

Employers prodded towards vaccinations

By Moby Salahuddin

President Joe Biden invoked his regulatory powers in early September to require all private-sector employers with 100 or more employees to ensure their workers are fully vaccinated or required to produce a negative test result on at least a weekly basis before they can return to work.

The president's decision, which also extends to federal employees and healthcare workers, will likely force numerous large employers to make vaccinations mandatory. Many of America's most-prominent companies are among those not requiring vaccinations of all their workers – the list includes Walmart, McDonald's, Bank of America, Delta Air Lines, CVS Health, Lowe's, and Home Depot.

The Republican National Committee said it would file a lawsuit against the Biden administration and Republican governors of Arizona, Georgia, Indiana, Montana, South Carolina, Tennessee, and Texas vowed to fight the mandate.

Employers apprehensive they would lose workers if they mandate vaccinations can take solace from several reports showing only a fraction of employees carried through their threat to quit if forced to take the vaccinations. According to an analysis by the journal *CommonWealth*, of 17 large organizations where resignations or terminations occurred, the median turnover was 0.6 percent.

Among the most-common reasons cited for not taking the vaccine is the fear the COVID vaccines are new and were rushed into production. Scott Gottlieb, former head of the Food and Drug Administration and one of the nation's foremost authorities on the vaccines, dismisses those concerns. "What I say is that this was a very long development process, actually, I mean, it felt quick in terms of the time but the clinical trials we did to actually evaluate these vaccines were the largest clinical trials conducted in modern times," he remarks.

OSHA is developing a rule under its Emergency Temporary Standard (ETS) to enforce the president's mandate. Fisher Phillips, a national labor and employment law firm, notes several unanswered questions: Will the mandate extend to employees working from home? Will OSHA require employers to collect proof of vaccination? What type of testing will be required? Who will pay for testing?

More vexingly, it is likely the ensuing rule will face legal challenges. "It is possible that a court could even block enforcement of the emergency rule until the legal challenges are resolved. OSHA will have to prove that there is a "grave danger" to the workers of large employees in order for the ETS to withstand a legal challenge, which may be a difficult task," the law firm concludes.

Employers who are not large enough to fall under the president's mandate but wish to make vaccinations mandatory should first consider whether they will allow unvaccinated workers to have the option of being tested weekly (as the president's plan provides). As *HBR* reports in its recent issue, ideally, an employer would have clear and simple implementation policies about who is subject to the mandate; which vaccines are acceptable; what proof of vaccination is required; whether to require booster shots when different cohorts become eligible for them; criteria for granting exemptions, including whether to require employees to reapply for exemptions periodically; and standards for those granted vaccination exemptions.

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CASE LAW UPDATE

By Lindsay Underwood

Mandatory Vaccines & Workers' Comp

Mandatory vaccination policies raise questions about how mandatory vaccines, and possible adverse reactions, could result in new workers' compensation claims. We will argue that when a vaccine is encouraged, but not mandated, any adverse reaction does *not* arise out of the employment. However, once it is mandated, it is nearly impossible to argue that any compensable occupational disease or injury by accident arising out of that mandatory vaccine no longer arises out of employment.

N.C.G.S. § 97-53 (13) provides that an occupational disease must be "due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." The NC Supreme Court has held this provision requires the disease is (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and, (3) there must be a causal connection between the disease and the claimant's employment. *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93-94, 301 S.E.2d 350 (1983).

In cases where the job exposed the employee to a greater risk of developing the disease, the first two elements listed above are satisfied. Thus, any employee arguing an entitlement to benefits after sustaining an adverse reaction from a mandatory COVID-19 vaccine will have to prove they are at an increased risk of developing their condition as a result of the employment, and also establish a causal connection between their reaction and employment.

If an employee is required to receive the vaccine as a condition of employment, any medically connected adverse reaction to that vaccine would likely be determined to have placed the employee at an "increased risk" of developing that reaction. The third element of the *Rutledge* test is satisfied where the occupational exposure "significantly contributed to, or was a significant causal factor in, the disease's development." The NC Supreme Court has held that to be reliable expert opinion testimony is must take the case out of the realm of conjecture and remote possibility.

