



January 11, 2021
Agnes Stucke

Professionals

- Agnes Stucke

Related

- Labor, Employment and Immigration
- Worker's Compensation

Mandatory Vaccination: Is It Worth a Shot?

As the COVID-19 vaccine becomes available, many employers are deciding whether to require employees to be vaccinated. In considering a compulsory vaccine program, employers should measure the potential implications of such a program with one that only recommends employees take the vaccine. Employers who mandate vaccination against COVID-19 may face workers' compensation claims if the injections give rise to injuries or prolonged illness.

(The FDA's approval of COVID-19 vaccines for emergency use will result in employers considering the adoption of mandatory vaccination policies for their employees. This is so despite the FDA's position that federal law prohibits mandatory use policies for any drug approved through the Agency's Emergency Use Authorization protocols. For more information, read our previous article on this topic.)

Workers' compensation eligibility requires an employee to prove there is an injury arising out of and in the course of employment. The details on potential workers' compensation liability vary from state-to-state and will likely unfold as state legislatures address COVID-19 and cases are litigated. Compensability should primarily focus on whether the vaccine was given *in the course of* employment. An injury or illness causally related to a mandatory COVID-19 vaccine would likely be compensable under many states' workers' compensation schemes. Employers might have difficulty arguing that adverse reactions did not arise in the course of employment if the employee had no choice but to be vaccinated as a requirement of employment.

In situations where an employer requires employees to be vaccinated, any resulting injury is likely to be deemed work-related. The outcome is less clear when the vaccine is voluntary. However, depending on the facts, a voluntary vaccine might still be considered to arise out of employment. Several factors might be considered in determining whether an injury from a voluntary immunization is work-related. Those factors include whether the vaccine: 1) directly or indirectly benefited the employer; 2) was within the terms, conditions or customs of the employment; 3) was employer or employee created; 4) was unreasonably reckless or created excessive risks; and 5) occurred on the premises of the employer. Side effects and injuries from non-mandated vaccinations might be found compensable depending on whether the employer strongly urged the employee to have the shot even without a formal requirement, whether employees were administered the shot while on the clock, whether the vaccine was provided by the employer at no or reduced cost,

whether the employer received any secondary benefit from the vaccination such as reduced absenteeism or reduced insurance rates, and whether the shot was also made available to non-employees. Employers should consider having an outside vendor dispense the vaccine to further remove the activity from the employment relationship.

One final point for employers to consider is that the law generally does not permit the waiver of potential workers' compensation claims. Even if an employer requires employees to sign a release as a condition of receiving the vaccination, it would likely not operate to bar any workers' compensation claims. In light of these potential legal issues arising from mandatory vaccination programs, and pending further state and federal guidelines, many employers may find that voluntary vaccinations are the safest way to balance protecting their business and their employees. Employers might also determine if there are alternatives that could sufficiently protect their workforce. If the use of masks, social distancing, and continued remote work is available, some employers might prefer those options instead of a vaccine program altogether.

This publication is intended for general information purposes only and does not and is not intended to constitute legal advice. The reader should consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances.