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JLO Newsletter Winter 2021

Considerations for Employers and Workers' Compensation Insurers Related to COVID-19 Vaccinations

By: Jordan D. Sisto

Delivery and administration of the first wave of COVID-19 vaccinations in the United States has already begun. Thousands of employees and high-risk individuals in the healthcare field have already received their first or second round of vaccinations. For employers and workers' compensation insurers, this begs several very important questions for which, unfortunately, there are not many clear answers. The following analysis will, hopefully, lend some important context to the Employment and Workers' Compensation landscape that can be expected over the next year at least.

Foremost among employers' concerns is obviously maintaining a safe and healthy workplace. Here at Jardine, Logan & O'Brien, for example, we have engaged in ever-changing screening and protective measures to ensure that our employees remain safe, productive, and able to deliver the highest quality service possible in new remote workspaces, courtrooms, and other virtual spaces. The more analog practice of law over the past several centuries has, largely, gotten a modern digital upgrade. Like most employers, keeping up has come with a lot of difficult and complicated decisions.

As vaccines roll out and become widely available, one of the very first issues faced by employers is whether to mandate the vaccine for employees in order to maintain a safe workplace. In this regard, guidance and caselaw, particularly in our areas of practice in Minnesota, Wisconsin, Iowa, and the Dakotas does little to advise employers and insurers of the risks and benefits of novel and emerging vaccination issues.

However, some historical guidance from both the Centers for Disease Control and Prevention as well as the Occupational Safety and Health Administration tend to shed light on this important decision for employers and insurers. The CDC has historically recommended that all healthcare workers be vaccinated if the worker has any direct or indirect contact with patients. In the wake of the Novel H1N1 Influenza A ("Swine Flu") pandemic of the early 2000's, OSHA provided a position statement on mandatory flu shots for employees in which Jordan Barab, acting Assistant Secretary, intimated that "[…] OSHA does not specifically require employees to take vaccines, an employer may do so." In such cases, employees may still refuse vaccines on religious or health-related grounds pursuant to section 11(c) of the Occupational Safety and Health Act of 1970, Title VII of the Civil Rights Act, and the American's with Disabilities Act.

What follows, then, is that employer-mandated vaccination is vulnerable to challenges on statutory grounds, and employers may not be able to terminate employees who refuse mandatory vaccination. Litigation will reasonably follow such challenges and workers' compensation issues will be inextricably tied to these workplace considerations. According to the Equal Employment Opportunity Commission, in its guidance regarding COVID-19, the ADA allows employers to have standards that require "an individual not pose a direct threat to the health and safety" of coworkers or customers. Thus, an employer seeking to

Announcement

Jardine, Logan & O'Brien, P.L.L.P. is pleased to announce that:

Tessa McEllistrem has been named partner at the firm.

Ms. McEllistrem has been an associate at the firm since 2014 and practices in the areas of civil litigation defense, government liability, and employment law. A graduate of St. Olaf College and William Mitchell School of Law, Ms. McEllistrem also serves on the Board of Directors of the Minnesota Defense Lawyers Association (MDLA).

terminate an employee who fails to accept a mandatory vaccination will have to prove that "a significant risk of substantial harm to the health or safety of an individual or others cannot be eliminated or reduced by reasonable accommodations" to keep the individual employed. The EEOC identified both remote work and leave under the Families First Coronavirus Response Act, or other similar legislation, as reasonable accommodations.

In addition to paying to defend against claims related to injuries associated with vaccination, employers must also consider that mandating an employee's vaccination will likely require that the employer pay for the vaccine, its administration, and the employee's time while being vaccinated, if not also any time the employee may need to recover from any negative side effects of the vaccine. Employers should consider those costs carefully when deciding whether to mandate vaccinations of their employees if other measures are available to ensure workplace safety.

