

Employee Benefits & Workers' Comp News



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101 Montgomery Street, Suite 800, San Francisco, CA 94104
Main (415) 957-0600 | License # 0589960



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Should Employers Make COVID-19 Vaccinations Mandatory?

Now that the rollout of COVID-19 vaccinations has begun many employers will confront the decision of whether to make vaccinations mandatory.

Can Employers Legally Require Employees to Get Vaccinated?

The Equal Employment Opportunity Commission and the Occupational Safety and Health Administration have essentially agreed that employers can mandate that workers receive the COVID-19 vaccine. Previously there had been concern about whether procedures related to giving employees the vaccine would violate medical privacy laws and provisions of the ADA.



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This Just In...

More than half of people who use medical marijuana products to ease pain also experience clusters of multiple withdrawal symptoms when they're between uses, finds new study published in the journal *Addiction*.

And about 10 percent of the patients taking part in the study experienced worsening changes to their sleep, mood, mental state, energy and appetite over the next two years as they continued to use cannabis.

Many of them may not recognize that these symptoms come not from their underlying condition, but from their brain and body's reaction to

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Although statements released in the past couple of months have led many employers to feel comfortable about mandating vaccinations, employers aren't getting a complete carte blanche. The health care providers used by employers to administer the vaccines need to ask certain screening questions before administering the COVID-19 vaccine to ensure there are no medical reasons for which the employee should not receive it.

Also, according to attorney and *National Law Review* contributor Benjamin E. Widener, to stay clear of violating Federal laws like the ADA, "Employers are advised to consider making vaccinations voluntary or, alternatively, should have a third-party administrator conduct everything with respect to the vaccine. Specifically, if an employer requires its employees to receive their vaccination from an outside provider, like a health care provider or pharmacy, which would be conducting the necessary pre-screening inquiries without any involvement of the employer, the ADA's restrictions against disability-related inquiries would not apply."

Workers' Compensation Pros and Cons

The desire to establish and maintain a safe workplace by requiring vaccinations has several workers' compensation implications. For one thing, employers will need to pay for mandatory vaccinations and any

complications arising from receiving them would be considered compensable injuries.

In some states, like California, "Even if the employer does not mandate the vaccine but encourages it, and the worker suffers a vaccine-related injury, that too could also be considered a compensable injury," according to attorney Jeff Adelson, partner with the Newport Beach, California, firm Adelson McLean P.C.

Attorney Natasa Timotijevic, an associate in the Chicago office of Goldberg Segalla LLP., pointed out to *Business Insurance*, that overall, there are favorable and unfavorable workers' compensation aspects of mandatory vaccinations.

Mandating or strongly encouraging employees to vaccinate could result in a lot of workers' comp cases from adverse effects of the vaccine. On the other hand, in some states like Illinois, where there are presumption laws requiring workers' comp coverage for any employee contracting COVID-19, the fact that the firm instituted mandatory vaccinations could be a defense against such claims.

"One of the ways that employers can rebut that presumption is demonstrating compliance with public health guidelines in place at time of exposure," said Timotijevic. If federal guidance encourages vaccination and the employer's vaccine policy is consistent with those guidelines, it could be one more piece of defense for rebutting those claims, she said.

the absence of substances in the cannabis products they're smoking, vaping, eating or applying to their skin, says the University of Michigan Addiction Center psychologist who led the study.

When someone experiences more than a few such symptoms, it's called cannabis withdrawal syndrome — and it can mean a higher risk of developing even more serious issues such as a cannabis use disorder.

"Some people report experiencing significant benefits from medical cannabis, but our findings suggest a real need to increase awareness about the signs of withdrawal symptoms developing to decrease the potential downsides of cannabis use, especially among those who experience severe or worsening symptoms over time," says Lara Coughlin, Ph.D., the addiction psychologist who led the analysis.

For more information on the study, go to <http://bit.ly/2Xw00kj>

Also, see our article **Workers' Comp Payments OK'd for Marijuana in Some States on page 4.**

One Size Shouldn't Fit All

Employers should also consider the nature of each employee's work before mandating vaccination. Employers need to come up with a plan that balances the needs and interests of the company with what is in the best interest of the worker.

