

Worker’s Compensation Implications for COVID-19 Vaccine Complications in the District of Columbia

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On December 11, 2020, the U.S. Food and Drug Administration (FDA) issued the first emergency use authorization for a vaccine to combat the spread of coronavirus (COVID-19) vaccine through emergency use authorization.¹ During the approval process, members of the FDA committee expressed concern regarding adverse reactions to the vaccine. The FDA reports the most common solicited adverse reactions were injection site reactions, fatigue, headache, muscle pain, chills, joint pain, and fever.² The FDA has noted the vaccine will be provided with a warning against administering it to anyone with a history of severe allergic reactions to vaccines or allergies to any of the ingredients of the vaccine.

As with prior vaccines, the U.S. Equal Employment Opportunity Commission (EEOC) has previously stated that an employer may mandate vaccinations during a pandemic, with exceptions based on an individual's religious beliefs per Title VII of the Civil Rights Act of 1964, as well as for individuals with a disability covered by Titles I and V of the Americans with Disabilities Act (ADA).³

With employers potentially mandating employees to take the COVID-19 vaccine, issues may arise with respect to compensability under workers' compensation laws due to adverse reactions to the vaccine. In the District of Columbia, there is a presumption of causal relationship afforded to claimants requiring that they only show “some evidence” of a work incident which attributed to the injury.⁴ The Courts have found that this statute was designed to effectuate the humanitarian purposes

¹ FDA News Release. <https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19>. Accessed December 11, 2020.

² FDA Briefing Document, Pfizer-BioNTech COVID-19 Vaccine. <https://www.fda.gov/media/144245/download>. Accessed December 11, 2020.

³ Pandemic Preparedness in the Workplace and the Americans with Disabilities Act. <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>. Accessed December 11, 2020.

⁴ D.C. Code § 32–1521

of the D.C. Workers' Compensation Act, noting it reflects a "strong legislative policy favoring awards in arguable cases."⁵

The D.C. Workers' Compensation Act requires that for an injury to be compensable, it must arise out of and in the course of employment.⁶ "Arising out of" refers to the causal connection between the injury and the employment. "In the course of" regards whether the injury took place within the time and place limits of the employment. Both requirements must be met independently for an injury to be compensable.

The D.C. Court of Appeals has previously upheld a ruling that a hospital employee who was required to obtain a pre-employment vaccination for MMR (measles, mumps and rubella), and then sustained a seizure as a result of the vaccine, was entitled to workers' compensation benefits.⁷ The Court upheld the decision that but for the employment, the claimant had no obligation, nor inclination, to obtain the vaccination, and that the vaccination furthered the interests of the hospital in avoiding liability and reducing absenteeism. The Court rejected the argument that the MMR vaccine is required by law for hospital employees.

Should an employer mandate the vaccination, it would likely be argued that the employer created a causal connection between any potential complications from the vaccine and the employment. Further, while the act of obtaining the mandated vaccine could take place outside of the workplace and after designated work hours, an impacted employee would argue that the act of receiving the vaccine was a mandated, work related activity which exposed the employee to the adverse reactions of the vaccine.

If an employer does not mandate the vaccination, the argument for compensability is less clear. The D.C. Court of Appeals has held that all risks causing injury to a claimant can be brought within three categories: (1) risks distinctly associated with the employment which are compensable, (2) risks personal to the claimant which are not compensable, and (3) "neutral" risks-i.e., risks having no particular employment or personal character.⁸ An employee working in environments with high risk of exposure to the virus, such as hospitals, grocery stores, restaurants, warehouses, and offices, would argue that the vaccination is necessary to safely perform their jobs. Alternatively, without an employer mandate to obtain the vaccination, it could be argued that the risk of contracting

⁵ Ferreira v. District of Columbia Dep't of Employment Servs., 531 A.2d 651, 655 (D.C. 1987) (quoting Wheatley v. Adler, 132 U.S.App. D.C. 177, 183, 407 F.2d 307, 313 (1968) (en banc)).

⁶ Grayson v. District of Columbia Dep't of Employment Servs., 516 A.2d 909 (D.C. 1986).

⁷ Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Servs., 821 A.2d 898, 900 (D.C. 2003).

⁸ Georgetown Univ. v. District of Columbia Dep't of Employment Servs., 971 A.2d 909, 920 n. 10 (D.C. 2009).

COVID-19 is not distinctly associated with any employment, as the entire population is at risk. Though obtaining the vaccine would be beneficial to the employee and may be considered a personal activity, it could be argued that the vaccine is mutually beneficial to the employer and expected of the employee.⁹ Nevertheless, with over half of American adults planning to get the vaccine, the connection is less clear.

In the aforementioned Court of Appeals decision regarding the MMR vaccine, the upheld decision provided a very useful analysis regarding vaccines during a pandemic. The upheld decision noted that asking whether the employment alone caused the vaccine poses the wrong question; rather, “it would be more correct to say that the employment need only be a concurring cause.”¹⁰ It further concluded that if the requirement of the MMR vaccine applied to everyone, noting an example of a mandated smallpox vaccination during an epidemic, then no special work-connection would exist. Given there is no Federal or District-wide mandate to receive the vaccine, this analysis is not directly on point, but certainly supports the position that obtaining a non-mandated COVID-19 vaccine is not a work-related act.

The U.S. Department of Health and Human Services (HHS) recently issued a declaration to provide liability protection for COVID-19 countermeasures, including vaccines.¹¹ Through the Public Readiness and Emergency Preparedness (PREP) Act, liability protections are afforded to those who manufacture, program plan, prescribe, administer, deliver, distribute or dispense the COVID-19 countermeasures. An employer and their worker’s compensation insurance carrier who work with a pharmacy or hospital to administer the vaccine may argue immunity from liability based on the PREP Act, relying on the liability protection afforded to program planners.

Furthermore, the PREP Act offers benefits for physical injuries or death directly related to administration or use of countermeasures to COVID-19, including the vaccine. These benefits include medical treatment, lost wages and even benefits to the person’s estate. Unlike the State of Maryland, the District of Columbia does not specifically bar a workers’ compensation claim when the injured worker is eligible for benefits under a federal law for an occupational disease.

⁹ Kolson v. District of Columbia Dep’t of Employment Servs., 699 A.2d 357, 360 (D.C. 1997)

¹⁰ Washington Hosp. Ctr. v. D.C. Dep’t of Employment Servs., 821 A.2d 898, 902 (D.C. 2003).

¹¹ Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID–19 and Republication of the Declaration. 85 FR 79190. <https://www.govinfo.gov/content/pkg/FR-2020-12-09/pdf/2020-26977.pdf>. Accessed December 11, 2020.