

COMMENTARY ARTICLE

Vaccine implications in workers' compensation

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As the battle against COVID-19 rages on, vaccinations have become a front-line conversation. Over the course of the pandemic, tens of millions of individuals have contracted COVID-19 with hundreds of thousands of those cases resulting in death. (covid.cdc.gov).

Although the vast majority of the cases have been dealt with outside the workers' compensation arena, there have been tens of thousands of cases addressed through the various state workers' compensation systems. Outcomes for those claims in workers' compensation have not been as dire as what was originally projected with over 90% of the claims involving limited time away from work with minimal medical treatment.

As a result of the pandemic, employers have been forced to rapidly adapt in areas that are new, uncertain, and challenging - from deploying work from home strategies to greater adaptation of technology to new state and federal legislation and regulations regarding leave, safety, workers' compensation, and liability. Employers have proven resilient and adapted quickly to the needs of their workforce and their customers. Yet, employers are now faced with another question: what role will vaccinations play in their employment arena?

Vaccine mandates

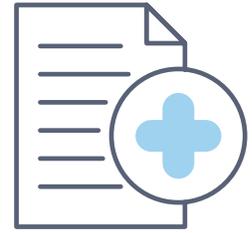
Mandating vaccines is not new to our society. Since *Jacobson v. Massachusetts*, the seminal case on state or municipality authority to mandate vaccinations, the judiciary has consistently upheld such mandates under state law.(1) All states require childhood vaccines as a condition of school entry, albeit with medical exceptions across all states, religious exceptions in 45 states, and philosophical exceptions in 15 states. Some states have incorporated vaccine requirements in the employment arena for healthcare workers based on the reasoning that healthcare workers are at an increased risk of contracting infectious diseases and transmitting them to vulnerable patients. (2)

Over the course of the last several months, many states and employers have tried a variety of approaches to encourage vaccinations for COVID-19. They have launched incentive programs, stressed personal responsibility, and provided mobile vaccination units - to name a few - to attain higher vaccination rates. Recently, several states and municipalities have taken the additional step of mandating vaccinations with the provision that those who do not vaccinate must comply with additional safety protocols. (3)

The General Duty Clause, Section 5 (a) (1) of the Occupational Health and Safety Act (OSHA) requires employers to provide a safe and healthy workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. OSHA frequently provides guidance on the application of that clause to various injuries, conditions, and or diseases that traverse the workplace and did so with regard to COVID-19 and vaccinations in its COVID-19 guidance update on August 13, 2021. In its purpose statement for the update, OSHA emphasized "vaccination is the most effective way to protect against severe illness or death from COVID-19". OSHA further suggested that "employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing - in addition to mask wearing and physical distancing - if they remain unvaccinated." (5) Additionally, OSHA recently updated its FAQ for COVID-19 stating that it will no longer require an employer to record worker side effects from a COVID-19 vaccine through May 2022. OSHA stated this direction was to avoid the appearance of discouraging workers from receiving the COVID-19 vaccination and to not disincentivize employer vaccination efforts. (6)

The Equal Employment Opportunity Commission (EEOC) recently opined on employer-mandated vaccinations for COVID-19. On May 28, 2021 the EEOC issued updated and expanded guidance for employers focusing on four topics: mandatory vaccination policies, accommodations, information about employee vaccination status, and vaccine incentives. The updated guidance reaffirmed that employers can require that employees receive the COVID-19 vaccine as a condition of returning to the workplace. However, employers are obligated to explore reasonable accommodations for employees who cannot be vaccinated due to disabilities or sincerely held religious beliefs. (7)

Workers' compensation implications



As of the writing of this paper, we do not yet have any specific laws, court decisions, or guidance directly addressing adverse reactions to the COVID-19 vaccine and the resulting implications for workers' compensation. Fact based analysis will need to determine whether workers' compensation laws apply to an injury and/or side effects allegedly caused by COVID-19, and this will happen case-by-case and state-by-state. However, courts have rendered decisions on compensability under workers' compensation regarding vaccines administered for smallpox, influenza, and measles that may have resulted in adverse reactions. In the case of *Spicer Mfg. Co. v. Tucker*, the Ohio Supreme Court held that an employee's death as a result of a smallpox vaccination was covered under workers' compensation. The decision was based primarily upon the fact that the employer mandated the vaccine as a condition of employment. Numerous other state courts have addressed side effects allegedly caused by vaccinations with the same or very similar reasoning as to coverage under workers' compensation. (8)

Larson's *Workers' Compensation* treatise, which is widely cited across the country in workers' compensation matters, observes that:

