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Employment Law

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Can Employers Legally Mandate COVID-19 Vaccinations?

Unless your state government enacts mandatory vaccination laws requiring it as a condition of employment, you could put your company at legal risk.

The COVID-19 vaccination has been touted as the easiest way to return to normalcy following the almost year-long pandemic. Such vaccinations will allow businesses to safely reopen and permit individuals and families to return to their routines.

Employers, in particular, are eager for business to return to pre-pandemic levels. While the



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This Just In ...

Concern about cybersecurity — and not, surprisingly, the coronavirus pandemic — is topmost in the minds of business leaders these days, according to international consulting firm Marsh & McLennan.

However, it's the pandemic that's making cybersecurity the greater threat right now, says Marsh & McLennan's CEO Dan Glaser. "Think about [a firm's] ability to service clients if [it has limited or no brick and mortar presence] and its systems are down?"

Climate change and the culture of working remotely are two other top risks identified by Glaser at the recent Reuters

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2019-20 influenza season cost employers \$13.1 billion in lost productivity, according to outplacement firm Challenger, Gray & Christmas, the global COVID-19 pandemic is expected to be even more damaging.

It's not surprising, then, that many employers are wondering if they can require employees to get the COVID-19 vaccine. The answers are "maybe" and "it depends."

The Law

You want to protect your employees, and the COVID-19 vaccination might seem the simplest solution. But, before you decide to require every employee to get the vaccination when it's available, make sure your actions do not put you at a legal risk.

Theoretically, employers can mandate that employees receive vaccines for both the flu and COVID-19 as a condition of employment. Certain high-risk workplaces, such as hospitals and nursing homes, already do so, and they can legally require employees to get one or more existing vaccinations. Experts assume that the COVID-19 vaccination would be included in the list of approved vaccinations. In addition, many states also require students to receive certain vaccinations in order to attend public or private K-12 schools.

While these practices suggest that schools and employers with traditionally high-risk workplaces might be able to mandate vaccinations, they are not common in schools or workplaces not associated with

health care. Therefore, before pursuing similar requirements, check to see if federal or state laws support your actions.

2020 CARES Act

The federal CARES Act requires group health plans to pay for COVID-19 vaccines that are recommended by the U.S. Preventive Health Services Taskforce and the Centers for Disease Control (CDC) Advisory Committee on Immunization Practices. If your health plan complies with this law, your employees will have access to the vaccine at no cost if they choose to take it.

EEOC Guidance

Although the Equal Employment Opportunity Commission (EEOC) has not addressed the issue of mandatory COVID-19 vaccinations in the workplace, it did address the issue during the H1N1 pandemic in 2009. The EEOC said that both the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 prohibited employers from compelling employees to be vaccinated for H1N1 regardless of their medical condition or religious beliefs even during a pandemic.

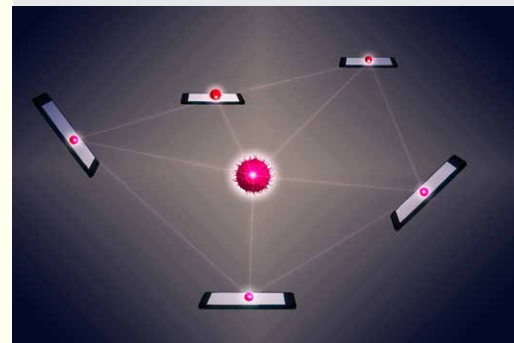
However, employers may be able to require COVID-19 vaccinations under the ADA or Title VII guidelines if they can demonstrate that the vaccine is "job-related and of business necessity" or prevents a "direct threat" to workplace safety. However, the EEOC says that under the ADA an

This Just In

Events Future of Insurance USA Conference, held this year online. Threats from climate change are not perceived as particularly disruptive at this time, though its impact is increasing, as catastrophic events such as wildfires and more powerful hurricanes take their toll.

