Jessica L. Roe
Attorney

612-351-8305 (D)
612-810-1807 (C)
jroe@roelawgroup.com

60 South Sixth Street
Suite 2670
Minneapolis, MN 55402
612-351-8300 (O)
612-351-8301 (F)
www.roelawgroup.com

NOTES FROM APRIL 8, 2021 WEBINAR

COVID-19 and Variants

Stay on top of the Centers for Disease Control and Prevention ("CDC") website, which provides information and updates related to COVID-19 and its variants.

Currently, three variants of the virus have been identified in the U.S. which spread more easily and faster than previous variants. Scientists are still debating whether the new variants will impact the effectiveness of the current COVID-19 vaccines. Vaccine developers are planning to update their shots to target the variants and Pfizer and Moderna are already working on modifying their vaccines given the variants and the current mutation rate.

HR managers should monitor the variants that enter their workplace. If your company chooses to keep track of vaccinations, you may want to have a system in place to keep track of who has been vaccinated with the current vaccine and who receives the variant-modified vaccine.

Watch for false negative COVID-19 tests with fully vaccinated employees who are showing symptoms of COVID-19. The FDA has noted that the new COVID-19 variants may cause molecular tests to generate false negatives. Further studies are needed to identify the impact each new variant may have on the accuracy of COVID-19 tests. Thus, if symptoms arise, ensure the company has a process for either understanding the type of test taken or a process for quarantine, if necessary.

Have Workplace Safety Measures in Place.

Health screenings for work should be a requirement to ensure employee safety. Businesses should implement multiple health safety measures to manage the new variants and increased COVID-19 cases. Even organizations without state, local, or public health screening guidelines should make screening employees a requirement to prevent outbreaks.

Despite what we don't know about how vaccine efficacy is impacted by COVID-19 variants, it is still best to get vaccinated. The current vaccines will still have the benefit of strengthening your immune system overall and potentially lessening the impact of a COVID-19 variant infection. As Dr. Fauci notes, the vaccines provide protection from

the virus and prevent emergence of new variants. Widespread vaccination is crucial to prevent new strains and mutations.

In the next few months, you will see a dramatic rise in cases due to the variants. Employers should feel confident that their pandemic safety program can handle it. Companies that do not prepare may face losses in productivity.

Update Language for Mask and Face Covering Fit in Alignment with CDC Recommendations.

Your COVID-19 workplace safety measures should discuss mask and face covering use in the workplace. However, the use of masks and face coverings is ultimately most effective when they are worn correctly. The CDC recommends strategies to improve mask fitting to more effectively slow the spread of COVID-19. These strategies include wearing a cloth mask over a medical procedure mask, knotting the ear loops of a medical procedure mask, using a mask fitter, or using a nylon covering over a mask.

Ensure You Have a Quarantine Protocol in Place for Fully Vaccinated Individuals Who May Have Been Exposed to COVID-19.

While receiving a COVID-19 vaccination does reduce the chances of infection, it is still possible to contract the virus after getting vaccinated. On April 2, 2021, the CDC updated its interim recommendations regarding activities fully vaccinated individuals can engage in and how fully vaccinated individuals should proceed if they've been exposed to COVID-19, among other topics.

The CDC recommends that fully vaccinated people who experience COVID-19 symptoms isolate themselves from others (just as non-vaccinated individuals would) and get tested for COVID-19. For fully vaccinated people with no symptoms following an exposure, the CDC states that such individuals need not quarantine or get tested. However, they should still monitor for COVID-19 symptoms for 14 days following an exposure.

Your workplace safety measures should address quarantine protocol for those who have been fully vaccinated, but who have been exposed to COVID-19. Make sure to also follow any applicable state, local, or public health guidance.

Vaccinations in the Workplace

The U.S. Equal Employment Opportunity Commission ("EEOC") has indicated in recent guidance that it is generally permissible for employers to ask employees about COVID-19 vaccination status. That's because this simple question alone is not likely to elicit information from the employee about possible medical conditions, an inquiry that otherwise would invoke federal or state disability laws.

In many cases, the answer to that question alone may be all you really need. If you don't really need to know anything beyond a simple "yes" or "no" to the question of whether they have been vaccinated – and in most cases, you won't – the EEOC suggests warning employees not to provide any other medical information in response to your question to make sure you don't inadvertently receive more information than you want.

If you require proof of vaccination, you should ask the employee to provide documentation from the immunization source showing the date(s) the vaccine was administered. To avoid potential legal issues related to this process, you should affirmatively inform employees that they do not need to provide any additional medical or family history information. The documentation you receive should be treated as a confidential medical record.

What Should You Do Now?

1. Decide if you need to know workers' vaccination status, and if so, who will be responsible for this inquiry.
2. Train your managers not to casually ask your workers about their vaccination status unless there is a specific work-related reason for the question. There may be a natural curiosity or concern on the part of your managers in posing such questions, but you need to let them know about the possible risks involved.
3. Keep information you receive as confidential as you would any medical-related information.
4. Ask employees to be respectful of other employees' privacy regarding vaccine status.
5. Do not let up on your social distancing, mask-wearing, and other safety precautions that you already have in place other than to relax as indicated by the CDC for vaccinated employees.

Americans with Disabilities Act

As an employer, you know to provide reasonable accommodations for applicants and employees with a physical or mental disability. A reasonable accommodation allows an applicant to have an equal opportunity to be considered for the job and allows an employee to be able to perform the essential functions of the job. A reasonable accommodation is not required if it is an undue hardship to the employer.