When inoculation is occasioned by the particular conditions of employment, injury resulting from the inoculation should be deemed to have occurred in the course of employment. If there is an element of actual compulsion emanating from the employer, the work connection is beyond question, as when the company requires the employee to submit to vaccination by the company's doctor as soon as the employee is hired, or during an epidemic tells the workers that unless they are vaccinated they cannot work until the epidemic is over. By equal logic, just as an employee on an overseas assignment is entitled to associate the contraction of malaria or polio or tuberculosis with the nature of the work, so any harm stemming from inoculations undertaken to protect against the risks of overseas diseases, whether the inoculations were strictly required or not, should be viewed as flowing directly from the employment. (9)

Recently, the Canadian provinces of Alberta (10) and Columbia (11) have issued guidance regarding the compensability of adverse reactions to COVID-19 vaccines. Although the guidance is not applicable within the United States, the questions and their attendant responses provide insight as to what could be considered in the

determination for compensability for adverse reactions under workers' compensation. As noted by the Ohio Supreme court in *Spicer*, their determination is based on whether the vaccination was a mandatory condition of employment.

An analogous situation for guidance as to COVID-19 vaccine reactions and workers' compensation would be claims that surround employer-sponsored social activities and their question of compensability in the event of an injury. Generally, the more an employer is involved with the social activity that ultimately provides a mutual benefit to the employer and the employee, the more likely the courts will lean towards deciding in favor of the injured worker.

When evaluating implications in workers' compensation for an adverse reaction to a vaccine, questions to consider include:

- Was the vaccination ordered by federal, state or local government?
- Does the employer strongly encourage or require COVID-19 vaccination for its employees?
- Does the employer pay for the vaccinations?
- Is the place of employment used to conduct the vaccinations?
- Is the employee at work when vaccinated?
- Is the employer receiving a mutual benefit (i.e. benefit of customers, business continuity)?
- Does the employee's occupation place them at greater risk of contracting or spreading COVID-19?

Conclusion

As employers encourage or require employees to receive a COVID-19 vaccine, they will need to evaluate the needs and interests of the company along with the best interest of their employees while ensuring a safe and productive work environment. Employers should develop a plan that takes into consideration the various federal and state laws surrounding the 'what,' 'when,' and 'how' vaccinations can be addressed in the employment arena. As for workers' compensation, the legal determination as to whether an adverse reaction to a COVID-19 vaccination is covered or not will depend on the factual details of the specific claim within the particular state jurisdiction.

Footnotes:

- (1). 197 U.S. 11 (1905)
- (2). The CDC maintains an updated on-line database of state laws pertaining to vaccination requirements for healthcare workers. See Centers for Disease Control and Prevention, State Immunization Laws for Healthcare Workers and Patients.
- (3). <https://www.littler.com/publication-press/publication/mandatory-employee-vaccines-coming-state-near-you>
- (4). Virtual Yale CEO Summit: Finding Common Ground Across a Divided Land. Yale School of Management. December 15, 2020.
- (5). Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace
- (6). See <https://www.osha.gov/coronavirus/faqs#vaccine>
- (7). See <https://www.eeoc.gov/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- (8). Alabama – AGO 2003-071; Louisiana – Moore v. St. Francis Cabrini Hospital 679 So.2d 943; New York – Matter of Stabel v. Westinghouse Electric Corp., 79 A.D.2d 842; California – Mather v. WCAB, 48 CCC 326; Massachusetts – Carolyn R. Hick’s Case, 62 Mass. App. Ct. 755; North Carolina – King v. J.N. Arthur, 96 S.E.2d 846; Colorado – City of Littleton v. Schum, 553 P.2d 399; Michigan – Neudeck v. Ford Motor Co., 249 Mich., 690; Ohio - Spicer Mfg. Co. vs. Tucker; Connecticut – Smith v. The Seamless Rubber (150 A. 110); Minnesota – Minn. Stat. Sect. 176.001, subd. 16; Florida – Suniland Toys v. Karns, 148 S0.2d 523; South Carolina – Alewine vs. Tobin Quarries; Illinois – Ida Hyneman v. State of Illinois 13 Ill. Ct. Cl. 150; Missouri – Doyle v. Lakeland Regional Hospital; Texas - Texas Employers Ins. Ass’n. vs. Mitchel 27 S.W. 2d 600; New Jersey – Saintsing v. Steinbach Company 64 A.2d. 99; District of Columbia – Washington Hosp. Ctr. V. District of Columbia Dept of Employment Servs., 821 A.2d 898; Maryland – 88 Op. Att’y Gen. 120; Oregon – Courtney K Leach, 69 Van Natta 439.
- (9). ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 100.01 (Desk Ed. 2000) [hereinafter LARSON'S]. supra note 45, at § 27.03 [2]
- (10). See https://www.wcb.ab.ca/assets/pdfs/workers/WFS_COVID-19_vaccine_reactions.pdf
- (11). See <https://www.worksafefbc.com/en/covid-19/vaccination-and-the-workplace>



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