

# COVID-19 Update for Employers: Vaccinations and Re-opening Workplaces

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# Agenda

## **I. Can employers mandate the COVID-19 vaccine?**

- EEOC guidance
- FFCRA regulations
- Other considerations

## **II. Can employers be held liable for not requiring all employees to receive the COVID-19 vaccine?**

- OSHA general duty
- Workers' compensation
- General liability

## **III. Can an employer face workers' compensation liability surrounding the vaccine administration?**

# **Can an Employer Mandate COVID-19 Vaccines?**

# Can Employers Mandate the COVID-19 Vaccine?

## **Yes, under federal law, BUT**

- Must provide reasonable exemptions (religious or medical based)
- Should be done in a way that complies with ADA regulations re: medical inquiries
- Should not conflict with any union collective bargaining agreements to the contrary

# EEOC Guidance: Exemptions

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, an employer should engage in the interactive process to identify reasonable accommodations (such as remote work, work with less person-to-person interaction, or work with PPE) and /or determine if the employee poses a direct threat.

If there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace.

# **EEOC Guidance Regarding Pre-Screening and Medical Inquiries**

If the employer administers the vaccine, it must be careful that pre-screening questions it asks employees are “job-related and consistent with business necessity.”

# FFCRA Guidance

- Families First Coronavirus Response Act (FFCRA) expired Dec. 31, 2020
- Tax credits still in place for employees who voluntarily offer paid leave
- President Biden has asked Congress to expand the FFCRA and expand it through Sept. 30, 2021

# FFCRA Guidance

**FAQ:** Can employers deny paid leave to employees who refuse the vaccine?

*TBD. Not as the law was previously written.*



# **Can an Employer Face Liability for NOT Requiring Employees to Receive COVID-19 Vaccination?**

# OSHA

**General Duty Clause:** Employers have a general duty to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

# OSHA

In a 2009 letter about the influenza vaccine, OSHA also advised employers may require an employee to take an influenza vaccine as long as they do not interfere with the employee's right to refuse vaccination because of a "reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as [a] serious reaction to the vaccine)."

# Workers' Compensation FAQs

- Is there workers' compensation liability if an unvaccinated employee contracts COVID-19 in a workplace where the vaccine was not required?
- Can an employee who refuses the vaccine be required to sign a waiver of any workers' compensation claim against the company?

# General Liability FAQs

- If an employee contracts COVID-19 in a workplace where the vaccine was not mandated and spreads the virus to a family member, can the family member sue the employer?
- Can third parties in the community sue the employer?

# **Can an Employer Face Workers' Compensation Liability Surrounding the Vaccine Administration?**

# **There is No One-Size Fits All Solution . . .**

- State workers' compensation system
- Fact-specific
- Evolving law

# But . . .

There are two federal programs set up to compensate an individual who has a severe reaction to a vaccination:

- 1. Vaccine Injury Compensation Program (VICP)**
- 2. Countermeasures Injury Compensation Program (CICP)**



# VICP and CACP

- Right now, anyone with a COVID-19 vaccine injury must go through the ineffective CACP
- But there is a push to have the federal government to open up the long-established VICP to COVID-19 injury claims
- The CACP is a “payer of last resort” — it will reimburse or pay for medical services or items or lost employment income not covered by other third-party payers like workers’ compensation

# **Can an Employer Face Workers' Compensation Liability Surrounding the Vaccine Administration?**

Answer: It depends (on the facts)!

# Is This Compensable?

- Employer-mandated COVID-19 vaccine → Most likely yes
  - “Arising out of”
  - “In the course of”

# Example

- **2012-031477 Trial Decision:** An employer required a hospital employee to receive immunization shots and shortly after the shot, she developed pain in her right arm. She underwent an MRI that revealed a labral tear. One physician related her right shoulder condition to the shot she received and issued a 5% PPD rating. Another physician indicated the right shoulder condition was not related and issued a 0% PPD rating.
- The main issue was whether the employee was entitled to PPD benefits. However, the employer/insurer had also been previously ordered to pay the employee's medical expenses.
- The ALJ found the employer/insurer were responsible to provide and pay for the claimant's medical expenses. However, the ALJ believed a 0% impairment rating was appropriate and the employee was not entitled to PPD benefits.

# Is This Compensable?

- A non-employer-mandated COVID-19 vaccine
- Factors to consider:
  - Employer pays or provides for it
  - Employer offers it on location
  - Employer allows an employee to receive it during their shift
  - Employer implies it is required or urges an employee to receive it

# Final Thoughts

- Risks and benefits of requiring or encouraging the COVID-19 vaccine
- Risks and benefits of COVID-19 exposure

# QUESTIONS?

s/c

# THANK YOU!



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