Technology has benefits and costs. It brings with it a cultural shift, allowing remote work but also displacing jobs with artificial intelligence and robotics.

Glaser expressed concern that the outlook for avoiding another year of disruption from the pandemic was dim. He felt that despite recent news of the availability of COVID-19 vaccines, "It's just very difficult to get hundreds of millions of vaccines available for use in any short period of time,"



employee with an underlying medical condition could be entitled to an exemption from mandatory vaccination for valid and supported medical reasons.

State Law

The U.S. Supreme Court says that states — not the federal government — can decide whether to enact legislation making vaccinations mandatory. If your state makes vaccinations mandatory, then the decision has been made for you.

Downsides

As wonderful as a vaccination sounds, not everyone is excited about taking a vaccine that was fast-tracked and has no performance record. Pharmaceutical companies were tasked with developing a drug in just a few months — a process that usually takes 10 years, according to the Wellcome Trust, a biomedical research charity in London. Many people wonder whether a vaccine developed so quickly can be safe for everyone. Individuals who have certain preexisting conditions could be at elevated risks. Others may have a religious objection to vaccinations in general.

Accommodations

If you do decide that mandatory vaccinations are the best course for your company, you will need to make accommodations for employees who:

- ✱ Have certain health conditions
- ✱ May suffer negatively if taking certain medications
- ✱ Have religious objections

You may have to make accommodations so these employees can work from home.

A less controversial option would be to strongly encourage flu vaccinations or to hold an onsite clinic.



How to Understand the Fine Print

While it's a good idea to read your insurance policy, hardly anybody does. The important thing is to understand what's in it. Here are a couple of concepts to know about how your insurance works.



What is subrogation and how does it apply to insurance?

Subrogation in the context of insurance is the right of an insurance company to “step into the shoes” of the insured after the company has paid the loss. Subrogation entitles the insurance company to assert any rights on its own behalf that the insured may have had to recover payment from the parties that caused the loss.

The topic of subrogation is loaded with nuance and there are too many

fine points to cover here. But these short explanations of how subrogation works in various types of insurance policies should be helpful.

- ✱ In auto insurance, for example, if you have collision coverage, your insurer will pay to repair your car regardless of whether you were at fault. If you were not at fault, though, your insurer would subrogate against the party who hit your car for the damages it paid out.
- ✱ In workers' compensation, if a worker is injured operating a piece of machinery that malfunctions, the worker would be compensated for his injuries according to the workers compensation laws of the state. But the insurance company that paid out the workers compensation would be subrogated to the worker's right to sue the manufacturer of the malfunctioning equipment and recover its payments.
- ✱ One of the most common appearances of subrogation is in property leases, which typically include mutual waivers of subrogation. In these clauses the landlord and tenant each agree to waive any rights of subrogation they may have against each other in the event of a loss. Most insurance policies permit waivers of subrogation as long as the waiver has been agreed to before any loss occurs.

Proximate Cause vs. Immediate Cause

Many coverage disputes between insurer and insured arise from different interpretation of the word "cause." Even when you have an "all-risk" property policy, it is not enough that the cause and its result (the loss) be covered. There must be a sufficiently close connection between the cause and the loss. This is known as the requirement of "proximate cause."

Black's Law Dictionary defines proximate cause as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." This is not to be confused with the "immediate cause," or cause closest to the injury's occurrence.

How do you distinguish between "proximate" and "immediate" cause?

All basic property insurance policies cover fire damage, but only "special form" policies cover water damage. Nevertheless, if you had a basic policy and your house burned, the policy would cover water damage from fire hoses, because the fire is the "proximate cause" that led to the damage. That is, the water damage would not have occurred without the fire.

Many cases aren't this clear-cut, however, and disputes often end up in court. Generally, though, whenever a dispute involves ambiguity in a policy's wording, the court will rule in favor of the insured. ■

Auto Damage Claims Growing Twice as Fast as Inflation

The average payment for auto physical damage insurance claims increased at more than double the rate of inflation from 2010 through 2018, according to a new study from the Insurance Research Council (IRC).

