

Legal Issues in Employee Fraud

By Leslie Bottomly

*Partner, Labor & Employment Group
Ater Wynne LLP*



Seven percent of annual revenue is lost to employee fraud according to some estimates.¹ The healthcare industry is not immune from this affliction. Organizations that suspect employee theft face potential liability if they wrongly accuse an innocent employee, or worse, discover their mistake only after the employee has been terminated. This article discusses the need to address suspected employee fraud while mitigating potential employment claims arising from the investigation and response.

Upon suspecting fraud, the first step is to conduct an investigation. Immediately placing the suspect

on leave removes the individual from the workplace, preventing further theft or destruction of evidence.

The investigator should be carefully selected. For less complex matters (pocketing co pays, stealing medication samples), the office manager or human resources representative may be appropriate for the task. Alternatively, if complex financial transactions are involved, a trained forensic accountant may be called for. When the extent of internal involvement with the fraud is unknown, an outside investigator is advisable.

An additional consideration is whether the organization anticipates making an insurance claim or pursuing civil or criminal charges. In such cases, an investigator with experience in these types of proceedings and the documentation required, and perhaps experience testifying in court, may be advisable. Another consideration is whether to engage the investigator through legal counsel in order to take the position that the investigation is subject to attorney-client privilege, which can protect aspects of the investigation from disclosure. This is particularly important if regulatory violations (billing and coding, HIPAA, etc.) are implicated, which may place

the organization in legal jeopardy. The organization will need to decide whether to report to law enforcement. Among the considerations are the desire to see justice imposed against the wrongdoer, the desire to prevent the individual from defrauding their next employer, the requirement of a police report in order to pursue an insurance claim, the time, effort, and possibly the publicity of a criminal prosecution, and discomfort with exposing the employer's operations and books to law enforcement personnel.

In addition, the organization must consider whether it has a legal or ethical obligation to report the wrongdoing to the government or an administrative or professional agency, such as the state medical board.

There are a number of legal constraints that must be observed in investigating employee misconduct. If an outside investigator is used, the Fair Credit Reporting Act (FCRA) imposes administrative requirements. Washington law prohibits the use of polygraphs on employees (except employees of drug manufacturers and distributors). Searching desks, lockers and offices, downloading or accessing e-mails, voicemails and other electronic data, videotaping

or otherwise conducting surveillance of employees, whether at work or off the job, raises significant privacy issues. Legal counsel should be consulted prior to these searches.

Sometimes the suspect will demand to have their lawyer present for an interview. Typically, employees do not have a right to have their lawyer present. In addition, although union workers are entitled to have a union representative present for investigative interviews that may result in discipline², the National Labor Relations Board has held that employees who work in a nonunionized workplace are not entitled to have a coworker present.³

An overly aggressive approach to the investigation (detaining witnesses, berating or interrogating them in an overbearing manner) can lead to claims of intentional infliction of emotional distress. In addition, when theft is first discovered, the facts are rarely clear, making defamation claims a risk (e.g., an employee is wrongly accused of stealing). This is another reason to instruct everyone to maintain strict confidentiality regarding the matter.

Additional legal issues arise in deciding whether to discipline or fire an employee based upon the investigation. The employer should consider any contractual requirements. For example, in a unionized workplace a collective bargaining agreement may require certain steps before termination and it may list specific terminable offenses. Even non-union employers may have progressive discipline policies or other constraints on the discipline that can be imposed. For example, employees

(usually executives) may have formal employment agreements that allow termination for “cause.” The definition of “cause” will need to be analyzed to determine if the conduct constitutes “cause” (sloppy or padded expense reimbursements may not constitute “cause”).

It may be tempting to deduct the amount stolen from the employee’s final paycheck. The law may prohibit this, however. In Washington, it is not permissible to deduct for equipment loaned to the employee that was not returned or to account for till shortages or theft.

Careful hiring practices may reduce exposure to fraud. References should be checked. Former employers that are not willing to discuss the details of the applicant’s performance or reasons for leaving may nevertheless be willing to say whether or not the indi-

vidual is eligible for rehire, or provide other insight into their work history.

Employers may wish to obtain criminal background checks on applicants. When using a third party to conduct a consumer credit and/or criminal background check, an employer must comply with the requirements of the Fair Credit Reporting Act. State laws differ on the permissibility of performing credit checks on applicants.

Stolen co-pays, forged prescriptions, theft of inventory or drug samples, and even fraudulent billing schemes are not uncommon in healthcare organizations. By using careful hiring practices and conducting legally compliant investigations, it is hoped further losses, in the form of legal claims by disgruntled employees, can be avoided.

Leslie Bottomly is a partner in the



Legal counsel from both sides of the brain.

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Contact Kathy Feldman, Seattle, klf@aterwynne.com or Stacey Mark, Portland, sem@aterwynne.com.

ATERWYNNE <small>LLP</small>	
ATTORNEYS AT LAW	
PORTLAND SEATTLE MENLO PARK SALT LAKE CITY	aterwynne.com

601 Union Street Suite 1501 Seattle, WA 98101 206-623-4711	1331 NW Lovejoy St. Suite 900 Portland, OR 97209 503-226-1191
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*Labor and Employment Group in
of Ater Wynne LLP. Contact her in
the firm's Portland office at lgb@
aterwynne.com.*

¹Association of Certified Fraud Examiners

2008 Report to the Nation on Occupational
Fraud and Abuse. (Available at [http://www.
acfe.com/documents/2008-rtnn.pdf](http://www.acfe.com/documents/2008-rtnn.pdf).)

²*NLRB v. Weingarten, Inc.*, 420 US 251
(1975). 420 US 251

³*IBM Corp.*, 341 NLRB 1288 (2004) (holding

that the right to a witness is available only to
union-represented employees, but reaffirm-
ing that an employee may not be disciplined
for merely requesting a witness). *Id.* at 1294.

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