For the moment, employers have some time to decide what they will do. Both of the vaccines currently available, produced by Moderna and Pfizer, were propagated under the FDA's emergency use authority. Vaccines propagated under an EUA cannot be mandated for lack of long-term safety data[1]. However, vaccines propagated by non-emergency measures can be mandated and will likely be available to employers in the near future. In the interim, employers are encouraged to consider the implications of mandating vaccinations and the relative benefit of doing so in their particular offices. The ADA indicates that, for medical treatment to be considered a condition of employment, the treatment must be job-related and consistent with business necessity. "Necessity," here, being defined as based on factual information and not on subjective perceptions or fears. That is, there needs to be a reasonable and articulable basis to believe that mandating a vaccination, such as the COVID-19 vaccine, is necessary to keep the workplace safe. This is the threshold consideration for employers in their analysis.

Federal and State legislation may also play a key role in determining if mandating vaccinations is appropriate. If any government action mandates vaccination, while constitutional challenges will surely follow, employers may be bound by the law. For example, the Supreme Court of the United States, in response to the smallpox epidemic of the early 20th century, upheld Massachusetts decision to mandate the vaccination of all citizens of the Commonwealth. *See Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11 (1905).

If there is a mandate at the federal, state, or local level, complications related to that vaccination are likely compensable under applicable Workers' Compensation Statutes regardless of employer action. Already in Minnesota, per Minnesota Statutes 176.011 subd. 16, an injury or disease resulting from a vaccine in response to a declaration by the Secretary of the United States Department of Health and Human Services under the Public Health Service Act to address an actual or potential health risk related to the employee's employment is an injury or disease arising out of and in the course of employment.

In these cases, the issue for Workers' Compensation Insurers and counsel will be causation. As the vaccines for COVID-19 are novel and have little to no long-term safety data, claimants may be inclined to blame their vaccination for any subsequent adverse effects. The Minnesota Workers' Compensation Court of Appeals heard similar arguments in *Lehman v. City of Madelia*, 1994 WL 600864 (W.C.C.A.) when an employee alleged that a mandatory hepatitis B vaccine was an actual cause of his development of rheumatoid arthritis. The matter came down to a battle of experts as to causation, eventually affirming judgment in favor of the employer and insurer because there was no literature or precedent connecting the vaccine to rheumatoid arthritis. The Employee's Compensation Review Board, however, was not swayed in the same manner. *In the Matter of Allen C. Hundley & Dep't of the Interior, Fish & Wildlife Serv.*, Fredericksburg, Va, 53 E.C.A.B. 551 (May 17, 2002), wherein the ECAB reversed a denial by the Office of Workers' Compensation of an employee's claim that a Lyme's disease vaccination was an actual cause of his rheumatoid arthritis based on an allegedly speculative expert opinion. Similar questions can be expected with the novel COVID-19 vaccines.

Employers and Insurers can also expect the cost of these claims to be varied. Claims related to mandatory vaccines may range from pain or disability resulting in missed work due to adverse reactions to the vaccination (*see Dann v. University of Wisconsin Medical Foundation, Inc.,* No. 15CV001908, 2016 WL 4488360, (Wis. Cir. Feb. 08, 2016)) up to massive damages claims akin to litigation revolving around Thalidomide[2].

At this time, the best advice for employers and insurers is this: stay abreast of State and Federal legislation relating to the COVID-19 pandemic and be prepared to adapt quickly and directly. Further, consider very seriously if mandating a vaccination is "necessary" as defined above for your employees. If so, be prepared to bear the costs mentioned above, at the very least, and to defend against any potential adverse effects that may creep up in the future. As every company likes to say at the moment, these are, indeed, unprecedent times. However, some forethought and prudence will go a long way in avoiding needless and costly litigation.

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[1] *See* 360bbb-3 (e)(1)(A)(ii)(III) of the Food, Drug and Cosmetics Act – 21 U.S.C. 564, giving anyone subject to administration of a mandated product (here, a vaccine) propagated under the EUA the right to refuse the product.

[2] Settlement and awards in litigation surrounding Thalidomide, a drug causing sever birth defects in children whose mothers had taken the drug, ranged in the tens of million's of dollars.

JLO Welcomes Our New Associate Attorneys

Megan A. McDonald

Megan received her Bachelor of Arts degree in Criminal Justice and Sociology from Simpson College in 2017, and her Juris Doctor from University St. Thomas School of Law in 2020. Prior to joining the firm as an associate Megan worked as a Law Clerk at JLO.