“Some industries will determine that the vaccine will be mandatory, but companies may also want to have separate policies based on job duties,” according to Gary Pearce, Detroit-based chief risk architect at risk management consultancy Aclaimant. For example, said Pearce in an interview with *Business Insurance*, the employer could create a vaccination mandate for employees who work in close contact with the public but not those who are able to perform their duties remotely.

“It’s going to be hard to shove a mandate down the throat of people who are working remotely and aren’t exposed ... On the other hand, if you have people who work in close proximity, that’s going to make vaccination much more justifiable.”

How to Administer a Vaccination Program

If an employer mandates or encourages vaccinations through its own program it should set up a process for tracking the inoculations according to who, when and where, both for the initial shot and the booster. Alternatively, there should be records of those who signed opt-out waivers for health or religious reasons.

Attorney Adelson suggests that a way to avoid adverse reactions turning into workers’ comp claims is to “provide a few days of paid time off for employees to get the shot and recover. ... Another option would be to have telemedicine options available for workers who have an adverse reaction.” ■

Workers Comp Payments OK’d for Marijuana in Some States

Medical marijuana is gaining wider acceptance in the medical community as an effective pain-reliever, which can be useful in workplace illnesses and injuries. But is it compensable under workers comp?



According to the Pacific Workers’ Compensation Law Center, “Supporters of medical marijuana argue that it can decrease medical expenses when dealing with chronic pain, which can derive from any kind of injury, including work-related injuries.”

Also, a study published in *Health Affairs* in July 2016 determined that the implementation of medical marijuana laws led to a significant decrease in the use of prescription drugs for which marijuana could serve as a clinical alternative. For example, Medicare would save more

than \$468 million per year on medications for disabled Americans, especially those older than 65.

Although medical marijuana is legal in a growing number of states, in many states it is not covered by workers’ compensation, even when prescribed by a doctor.

Insurance companies have traditionally been concerned about marijuana’s effects on workers, the unregulated nature of the business, the drug’s inconsistent quality, the unstandardized dosages, and how it interacts with other drugs. The states that have legalized marijuana have

mitigated these concerns to some extent by overseeing its manufacture and distribution. But the main issue is that its use, possession, and distribution are illegal under Federal law.

For instance, in California, one of the first states to legalize marijuana for medical and now recreational use, it is a Schedule 1 drug, and its possession and distribution are strictly speaking a violation of the Federal Controlled Substances Act.

Judges Get Around the Federal Act

Judges in some states have been able to get around the Federal law and permit workers' comp coverage by pointing out that employers do not possess, manufacture or distribute the drug; they merely allow workers to use it when prescribed by medical doctors.

A number of recent court cases, as reported by *Business Insurance*, reveal that more states are starting to allow workers' compensation to pay for marijuana treatment, either directly or as a reimbursement.

Cases Trending Favorable for Marijuana Comp Payments

In March 2019, in *Re Appeal of Panaggio*, the New Hampshire Supreme Court unanimously over-

turned a workers' comp appeals board decision to deny an injured worker reimbursement for therapeutic marijuana, saying that denying reimbursement to the worker was the same as denying him "his right to medical care deemed reasonable under the Workers' Compensation Law."

In October 2019, the Connecticut Workers' Compensation Commission (*Caye v. Thyssenkrupp Elevator*) said insurers didn't have to pay for medical marijuana directly but can be forced to reimburse workers' comp claimants for medical marijuana they purchased themselves.

In June 2018, the Delaware Superior Court (*Kalix v. Giles & Ransom*,) also said a worker was entitled to reimbursement for \$21,000 he spent at dispensaries purchasing medical marijuana and cannabinoids for pain relief.

"I think courts will be ruling more and more that (insurers) should pay for medical marijuana," said Brian Allen, Salt Lake City-based vice president of governmental affairs, pharmacy solutions for Mitchell International Inc. "Over time, we will see (marijuana) in treatment guidelines, and there will be science of how we can use it in treating injuries in workers' compensation." ■

Health Care Benefit Trends for 2021

Health care in 2020 has been impacted by the pandemic and that trend is expected to continue next year.

Here are some of the cost and benefit trends we can expect to take center stage this year.

Costs

Health care premiums are expected to rise at higher rates than in recent years. Business Source Group on Health predicts that large employers will see premium increases ranging from 5.3 percent to 6.1 percent. Small employers may see increases as high as 20 percent.