The study, *Patterns in Auto Physical Damage Insurance Claims*, found that average payments increased 3.7 percent annualized during the study period, while the overall Consumer Price Index (CPI), as well as the CPI for motor vehicle maintenance and repair, grew 1.8 percent annualized.

"Damage to vehicles accounts for a growing share of the costs of paying auto insurance claims," said David Corum, CPCU, vice president of the IRC. "As vehicle technology continues to evolve, an understanding of the cost drivers behind auto physical damage claims will be important in addressing issues in auto insurance availabil-

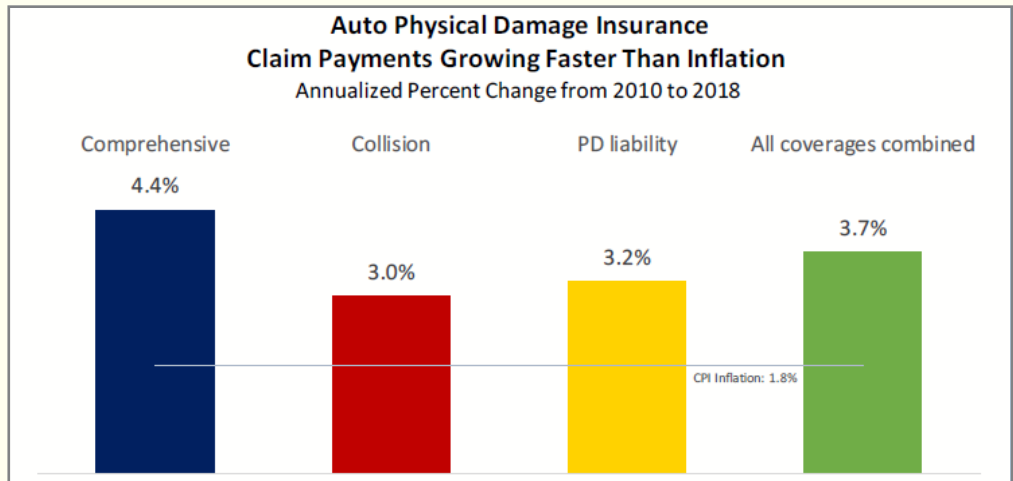
ity and affordability.”

Other findings from the study:

- ✱ Total losses have become more common and more expensive.
- ✱ Catastrophe claims accounted for about one in five dollars paid for comprehensive claims.
- ✱ Deductibles and policy limits have not kept pace with the growth in payments.
- ✱ Physical damage claims have become less likely to have associated injury claims.
- ✱ The rate of attorney involvement is lower in physical damage claims than in auto injury claims.
- ✱ For most aspects of physical damage claims, there are significant differences among states.

According to National Association of Insurance Commissioners (NAIC) data, vehicle damage claims accounted for 60 percent of incurred personal auto losses in 2016, even as the injury cost index — a measure of injury costs relative to physical damage liability claims — declined. Enhanced passenger protections have contributed to a drop in the frequency of injury claims relative to the number of accidents, underscoring an important reality: auto safety improvements are effective but add to the cost of claims, as they lead to more expensive repairs when accidents happen.

With auto claims costs greatly outpac-



ing inflation, it’s worth noting that auto insurance premium growth has trailed CPI growth, particularly since the COVID-19 pandemic and its subsequent economic downturn has led to insurers giving back \$14 billion to policyholders in the form of refunds, premium reductions, and divi-

dends.

The study presents findings from a collection of more than 220,000 claims closed with payment under the three principal private passenger auto physical damage coverages in claim years 2010, 2014, and 2018. ■

Should Employees Be Disciplined for Not Social Distancing?

Social distancing and mask wearing have been viewed as important ways to protect people from COVID-19. So, employers enforce 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-discrimina-



tion 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. ■