Alexandra A. Meyer

Alexandra received her Bachelor of Arts degree in Political Science from St. Olaf College in Northfield, MN in 2012 and her Juris Doctor from Mitchell Hamline School of Law in 2016. Prior to joining the firm as an associate Alexandra worked for a prominent St. Paul Workers' Compensation defense firm.

Congratulations

Pat Skoglund and **Megan McDonald** obtained a defense verdict for a client in a November 2020 Zoom Trial in Ramsey County District Court. The case was initiated in Conciliation Court where Plaintiff claimed that Defendants unlawfully possessed his dog. Plaintiff appealed to District court where the District Court found in favor of the Defendants. The District Court held promissory estoppel and injustice would be worked if Plaintiff's promises to sell the dog to Defendants were not enforced as they provided care to the dog for over 2 years.

Recent Minnesota Supreme Court Cases:

Standard of Proof for Minnesota Harassment Claims and Sick and Safety Leave Affirmed

By: Nikita E. Luyken

The Minnesota Supreme Court released two noteworthy employment law decisions in June 2020. First, in *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222 (Minn. 2020), the Court upheld the current standard to prove sexual harassment under the Minnesota Human Rights Act. Second, in *Minnesota Chamber of Commerce v. City of Minneapolis*, 944 N.W.2d 441 (Minn. 2020), the Court affirmed the City of Minneapolis's sick and safety leave ordinance.

Kenneh

Appellant Kenneh sued her former employer, respondent Homeward Bound, for sexual harassment in violation of the Minnesota Human Rights Act. The district court granted summary judgment in favor of Homeward Bound after concluding that Appellant failed to allege conduct sufficiently severe or pervasive to support a claim for sexual harassment. The court of appeals affirmed and Appellant petitioned for review.

On June 3, 2020, the Minnesota Supreme Court affirmed that the Minnesota Human Rights Act requires plaintiffs to show that the alleged harassing conduct in a hostile work environment claim is sufficiently "severe or pervasive" to constitute sexual harassment. Under the Court's decision, an employee, to bring a successful sexual harassment claim, must prove that "the work environment must be both objectively and subjectively offensive in that a reasonable person would find the environment hostile or abusive and the victim in fact perceived it to be so" *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 230-31 (Minn. 2020). Further, courts and juries must consider the totality of the circumstances when deciding each case and not rely on a "purportedly analogous" federal decision. The Court reasoned that a single, severe incident may support a claim for relief while pervasive incidents, any of which may not be actionable when considered in isolation, may produce an objectively hostile environment when considered as a whole. The Court concluded that, under this standard, it will be more difficult for employers to win summary judgment prior to trial in harassment claims brought by employees. Lastly, the Court held that "zero tolerance" policies in employee handbooks do not hold employers to a higher legal standard in harassment cases. The terms of a non-contractual employment policy do not alter statutory definitions or the showing needed to establish a statutory claim.

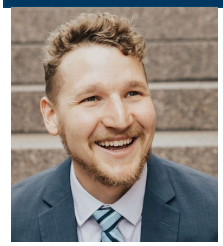
City of Minneapolis

In May 2016, the Minneapolis City Council passed the Sick and Safe Time Ordinance which allows employees who work in the City for at least 80 hours a year to accrue at least one hour of sick and safe time for every 30 hours worked in a calendar year, up to a maximum of 48 hours. Employers must also allow employees to carry over unused sick and safe time into the next year, but the total amount of accrued sick and safe time may not exceed 80 hours. The Minnesota Chamber of Commerce first sued the City in October 2016 contending that state law preempts the Ordinance.

The district court held that the Chamber did not show a likelihood of success on the merits of its preemption arguments, however, the court did temporarily enjoin the City from enforcing the Ordinance against any employer "resident outside the geographic boundaries of the City of Minneapolis."

On June 10, 2020, the Minnesota Supreme Court held that the City of Minneapolis's sick and safety leave ordinance is not pre-empted by state law, and therefore remains in effect. Further, the Court agreed the ordinance may apply to employers located outside of Minneapolis, as long as the employee's work is within the geographic limits of the City of Minneapolis.

About the Authors



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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

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