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Vaccination Mandates and Workers' Compensation Liability

By Ashley R. Menzel

As COVID-19 restrictions ease in Minnesota, employers are deciding how to safely return their employees to work. Some are choosing to mandate vaccinations. Others are offering optional onsite clinics or incentives for vaccinated employees. While every employer may approach vaccinations differently, each scenario results in differing workers' compensation liability if an employee has an adverse reaction to the vaccine.

Under Minn. Stat. §176.021, subd. 9., injuries sustained while participating in *voluntary* recreational programs, including health promotion programs sponsored by employers, do not arise out of and in the course of employment. This is true even when the employer pays some or all of the costs associated with the program. However, where employees are *mandated* by the employer to participate in the program, an employer can be liable for workers' compensation benefits.

When is a program "voluntary" under the statute? In *Shire v. Rosemount, Inc.*, 875 N.W.2d 289 (Minn. 2016), the employer held annual appreciation events for employees. The employee handbook stated that these events were "voluntary." However, if employees chose not to attend the event, their options were to either use limited vacation time or take unpaid leave. The employee in *Shire* participated in the event because he did not want to use his vacation or take unpaid leave. The employee was injured at the event. Ultimately, the Minnesota Supreme Court determined that the injury was compensable because the program was not truly voluntary if employees must choose between attending the program or risk forfeiting pay or benefits.

Under *Shire*, if an employer expects their employees to get vaccinated or forfeit their pay or benefits, and the employee has an adverse reaction to the vaccine, the employee likely has a viable claim for workers' compensation benefits.

Making the vaccine available to employees does not necessarily make it mandatory. If an employer offers an optional onsite vaccine clinic, an employee takes advantage of the clinic and develops a reaction, the reaction is likely not compensable in Minnesota. This scenario is similar to employers who offer an optional flu vaccine onsite by a provider outside of the organization. As long as the vaccine is voluntary and there are no adverse consequences, such as

forfeiting pay or benefits, for employees who decline, any reaction would likely not be compensable under Minn. Stat. § 176.021, subd. 9, and *Shire*.

If an employer strongly encourages, but does not require, employees to get the COVID-19 vaccine by offering incentives, the case law is less clear. Under *Shire*, if an employee risks losing pay or another benefit by not participating, choosing to get the vaccine is no longer voluntary. Under this standard, perhaps the total value of the incentive may be instrumental in determining the voluntary nature of the vaccine. Unfortunately, Minnesota's workers' compensation courts have not yet addressed whether a program remains voluntary if an employee receives some type of bonus or additional benefit for getting vaccinated. To distinguish *Shire*, an employer may maintain that offering an incentive or encouragement is different than requiring the forfeit of an otherwise established benefit or pay. An employee who opts out of the vaccine is not having anything taken away from them that they are otherwise entitled to. Of course, it will be up to the court to decide whether that argument aligns with the statute and *Shire*.

If you have any questions about vaccination policies and workers' compensation liability, or any other workers' compensation issue, please contact me or the Brown & Carlson Hotline at (855) 844-7070.

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