

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION UPDATE "WE'VE GOT YOU COVERED!"

A Newsletter for Employers and Claims Professionals

January 2021

A WORD FROM THE PRACTICE CHAIR

I know you all have had a healthy dose of January already, but it is never too late to say Happy New Year to our friends! I do hope all those desires and wishes you had to bottle up in 2020 come true for you and yours in 2021. I, as well as the Heyl Royster Workers' Compensation Practice Group, have resolved to do a better job in reaching out to you, our valuable friends. I know we "talk" every month through these newsletters, but there needs to be more. Due to the pandemic limitations, which we here at Heyl Royster respect, we have not been able to engage like we are used to doing. We have developed plans to break down some of those barriers, metaphorically speaking, and facilitate virtual meetings with you, because needless to say, we have a great deal to discuss in the workers' compensation world. Our jobs have not stopped due to COVID. As a matter of fact, they have become more complicated and intense. Since Heyl Royster prides itself on always being there for you, we have resolved to make ourselves more available to you. So, please stay tuned for the roll out of our 2021 plans which will help you in your everyday workers' compensation claims handling and the battles on the front lines.

This month, one of our associates, Wendi Werren, who works out of our Rockford, Illinois office, has jumped into a very timely subject matter, a topic on which I must admit, I have fielded many phone calls and e-mails over the past two months. As we see and hear about the COVID vaccine being distributed to front line workers (as well as others) it brings up the subject matter of whether

a worker who receives the vaccine and suffers some type of allergic reaction to same can file a workers' compensation claim against his employer if that vaccine was provided and/or mandated by said employer. This is an interesting topic and the analysis of this problem is nicely outlined below. If you have any further specific questions on this subject, please don't hesitate to contact myself or any of the Heyl Royster Workers' Compensation team.

Finally, I wanted all of us to be aware of a topic we will hear more about in the not too distant future. The Illinois Supreme Court just took up another case and agreed to hear arguments regarding same. You might recall last year they took up the *McAllister* matter and now here we are in 2021 they are taking another workers' compensation matter. This is highly unusual for our Supreme Court. The case of *McDonald v. Symphony Bronzeville Park, LLC*, No. 126511 / 1st District, is based upon whether the exclusivity of the Illinois Workers' Compensation Act bars a claim for statutory damages under the Biometric Information Privacy Act (BIPA). In this case the employee has alleged the employer violated his statutory privacy rights under BIPA. The Supreme Court will decide whether the exclusivity of the Illinois Workers' Compensation Act will limit the employee's ability to bring a BIPA action. We will update you as this unfolds.



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COVID-19 VACCINES & EMPLOYEE INJURY: IS THERE A COMPENSABLE WORKERS' COMPENSATION CLAIM

By: Wendi Werren, Rockford Office

Ten months ago, our country was grappling with the fact that we were in the beginning of a pandemic. Our lives as we knew them were greatly changed, many adapting to working remotely and being asked to interact virtually. The development and disbursement of a COVID-19 vaccine distributable to the masses seemed unlikely anytime soon. Yet, here we are today with two (currently) vaccines with FDA emergency use authorization. In Illinois, the first phase of vaccinations were made available to frontline healthcare workers as well as residents and staff of long-term care facilities. The next phase under the administration plan will include additional non-healthcare frontline essential workers.

With employees receiving the vaccine daily, employers are asking whether there are any liability concerns should an alleged employee injury occur caused by the COVID-19 vaccine? Would that injury be compensable under the Illinois Workers' Compensation Act?

Section 11 of the Illinois Workers' Compensation Act and Occupational Diseases Act

The plain language of the Illinois Workers' Compensation Act and Occupational Diseases Act does provide coverage for injury due to the administration of a vaccine. The Act states in relevant part:

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.

820 ILCS 305/11. The Occupational Diseases Act contains a similar provision. 820 ILCS 310/1(d).

However, employee injury allegedly due to the administration of a vaccine is not automatically compensable.

When may an employee injury allegedly due to the administration of the COVID-19 vaccine be compensable?

The first question to answer is whether or not the administration of the vaccine was required by the employer? The Commission has held that employee injury attributable to receipt of a preventative vaccine is contingent on whether the vaccine was required by the employer. For example, a flu vaccine related injury was held not to arise out of and in the course of employment when the employer paid for the flu vaccine, but inoculation was optional. *Stolleis v. Bunn Capitol*, 96 IIC 1349. Here, the Commission found that receipt of the flu shot did not expose the employee to an increased risk incidental to employment and was not compensable.