Here are a few ways employers can counteract the increases:

Savings Accounts:

- ✦ The new individual coverage Health Reimbursement Arrangement (HRA) was established January 1, 2020, and allows businesses the option to offer full-time, part-time and seasonal employees a monthly allowance of tax-free money to buy health insurance that fits their unique needs.
- ✦ Health Savings Accounts (HSAs) and Flexible Spending Accounts (FSAs) are expected to be more popular because of the CARES Act, a coronavirus-targeted legislation passed in March 2020. The changes expand the use of these accounts by:

- ◆ Protecting reimbursements for COVID-19 testing and treatment and telemedicine appointments — even before plan deductibles are met.
- ◆ Extending election and payment periods for COBRA participants.
- ◆ Making feminine hygiene products and over-the-counter drugs eligible for HSA and FSA reimbursement.

No Copays or Deductibles

- ✱ Zero copays and zero deductibles are not the norm, but they are gaining favor. High-deductible plans were previously seen as way to get employees to use their health care dollars more wisely. In theory, employees would have “skin in the game” and by realizing health care benefits aren’t free, keep costs lower. That was not the outcome, however. As costs have continued to rise, so have deductibles associated with employer-sponsored health benefits, which now average more than \$1,600 — more than most employees have saved. A radically different approach does away with most deductibles and copays.

Defined Contributions

- ✱ With a defined-contribution model, the employer sets aside a fixed amount of health benefits dollars for each employee. Employees are offered a variety of health plan options and can choose the one that fits their needs and budgets. With this model, employer budgets for

benefits are predictable because they don’t depend on the employees’ enrollment choices or their health spending.

Increased cost-sharing

- ✱ Employers who are struggling financially may need to increase employees’ premiums and cost sharing. It’s helpful to pair these skinny plans with a health savings account and/or flexible spending account.

Benefits:

To help employees get the most out of their health plans, new or increased benefits are being added. Here are two of the more popular benefits:

Telemedicine

- ✱ Telemedicine is the use of smartphones, tablets or computers to visit with a doctor or health specialist and get a diagnosis and prescription. Experts expect that even after the pandemic is over, telemedicine will still be popular because of its convenience and lower costs. Some health plans charge members nothing for a telemedicine visit.

Mental Health

- ✱ The global pandemic has severely tested everyone’s mental health. A recent Centers for Disease Control and Prevention study showed that the nation-

al rate of anxiety in the United States tripled in the second quarter compared to the same period in 2019. During the same time depression almost quadrupled. Health plans are adding increased mental health support — both in person and via telemedicine. Other programs that help ease stress include flexible work arrangements, mental wellness programs and access to health savings accounts and/or flexible spending accounts. ■



What You Need to Know About Disciplining Employees for Not Social Distancing

Social distancing and mask wearing are viewed as some of the best ways to protect yourself and others from COVID-19. That's why many employers insist their employees take these precautions on the job site.

But what about after hours? What steps can an employer take if there's evidence an employee is not taking precautions and is engaged in risky behavior when away from the workplace?

What You Lawfully Can Do

You can legally educate your employees about the risks when not following guidelines from the U.S. Centers for Disease Control and Prevention (CDC).

In states with an executive order or health order requiring mask wearing or prohibiting large gatherings, employers can require employees to sign a certificate stating that they will follow guidelines when away from the office. If evidence reveals that the employee wasn't following the guidelines, the employer could discipline the employee.

Employers who learn that employees have not been following safe practices may send employees home — particularly if social distancing is required by state or local order. They also may ask employees to fill out a daily health survey.



What You Can't Do

Employers who are considering disciplining their employees need to be aware of "lawful off-duty" statutes or anti-discrimination laws. For instance, California, Colorado, Illinois, Nevada, New York, North Dakota and South Carolina have laws protecting employees' lawful off-duty conduct. Disciplining an employee for not wearing a mask while off duty or for attending a large event could violate these laws.

Many state constitutions guarantee citizens the right to privacy within reasonable limits. For instance, Alaska courts have allowed lawsuits based on the claim that individual's privacy was invaded when an entity unreasonably intruded into their private affairs. This means that an employer needs to have justifiable and compelling reasons for asking intrusive questions about employees' off-duty behaviors. ■

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