



Are vaccine-related reactions compensable in Oregon?

By Ehren Rhea ■ January 4, 2021

With December news of some adverse reactions to the COVID-19 vaccine, Oregon employers may be starting to consider the legal liability of those vaccine reactions in a workplace setting. The simple answer is it depends: if medical causation is established, whether a vaccine reaction should be covered under an Oregon workers' compensation claim turns on whether the vaccination "arises out of" and occurs "in the course of" the worker's employment.

Oregon employs a two-prong test to determine whether an injury "arises out of" and occurs "in the course of" employment. The first prong looks at whether the injury "arises out of" the employment, meaning that there is a connection between the work activity and the injury event. The second prong looks at whether the injury occurred "in the course of" employment, and depends on the time, place, and circumstances of the injury. When the courts employ this two-prong test, both factors must be present to some degree. However, an injury will "arise out of" and "in the course of" employment even if the factors supporting one prong are weak, if the factors supporting the other prong are strong.

In the 2017 case of *Courtney K Leach*,¹ the Board determined that a vaccine reaction from a flu shot taken at work occurred "in the course of" employment but did not "arise out of" employment. In that case, a flu vaccine occurred at the worksite during working hours. The flu vaccine was encouraged but not mandatory, and it was paid for by either employer-provided healthcare or a \$26.00 payment by the worker.

The Oregon Workers' Compensation Board decided the worker's flu shot did not "arise out of" her employment because there was not a sufficient link to the flu shot and a risk caused by employment. Although the employer arranged for the flu-shot clinic at the workplace during work hours, the shots were administered by a third party under contract with the employer's health insurance providers. Furthermore, the employees paid for their shots or used their health insurance.

Additionally, the employer did not require the worker to receive a flu shot. Rather, the worker decided to get a flu shot based on her belief it would prevent her from contracting the flu. In reaching this decision the

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COVID-19 vaccine compensability (continued)

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Board determined obtaining a flu shot was a neutral risk with no particular employment or personal connection to the adverse reaction. Since the “arise out of” prong was not satisfied, the Board upheld the claim denial.

The Board’s decision in *Leach* does not mean every adverse reaction to a vaccination occurring as a result of an employer’s immunization program will be excluded from workers’ compensation coverage. In the 1998 case of *Robert L. Dawson*,² a bus driver injured his ankle while descending a flight of stairs to return to his bus and continue his route after stopping to get an employer-approved flu shot on the employer’s premises. What is important about this case is the act of obtaining the shot was considered an employment-related risk because the employer benefited from the shot being provided. This was because having a flu shot could prevent the employee from getting the flu and missing work.

The Board distinguished the *Leach* case from the *Dawson* case. The flu shots in *Leach* were not controlled by the employer, nor were they an employment condition. Although the employer would likely benefit if its employees did not contract the flu, such a prospect did not transform the injections, which were offered on a voluntary basis and at claimant’s (or her health insurer’s) expense, into an employment-related risk or an employment condition that put claimant in a position to be injured.

Given the contrast between these two cases the details of who administers and pays for the vaccination is very important when deciding if an adverse reaction can form the basis of a valid claim. It is very likely a vaccine paid for or administered by an employer would be considered within the course and scope of employment, even if the vaccination was voluntary rather than mandatory.

By contrast, a vaccine administered by a third party, paid for by the worker or the worker’s insurance, and voluntary would probably not be within the course and scope of employment. It is also likely an adverse reaction to a mandatory vaccine would be covered by a workers’ compensation claim regardless of the party that administered the vaccine because mandating a vaccine would inherently turn the activity into a work-related risk.

The risks posed by COVID-19 can create some complicated legal liability issues, especially with respect to workers’ compensation law. If you are concerned about the risks to your workforce, a consultation with a Reinisch Wilson Weier attorney can help to understand your legal liability during these difficult times. ■

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¹ *Courtney K Leach*, 69 Van Natta 439 (2017).

² *Robert L. Dawson*, 50 Van Natta 2110 (1998), *aff’d* without opinion, 160 Or App 700 (1999).

