



COVID-19 VACCINATIONS AND LIABILITY UNDER ILLINOIS WORKERS' COMPENSATION ACT

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APPLICABLE PORTIONS OF THE ILLINOIS WORK COMP ACT

Under Illinois law, generally, purely voluntary acts are not compensable. However, under the Good Samaritan Doctrine, voluntary acts can be deemed to remain within the course of employment. However, applying that doctrine to voluntary Covid-19 vaccinations would be a stretch.

The Illinois Workers' Compensation Act (hereinafter "the Act") provides as follows:

§11: COMPENSATION DUE IS FULL MEASURE OF LIABILITY

Section 11. The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in Section 3 of this Act, or of any employer who is not engaged in any such enterprises or businesses, but who has elected to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act, and whose election to continue under this Act, has not been nullified by any action of his employees as provided for in this Act.

VOLUNTARY RECREATION

Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program.

VACCINES

Any injury to or disease or death of an employee arising from the administration of a vaccine, including without limitation smallpox vaccine, to prepare for, or as a response to, a threatened or potential bioterrorist incident to the employee as part of a voluntary inoculation program in connection with the

person's employment or in connection with any governmental program or recommendation for the inoculation of workers in the employee's occupation, geographical area, or other category that includes the employee is deemed to arise out of and in the course of the employment for all purposes under this Act. This paragraph added by this amendatory Act of the 93rd General Assembly is declarative of existing law and is not a new enactment.

Therefore, the question becomes in Illinois, would an employer's voluntary Covid-19 vaccination program be considered similar to a voluntary recreation programs under Section 11? We find this unlikely. However, it is more likely that liability could be created under the "Vaccines" in Section 11 of the Act. While Covid-19 is not a bioterrorist threat, it is yet to be seen if there will be governmental (federal or state) programs or recommendations for the inoculation of employees for Covid-19. Such programs would likely bring liability under that language of Section 11. Certainly, it would be easy for the legislature to amend the statute to list "pandemic" or "national health care crisis" along with "bioterrorist threat," which could expand liability to Covid-19. As such, this statutory language is troubling for employers in Illinois.

RELEVANT CASE LAW

Further, the Illinois Worker's Compensation Commission has found adverse reactions to vaccines to be compensable:

- In *Vaughn v. Centralia Corrections Center* (2001 IIC 855; 95 WC 17129), Petitioner, a prison guard, received a Hepatitis B injection after breaking up a fight between inmates at which time she was exposed to blood. Within three hours of the injection, she developed fevers, chills, nausea and severe headaches. After the second vaccine she developed nausea, vomiting, chills, sweats, bloody urine, kidney pain, earaches, headaches, constant fatigue, irritability, chest pains, blurred vision, dizziness and swollen neck gland. Relying on medical testimony and Petitioner's testimony that the symptoms were consistent since the vaccinations, the Commission found the Petitioner's current condition of ill-being (adverse vaccine reaction) causally connected the work-related incident.
- Likewise, in *Lane v. Ferrell Hospital* (97 ICC 832; 94 WC 16545) the Commission concluded that the adverse reactions a nurse experienced from a Hepatitis B vaccine after being exposed to blood while working were compensable.
- However, in *Visconti v. Hill-Rom* (13 IWCC 736; 10 WC 49199), the Commission found that Petitioner's alleged reaction to the flu shot did not arise out of his employment and was not the cause of his current condition of ill-being. Here, Petitioner was employed as a medical equipment repairman. At least two of the hospitals that the respondent services and that petitioner goes to on behalf of the respondent require all employees and persons working in the hospital to have a flu shot. Respondent requires employees to get a flu shot each year. Petitioner had had a flu shot the year before in 2009, at that time it was administered in two parts, he did not have any problems after those shots. The flu shot he received on October 9, 2010 was a single dose. After he received the flu shot, he testified that bright lights gave him a headache and he could not see out of his left eye but could see dark and light in his right eye. He also had pain in his eyes. Medical testimony indicated it typically requires at least one week but on average