On the other hand, when a registered nurse was required to obtain a series of three Hepatitis B injections as a condition of employment, she subsequently suffered brain dysfunction, including loss of memory and energy, extreme periods of pain,

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and inability to recover from any type of illness. *Lane v. Ferrell Hospital*, 97 IIC 832. The Commission found the injury arose out of and in the course of her employment and was compensable.

In 2020 the Illinois Supreme Court set forth a bright line test in *McAllister* for determining whether an injury arises out of an employment related risk, as we previously discussed [here](#). *McAllister v. Illinois Workers' Compensation Commission*, 2020 IL 124848. The analysis under *McAllister* would likely result in findings similar to those in *Lane* and *Stolleis*. If an employer instructed or required the employee to obtain the vaccine, prong one of the *McAllister* test – an act the employee was instructed to perform by the employer – is likely satisfied, and the injury would be compensable.

On the other hand, if an employer assisted in some way to make the vaccine available to employees but did not require inoculation, the analysis under *McAllister* likely shifts to the “neutral risk” analysis. A neutral risk is compensable only if the employee was exposed to risks associated with the COVID-19 vaccine to a greater degree than that encountered by the general public, so compensability would be unlikely under this analysis.

However, there is a critical distinction between “routine” vaccines (such as Hepatitis, flu, and measles) and the COVID-19 vaccine – the COVID-19 vaccine is a countermeasure under the PREP Act employed on an emergency basis in response to a global pandemic which grants employers liability immunity. Thus there is a strong argument that such injuries should not be compensable under state workers' compensation or occupational disease laws unless the employer engaged in willful misconduct. Because the pandemic has triggered unprecedented emergency conditions and subsequent government action, there is an argument employers can make an argument that injuries resulting from a COVID-19

vaccine authorized for use on an emergency basis are not compensable.

Liability Immunity under the PREP Act

The federal Public Readiness and Emergency Preparedness Act (PREP Act) of 2005 provides expansive liability immunity regarding emergency countermeasures employed during a pandemic. To trigger the protections of the PREP Act, the Secretary of the Department of Health and Human Services issued the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 in March 2020. 85 Fed. Reg. 15198-15203 (March 17, 2020). The Declaration affords liability immunity to people and entities involved in testing, development, manufacture, distribution, administration, labeling, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of medical countermeasures during a pandemic. The only statutory exception to immunity is for action or failure to act that constitutes willful misconduct. Click [here](#) for answers to frequently asked questions related to the COVID-19 Declaration.

A “covered countermeasure” under the Act includes qualified pandemic products, such as a drug, biological product, or device that is manufactured, used, designed, developed, licensed or procured to diagnose, mitigate, prevent, treat, or cure a pandemic or limit the harm such pandemic may cause. Countermeasures include an unapproved drug, biological product, or device used under an Emergency Use Authorization (EUA) issued by the FDA. The COVID-19 vaccines available today are a covered countermeasure and gained approval for use by the FDA via an EUA.

The PREP Act grants liability immunity to people and entities engaged in the distribution

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of the COVID-19 vaccine who are classified as "distributors" and "program planners." Distributors include manufacturers, carriers, distributors, brokers, warehouses, and retail pharmacies. Program planners include State or local government and their employees, and private sector employers or community groups who supervise or administer a program with respect to the administration, dispensing, distribution, provision, or use of a countermeasure. Program planners also include those who establish requirements, provide policy guidance, or supply technical advice or assistance or who provide a facility to administer or use a covered countermeasure in accordance with the Declaration.

Therefore, if an employee is injured by a COVID-19 vaccine, there is a strong argument that an employer is protected by the immunity afforded by the PREP Act so long as the employer did not act with willful misconduct.

What this Means for Employers

The COVID-19 landscape is constantly evolving, and liability for COVID-19 injury will become clearer with time. Given that some inoculated employees may allege a reaction to the vaccine, there will probably be workers' compensation claims filed. Employers can serve as a major pipeline for vaccine distribution. However, Illinois precedent and provisions of the PREP ACT Declaration both indicate that when employers make a vaccine available but do not require inoculation, injuries are not compensable. Given the breadth of immunity afforded under the PREP Act and the COVID-19 Declaration, there is a strong argument that even mandatory COVID-19 vaccine injury is not compensable, but that determination is not guaranteed. If the provisions of the Workers' Compensation Act prevailed, mandatory COVID-19 inoculation could likely be compensable.

