

Faking COVID-19 Illness Can Have Serious Consequences

Employers should have clear time-off policies and consider safety first

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Employees who fake coronavirus-related illnesses to get out of work—though doing so may be rare—could lose their jobs and face criminal penalties. Additionally, businesses may have to take costly steps to clean the worksite and trace employee contacts after an employee reports that he or she has tested positive for the virus. Employers should take each claim seriously and also have procedures in place to identify false claims.

"Employers should remain empathetic, sympathetic and reassuring given the continued spread of coronavirus," said Mark Keenan, an attorney with Barnes & Thornburg in Atlanta. "However, employers must also be vigilant about potential fraudulent reports."

Despite the potential that an employee might falsely report a positive test, attorney Joseph Shelton with Fisher Phillips in Nashville said he still advises employers to "stay the course on doing what's right in terms of the employer's efforts to take appropriate cautions to hopefully prevent any outbreaks."

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Criminal Sanctions

The FBI recently warned employers to be on the lookout for potential fraud (<https://www.cnn.com/2020/04/14/politics/fbi-warning-fake-coronavirus-test-results/index.html>), citing the case of an employee at a critical manufacturing facility who faked a positive COVID-19 test result, leading to a plant shutdown and productivity loss of \$175,000.

In some cases, employees have been (<https://www.cnn.com/2020/05/22/us/georgia-man-covid-19-charged-false-diagnosis/index.html>) arrested for making fraudulent COVID-19 claims, noted Scott McLaughlin, an attorney with Eversheds Sutherland in Houston. Aside from that, he said, there could be a variety of legal consequences, depending on the specific facts of the misrepresentation.

However, Barnes & Thornburg's Keenan observed, "these types of cases appear to be few and far between." Since a number of states are still reporting increases in daily infection rates (<https://www.washingtonpost.com/nation/2020/06/23/coronavirus-live-updates-us/>), employers shouldn't assume their employees are in this group, he said.

McLaughlin noted that there will be some workers who are "playing the system." He added, "There is not a way to avoid that, and, in this situation, employers obviously need to err on the side of safety and caution first."

Asking for Documentation

The U.S. Centers for Disease Control and Prevention has said that employers "should not require sick employees to provide a COVID-19 test result or a health care provider's note to validate their illness, qualify for sick leave or to return to work."

The employee might not be able to see a physician to obtain a note or a test. But even for COVID-19-related issues, Keenan said, the employer can and should require appropriate documentation confirming the employee's need for paid time off or leave under the Families First Coronavirus Response Act (FFCRA) or the Family and Medical Leave Act (FMLA). The U.S. Department of Labor's FFCRA regulations (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-releases-ffcra-regulations-coronavirus.aspx) state that the employer may require employees to provide the following:

A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.

"Of course, employers would need to be compliant with any local or state laws that might impact the documentation issue," noted Ariel Kelly, an attorney with Fisher Phillips in Nashville, Tenn.

Keenan suggested that employers ask follow-up questions to clarify ambiguities and continue to verify anything that seems out of the ordinary, just as they would with ambiguous or problematic FMLA requests. "Without being heavy-handed, the employer can remind all employees of the critical importance of providing accurate information so that the employer can take steps to ensure the safety of the workforce," he said.

Employers should also note that the Equal Employment Opportunity Commission has specifically stated that documentation can be requested in disability matters (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-answers-coronavirus-questions-on-return-to-work.aspx).

"Employment lawyers always say to document everything," said Kathy Dudley Helms, an attorney with Ogletree Deakins in Columbia, S.C. However, she said, there may be circumstances, such as in a COVID-19 hot spot, where obtaining a note or test would overburden health care providers. So employers may need to be flexible.

McLaughlin at Eversheds Sutherland explained, "From a workplace-safety standpoint, it is perfectly acceptable for an employer to require fitness-for-duty information from a physician when an employee has had COVID-19 or symptoms or there are other reasons to be concerned about whether an employee has been exposed. Generally, employers are within their rights to seek documentation of COVID-19-free status because of their obligation to maintain a safe workplace."

Time-Off Policies

Most employers have policies outlining the consequences of falsifying documents. "Employers need to have clearly communicated rules and expectations and then abide by them," Helms said.

McLaughlin noted that an employer can fire a worker who is caught falsely reporting an illness from COVID-19. "Employers should not, however, allow their concern about false sick reporting to mitigate their overall COVID-19 safety practices," he said.

Helms mentioned that an employer can change an excused absence to an unexcused absence if it later discovers that an employee falsified the need for time off.

The gray area occurs when employees say they might have been exposed to COVID-19 and ask to quarantine, she said, which may become an issue if the time off is paid, or employees are permitted to work remotely when they would otherwise be expected to report to the worksite.

"Right now, time out for COVID-19 reasons has been freely given out of an abundance of caution," she noted.

Connecting with Employees

"The current environment presents an opportunity for employers to connect with their workforces in a positive manner," Keenan said. Employers should communicate the steps they've taken to promote employee safety and health, reinforce their infection-control policy, and use the current situation to promote two-way communication.

"Give employees an avenue to report their questions and concerns," he said. "By doing so, employers will foster a positive work climate and positive employee relations, and it is likely that employees themselves would flag potential fraud or abuse of the current pandemic by others."

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