or religious reasons, employers must provide some reasonable accommodation to the employee under the ADA, Title VII, and similar laws. Even with such testing, employers should continue to encourage social distancing, regular handwashing, and the use of other safety measures such as masks/PPE that may apply to the particular workforce. For employers who decide to mandate either testing or vaccinations, a well-drafted written policy and procedure, adhering to EEOC guidance and other applicable laws for compliance, is essential and should be implemented with guidance from employment counsel.

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options, if available. However, there may be situations where an accommodation is not reasonable or possible.

The same considerations should be applied if a pregnant employee states that she has been advised due to medical reasons related to her pregnancy to not receive the vaccine. The employer should consider the request, and conduct an individualized assessment to determine whether reasonable accommodations can be provided.

Accommodations may also be necessary if an employee declines vaccination due to a sincerely held religious belief, practice, or observance. However, if no reasonable accommodation is possible, then the employer may exclude the employee from the workplace. This does not mean the employer may automatically discharge the employee as considerations should be given to rights and responsibilities under other laws.

Another legal issue which may arise is the application of the Genetic Information Nondiscrimination Act (GINA), which prohibits an employer or a doctor working for the

employer from asking questions about genetic information. Administering a vaccine or requiring employees to provide proof of vaccination does not implicate GINA because it does not involve the use of genetic information to make employment decisions or acquire or disclose genetic information. However, the pre-screening questions may violate GINA, if the employee is asked about genetic information, such as family medical history. GINA does not prohibit an employee’s own health care provider from asking about genetic information. So, employers who want to minimize the risk of potential GINA liability may want to request employees to provide proof of vaccination (from their own health care provider) instead of administering the vaccination themselves, ensuring that the proof of vaccination does not include genetic information.

Employers who mandate vaccination could also face potential liability that arises from requiring a vaccine where the vaccine then causes harm to the employee. This could result in workers’ compensation and/or tort liability

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claims asserted against the employer.

In summary, employers can generally require employees to get the COVID-19 vaccine and may bar them from the workplace if they refuse. However, employers should consult with legal counsel to fully consider all legal implications and considerations in drafting an appropriate policy and procedure. To reduce the potential legal risks, employers may consider requiring employees to provide proof of vaccination, whereby the employee obtains the

vaccination from a health care provider of their choosing, instead of the employer administering the vaccination process itself or through a contracted pharmacy or health care provider. Employers should also consider the efficacy of simply encouraging their employees to get the vaccine rather than issuing a company-wide mandate, including incentives such as paid time off to receive the vaccine and recover from any side effects.

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to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry as it is not likely to elicit information about a disability. Employers should continue to ask employees for proper documentation and analyze the documentation thoroughly to prevent situations like the ones in Georgia. HR is uniquely equipped in many cases to observe indications of fraudulent claims and to handle them appropriately in accordance with applicable laws.

On December 21, 2020, the U.S. Department of Health and Human Services Office of Inspector General alerted the public about fraud schemes related to the COVID-19. The OIG indicated scammers are using various methodologies for COVID-19-related scams. Of note, these scammers are offering individuals COVID-19 tests, HHS grants, and Medicare prescription cards in exchange for personal details, including Medicare information. For more information and details visit <https://oig.hhs.gov/coronavirus/fraud-alert-covid19.asp>.

If employers choose to require employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the EEOC suggests that employers make clear to employees not to provide any medical information as part of the proof, to avoid implicating the Americans with Disabilities Act. In other words, ensure your policy and procedure for COVID-19 is explicit and provides that no other personal, medical details of the employee should be on their proof of vaccination documentation. Keep in mind if an employee refuses to work because they believe there is an immediate or imminent threat of death or serious harm due to their COVID-19 concerns, an employer should immediately analyze the situation and consult with employment counsel to determine the viability of the employee's concern.

The same care should be taken with respect to claims for unemployment compensation, which is another area recently noted as having many fraudulent claims. For example, in California a grand jury returned an

indictment involving a prison-based scheme out of the Central California Women's Facility (CCWF). An inmate and a parolee were indicted for conspiracy to commit mail fraud and aggravated identity theft charges for the submission of several fraudulent Employment Development Department unemployment insurance claims. The scheme was discovered via recorded jail calls and emails which showed the inmate obtained names, dates of birth, and social security numbers for inmates at CCWF. The inmate then relayed this information to the parolee, who submitted fraudulent claims. These claims falsely stated that the inmates at CCWF had worked within the prescribed period as hairstylists, barbers, and other occupations, and that they were available to work when they were actually incarcerated. Both women were able to steal \$200,000 from the Employment Development Department.

In another recent California scam, a former Employment Development Department employee is currently accused of a mail scheme involving almost 100 fake unemployment claims filed in other people's names. According to the criminal complaint, the employee was able to get at least 12 of those claims processed for a value of over \$200,000 in unemployment benefits. For reference, if all 100 claims were accepted, it is anticipated the former employee would have made at least \$2 million in stolen money.

Do not let a COVID-19 incidents like the ones mentioned above cost your company. Employers should look to the CDC recommendations and EEOC guidance when dealing with various COVID-19 scenarios but its best to consult with employment counsel regarding your policies and procedures. Consulting with counsel ensures proper protocol is in place, that the policies and procedures implemented are consistent, and that any questions of falsities or discovery of fraudulent behavior is reported to the proper authorities.

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