If you have questions regarding your company's COVID-19 vaccine plan, please contact any of the members of our Workers' Compensation Practice Group.



Wendi Werren, Rockford Office

Wendi focuses her practice on providing exceptional client service in the areas of casualty/tort litigation, labor and employment law, construction law, business and commercial litigation, workers' compensation, and product liability. As a law student, Wendi served as a graduate assistant in human resources where she focused on employment law, civil rights, and Title IX investigations. Her work, in conjunction with the passage of the Illinois Preventing Sexual Violence in Higher Education Act, ignited her interest in defense litigation, including defense of the accused in administrative investigations in the educational setting. Wendi was also a member of the *Northern Illinois University Law Review* and achieved the rank of National Semi-Finalist in the American Bar Association Negotiations competition.

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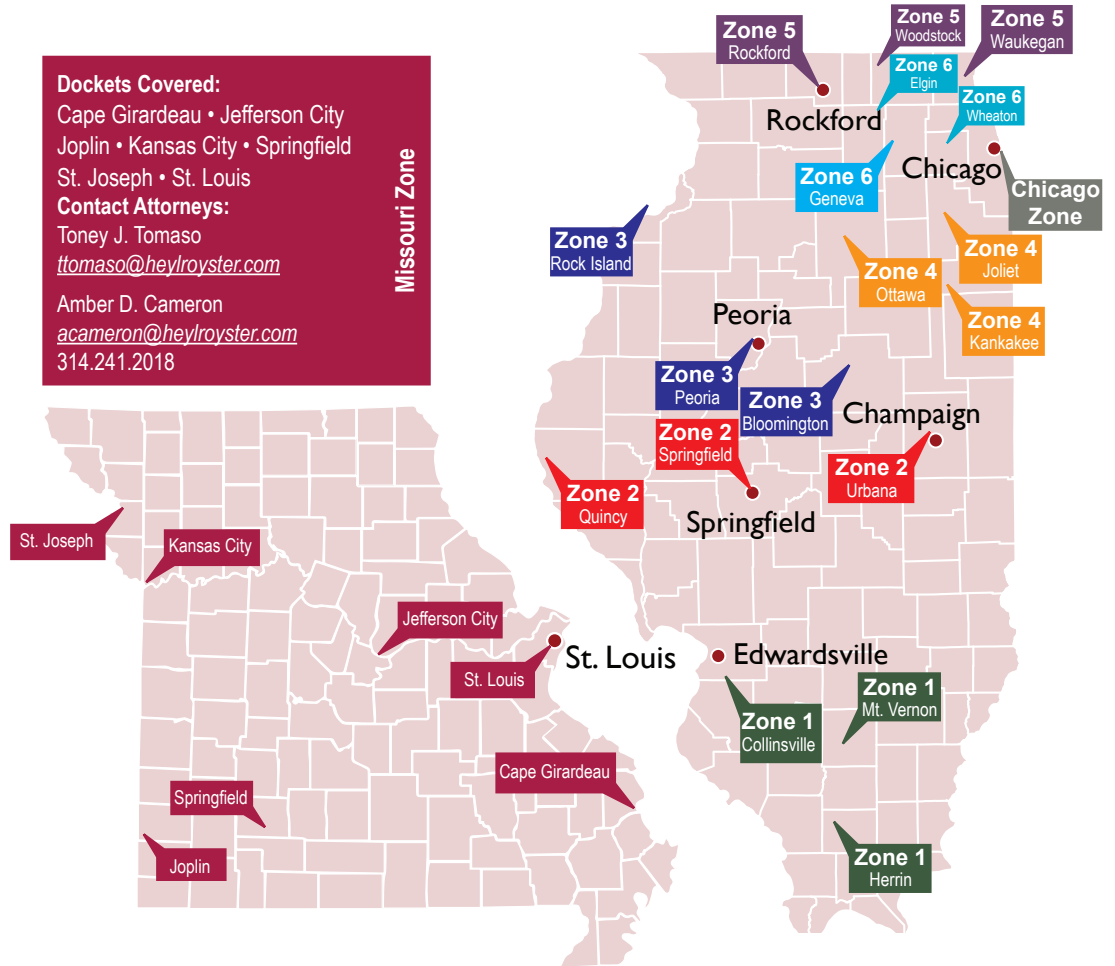
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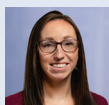
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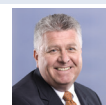
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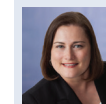
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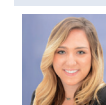
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