In one case, *Kai-Ling Fu v. UNC Chapel Hill*, 188 N.C. App. 610, 655 S.E.2d 907 (2008), the employee reported an adverse reaction after being required to be vaccinated against a Venezuelan virus. The employee reported headaches, fever, and shortness of breath. She was prescribed an inhaler, referred to counseling for anxiety, and instructed to remain out of work because of fatigue. The Court of Appeals held the employee was at a higher risk

than the general public of developing her symptoms, specifically noting that when an individual has to take a vaccine because of their employment they are likely at an increased risk than the general public.

Thus, it is likely any adverse reaction from a mandatory COVID-19 vaccine would result in exposure for a workers' compensation claim. As in any other alleged occupational disease claim, the employee would still need to prove the elements of the *Rutledge* test, to include showing a causal relationship between any symptoms and the vaccine.

We may also have a defense under the "peculiar sensitivity" theory, where an employee's sensitivity to a vaccine makes their reaction unique. Though that defense is difficult to prove, it should be part of any post-injury investigation. Although most of the cases will be analyzed under the occupational disease standard, we may end up with injury by accident exposure as well. If the vaccine itself is not administered properly and the employee is injured during the administration of the vaccine, that could be seen as an injury by accident.

Under either argument, the main investigation will be whether the alleged adverse reaction is truly from the vaccine and not from some other pre-existing condition that the employee might have.

As you can see, the four decisions that have been issued to date have been a 50-50 split on entitlement to extended benefits. The cases are also very fact specific. What is clear from the decisions where entitlement to extended benefits has been denied is that the testimony from medical providers and a vocational rehabilitation specialist are necessary to support a finding that a plaintiff has wage earning capacity.

Defendants should make sure to have good experts secured prior to the hearing, along with possible surveillance and a labor market survey. It is also helpful to have a complete picture of the plaintiff's job history, educational background, and other activities outside of work or education, like the ability to exercise, do yardwork, or maintain positions on boards or as a volunteer.

Lindsay Underwood is an attorney in Teague Campbell's Raleigh office. She is a graduate of Cleveland State University and Wake Forest University School of Law.



President's Note

New Venue for Conference 2022

I am pleased to announce our conference next year will be held on April 18-20 at the Embassy Suites by Hilton Wilmington Riverfront. A primary reason for our move is the Holiday Inn in Wrightsville Beach is undergoing a massive renovation which is expected to last until at least the end of March 2022. Given delays throughout the supply chain and widespread labor shortages, our board concluded chances are high the hotel may still be undergoing construction at the time of our scheduled conference.

Rates at the Embassy Suites will be \$189 (river view) and \$169 (standard view) per night. Rates include a made-to-order breakfast and a manager's reception each evening. Alert readers may have noticed we will be following a Monday-Wednesday schedule next year, instead of our traditional Wednesday-Friday rotation. The hotel did not have availability on other dates.

Those of you who attended our September conference will recall we had a vigorous discussion around defending extended benefits. As I listened to the discussion on strategies for the 500-week cases, it appeared the losses seemed tied to the inappropriate

or, perhaps, ineffective use of vocational services/labor market surveys. This prompted an idea and with board feedback developed into the beginning of a plan.

Our association would like to host workshops in Raleigh and Charlotte for defense attorneys, adjusters, vocational consultants, and employers. The purpose would be to educate our audience on strategies to win cases exceeding 500 weeks. We would cover the proper use of vocational planning for decisions on job search vs. labor market survey use. We would obtain CEU approval for attorneys, adjusters, rehab professionals.

Please let me know if you are interested in participating. We have established a starter-group to get the ball rolling. Please join us.

Stephanie Gay



Early Manual Therapy Improves Outcomes

Workers with low-back pain who received manual therapy early within two weeks of their physical therapy care had lower medical costs and fewer days away from work than those who received it later, according to a new study from the Workers Compensation Research Institute (WCRI). Manual Therapy is hands-on therapy that improves range of motion and reduces pain.