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two to four weeks to develop an immune reaction to the offending agent. Therefore, for the petitioner to develop post vaccination optic neuritis within 24 to 48 hours would be extremely unlikely. In addition, a brief literature research showed that all patients who develop post vaccination neuritis develop it after approximately two weeks. Further, the diagnosis of bilateral simultaneous optic neuritis was most likely post viral optic neuritis and not post-vaccination optic neuritis because the spinal tap results from St. John's Mercy Medical Center were suggestive of meningitis. Therefore, reaching its decision that petitioner's current condition of ill-being is not causally connected to the injury or exposure on October 9, 2010., the Commission stated as follows:

1. When the petitioner accompanied his girlfriend, on October 9, to get her flu shot he was not going there originally to get the shot for himself;
2. While there a nurse at the facility talked the petitioner into getting a flu shot himself.
3. The petitioner did get a flu shot that day, despite the fact that he had been ill a few days before.
4. The petitioner was not working the day that he got the flu shot and fifth, he did not get it at the place of his employment.
5. Finally, no evidence was presented linking the respondent with the facility at which the flu shot was obtained or with the actual serum that was used. Further, the diagnosis of bilateral simultaneous optic neuritis was most likely post viral optic neuritis and not post-vaccination optic neuritis because the spinal tap results from St. John's Mercy Medical Center were suggestive of meningitis. Therefore, the petitioner's current condition of ill-being is not causally connected to the injury or exposure on October 9, 2010.

The facts in Visconti are exceptional and thus, this is an outlier case that may be a guide to defending a Covid-19 adverse reaction case wherein the employee had evidence of previous illness, etc. As such, we did want to mention this case for that purpose.

- Most recently, in McAllister, the Illinois Supreme Court held “a risk is distinctly associated with an employee’s employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. McAllister v. IWCC, 20 IL 124848 (2020), citing Caterpillar Tractor, 129 Ill. 2d at 5820.

Based on the discussion of risk in McAllister, employers should anticipate the Courts could find mandatory vaccination would be a risk that “[an employee] was instructed to perform by the employer.” Additionally, employers can anticipate the Courts might find voluntary vaccination a risk that “[an] employee might reasonably be expected to perform incident to his or her assigned duties.”

CONSIDERATIONS AND RECOMMENDATIONS:

The Illinois legislature passed a bill amending the Illinois Workers’ Occupational Diseases Act to include a new subsection, 1(g), which created a rebuttable presumption for Covid-19 exposure and contraction in the workplace. Thus, “accident” and “causation” are presumed in favor of the employee.

While the case involving the flu shot demonstrates under what circumstances an adverse reaction might



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be defensible, that case has exceptional facts. However, in the case of a Covid-19 vaccine, a finding of liability against employers for adverse reactions seems more likely to come from language of Section 11 of the Act and the other cases discussed above.

Therefore, at this time, employers in Illinois should do a cost benefit analysis of the liability of a mandatory vaccination program (with ADA exemptions) vs. the liability and costs of workers' compensation claims for Covid-19 infections. For example, an employer should weigh the costs and benefits of mandating vaccines for employees who are an essential worker and routinely exposed to the public with the cost of no mandate and employees contracting Covid-19 (compensable under work comp) and possibly infecting fellow employees. While the Covid-19 vaccination is new, generally severe and/or debilitating side effects of vaccinations have not been common. Thus, the costs and liability risks for voluntary or mandatory vaccination may be less than the costs of Covid-19 work comp claims in Illinois due to the "Covid presumption." Further, while there may be an uptick in workers comp claims arising from adverse reactions to Covid-19 vaccines, a vaccine mandate might act as a supplementary defense in COVID-19 exposure claims.

Finally, please note the Covid-19 pandemic and vaccination situation continue to evolve and change. Therefore, we recommend that employers continue to re-evaluate their positions on these issues and we will provide updated opinions as the situations change and develop.

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If you have questions or concerns, please contact us.

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