The critical, first step in providing a reasonable accommodation is to have a dialogue with an applicant or employee. This dialogue is often referred to as the "interactive process." As part of the interactive process, employers must engage in a "timely, good faith" dialogue with an applicant or employee. Here is what we, as litigators, want employers to know about the interactive process:

First, employers should document when a request for reasonable accommodation is received, when the interactive process is initiated, and any discussions between an employer and applicant or employee about the requested accommodation. If there is

subsequent litigation over this issue, this documentation may be helpful evidence to prove that the employer "timely" engaged in the interactive process.

Second, it is important that employers document all potential reasonable accommodations identified and considered, even if a suggested accommodation cannot be provided because it would result in an undue hardship. It is important to show that the employer evaluated the proposed accommodation as part of the interactive process. Evidence of other potential accommodations and the effectiveness of those alternatives can be used to show that the employer acted in "good faith" when engaging in the interactive process.

Third, after providing a reasonable accommodation to an applicant or employee, the employer should confirm that the accommodation is effective. This may mean periodic or ongoing checks to see if the accommodation is still effective. Employers should document these follow-up inquiries. If an accommodation is not meeting an employee's needs, the employer and employee should re-open the interactive process dialogue to consider other potential accommodations.

Finally, employers should ensure they are handling accommodation issues as confidentially as possible. While it may be obvious that an employee has been provided certain accommodations, the underlying medical or disability issues, and the work-related limitations, should be kept confidential.

FCRA Lawsuits

Throughout the last decade, class-action lawsuits claiming violations of the Fair Credit Reporting Act ("FCRA") have been very costly for employers. When your company is running pre-employment screenings, the FCRA isn't the only law you need to follow. Today, there are more jurisdictions with "ban-the-box" laws and salary history bans than ever before. "Ban-the-box" laws delay questions about criminal history until later in the hiring process, while salary history bans prohibit questions about past pay. These initiatives are intended to help ex-offenders land jobs and to reduce pay discrimination.

What are Employer Compliance Responsibilities?

Employers that want to obtain a background check report about a job applicant or current employee must comply with the FCRA and provide to the individual a **standalone document** with a **clear and conspicuous disclosure** of the employer's intention to do so and obtain the individual's **authorization**. Employers will want to ensure their background check companies are in complete compliance with federal and state laws regarding background checks.

FCRA compliance at the employer level includes attention to the following:

Permissible Purpose: The FCRA permits employers to use third-party background screening companies to perform background checks for certain permissible purposes, including to conduct screenings on candidates or employees. If an employer is

conducting screening for employment purposes, they must follow the provisions within the FCRA in order to do so.

Disclosure and Consent: Candidates or employees must be provided written disclosure of the intent to conduct a background check. This disclosure must be separate from all other documents and be presented on its own. In addition, candidates must provide their signed consent for the background check.

By way of background, the principal appellate opinion on disclosure and authorization forms is the Ninth Circuit's *Gilberg v. California Check Cashing Stores, LLC*, No. 17-16263 (January 2019). The *Gilberg* opinion made clear that **any extraneous information** in an FCRA disclosure form violates the FCRA's requirement that the disclosure must be "in a document that consists solely of the disclosure" (the standalone requirement). The employer in *Gilberg* was found to have violated the standalone requirement by:

1. Combining the authorization and disclosure into one document; and
2. Including several state-related disclosures in the form.

Results: Once the background check is complete, but before any adverse hiring decisions are made, the candidate must be shown the results of the background check and be given the opportunity to dispute any incorrect or incomplete results on the report. In addition, candidates must provide their signed consent for the background check.

EEOC Guidance: The EEOC has guidelines in place to protect against discrimination. Employers must consider certain factors, including but not limited to:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct, and/or completion of the sentence;
- The nature of the job held or sought; and
- Whether any federal or state consumer reporting and ban the box laws apply.

Considering each case on an individual basis and factoring in other information such as time, overall character, and rehabilitation efforts will help employers to put past criminal behavior into context. In addition, having well-defined, position-specific hire/no hire matrices in place for your organization will help you apply standards consistently, fairly, and in accordance with EEOC regulations.

2-Step Adverse Action Procedures: If something is reported in a background screening report that may have an adverse effect on the candidate, such that it precludes them from being hired, the FCRA mandates a 2-step adverse action process. First, the employer must provide a written pre-adverse action notification, along with a copy of the consumer report and the Consumer Financial Protection Bureau's "A Summary of Your Rights Under the Fair Credit Reporting Act." The employer must allow for a reasonable time, generally, a minimum of at least 5 business days (some jurisdictions require a longer

period of time) that gives the candidate the chance to explain, dispute, or correct findings before any hiring decision is final. Second, once an adverse hiring decision is final, candidates must be given a written adverse employment decision notice.

Given the steady uptick in FCRA litigation, it is advisable for employers to review their FCRA disclosure and authorization forms on at least a yearly basis, or whenever important appellate opinions are issued, to ensure compliance with the FCRA. In general, the guidance provided by recent court opinions indicate that:

1. Background check disclosure forms may contain some concise explanatory language, **but there is a limit to what is explanatory and what is unlawfully extraneous**.
2. Background check disclosure forms may be presented at the same time as other materials, including application materials, **so long as the background check disclosures are on a separate form**.
3. Language in a **separate authorization form** has no impact on the **disclosure form's compliance** with the FCRA's standalone requirement.