The study, *Outcomes Associated with Manual Therapy for Workers with Non-Chronic Low Back Pain*, focuses on low-back pain claims in 28 states. It compares costs and outcomes between claims with early and late MT and between claims with and without MT. The following are among the study's findings:

Among workers who received manual therapy, early therapy (within 2 weeks of PT care) was associated with lower costs and shorter temporary disability duration as compared with late manual therapy (after 2 weeks of PT care). Early MT was also associated with a lower likelihood of receiving magnetic resonance imaging, pain management injections, and opioids, as compared with late MT.

Among workers with low-back pain, those who received MT had higher costs and slightly longer TD durations than those who did not receive MT but received other PT services. These differences may partly reflect dissimilarities in injury severity or underlying health conditions that cannot be measured in the data. Also, longer periods of observation (more than 18 months) may be important to consider when addressing the cost effectiveness of MT treatment.

Large interstate variations in the utilization of MT services were seen across the 28 study states, which could be explained, to some extent, by differences in state policies influencing provider practices and billing. Data used for the analysis capture medical services and benefit payments at 18 months postinjury for workers with low-back pain who did not have surgery but received MT and other medical services provided by non-chiropractic providers.

The 28 states in the WCRI study included North Carolina, South Carolina, Georgia, Tennessee, Virginia, and Arkansas.

coming up

April 18-20, 2022

NC Association of Self-Insurers' Annual Conference.

Embassy Suites by Hilton Wilmington Riverfront

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The employers' voice in workers' comp

NC Industrial Commission Update

By Bruce Hamilton

Continuation of Current Deputy Commissioner Hearing Procedures

In-person Deputy Commissioner hearings that were scheduled to begin October 1, 2021 have now been delayed and Deputy Commissioners will continue to conduct hearings via WebEx videoconferencing unless the Deputy Commissioner grants an in-person hearing upon showing of good cause.

Wanda Blanche Taylor and Adrian Phillips Confirmed by General Assembly to Serve as Commissioners

Wanda Blanche Taylor and Adrian Phillips were both confirmed by the General Assembly to serve on the Full Commission. Commissioner Taylor replaces Charlton Allen and Commissioner Phillips replaces Christopher Loutit. Commissioner Phillips' term is through April 30, 2027. Commissioner Taylor's term is through June 30, 2026.

Recent Trends in NC Comp Costs

By Hayden Burrus, FCAS, MAAA

The North Carolina workers' compensation environment has been healthy for the past several years. Workers' comp loss costs as a percentage of payroll have been declining each year since 2016. Most recently rating bureaus project that 2021 costs will be 5.3% lower than 2020 costs.

Recent unique influences on the state's workers' comp environment include:

Covid-19: Many businesses shut down or reduced hours temporarily, and many employees left their jobs altogether in order to respond to new family obligations created by the pandemic. Those employees that left were overwhelmingly women with school-age children at home. As a result, the demographic makeup (and potential workers' comp costs) of the remaining employees have changed.

Telecommuting has increased dramatically in a short period. It is unknown how workers' comp risks have changed as a result of that shift, but a potential new exposure from telecommuting includes repetitive strain injury. It is interesting to note that the North Carolina Basic Manual for Workers Compensation and Employers Liability (NC Basic Manual) now allows some telecommuting employees, whose duties were previously assigned to a higher-rated governing classification, to be reassigned to classification code 8871 – Clerical Telecommuter Employees.

PTSD: Legislative activity has increased across the country to broaden and establish workers compensation benefits for posttraumatic stress disorder. This could affect mental-mental claims, mental-physical claims, presumption of compensability for first responders.

Drug Costs: Drug costs remain high. However, one notable bright spot is that opioid prescriptions are down over 10% from their recent highs.

Unprofitable Class Codes: A study of North Carolina data by class codes show that a few business types have been consistently unprofitable in recent years and are significantly more likely to end up in the assigned risk pool. These types include carpentry, painting, trucking, and roofing.

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