

Vaccines- Let's Give 'em a Shot!

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Benefits of the Vaccine

- No live virus
- 95% effective at preventing COVID-19
- Can prevent serious illness if infected



Vaccine Injuries

- What is a vaccine injury?
- Are they covered by Workers Compensation Insurance?
- What is needed to prove a vaccine injury is industrial?



What is a vaccine?



- Vaccine – Agent that stimulates the immune system to produce antibodies
- Does not treat or cure – vaccines prevent injury



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What is NOT a vaccine?



- Not a medication to treat an illness
- Not a medical device to support the bodily function
- Not blood plasma that is used to treat COVID infections



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COVID Vaccine - three approved for use by the FDA



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Common Side Effects

- Listed by the CDC
- Documented through clinical trials
- Injection Site: Pain, Swelling, Redness
- Rest of Body: Chills, Fatigue, Headache



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Legal Standards

- What is an injury
- Labor Code 3208 – “includes any injury or disease arising out of the employment”



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Legal Standards



Health Care Workers – 3208.05 – “includes a reaction to or a side effect arising from health care provided by an employer to a health care worker, which health care is intended to prevent the development or manifestation of any bloodborne disease, illness....”



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Roberts v USO Camp Shows (1949)

- Musician, employer required a vaccination
- Employer designated the doctor
- Employer paid for the vaccinations



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Roberts v USO Camp Shows (1949)

Holding: “Incapacity caused by illness from vaccination or inoculation may properly be found to have arisen out of the employment where such treatment is submitted to pursuant to the direction or for the benefit of the employer”

- In this case, the employer required the vaccinations and the applicant developed encephalitis (brain swelling)



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Maher v. WCAB (1983)

- CA Supreme Court
- An employer may be liable for an injury sustained as a result of treatment that is required as a condition of employment
- TB test was positive, so medications were required, which had adverse side effects, and this was compensable



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Maher v. WCAB (1983)

- Holding:

“employee submits to an inoculation or a vaccination at the direction of the employer and for the employer's benefit, any injury resulting from an adverse reaction is compensable”

- since the test was a work requirement, and there is employer benefit from the test, the resulting injury is work related;



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Saint Agnes Medical Center v. WCAB (Cook) (1998)

The WCAB found that employers may also be liable for an injury sustained by an employee as a result of treatment that is *optionally* provided as preventative care, even if not a condition of employment.

- But this is a medical center, the flu vaccine was for the benefit of other employees and patients (most employers it wont be both);



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Injection Site Injuries

What are common vaccine injuries?

- Redness (less 5%)
- Swelling (5% or less)
- Pain (83%)



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Allergic Reaction

- Some patients have an allergic reaction
- The CDC lists severity of injury from Mild, Moderate, Severe
 - But about a quarter of the injuries in vaccination patients also occurred in the placebo patients



Why?

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Systemic Reactions

77% of recipients ages 18-55 have at least one*:

- | | |
|------------------|---------------------|
| ▫ Fever - 5% | ▫ Vomiting – 1% |
| ▫ Fatigue - 47% | ▫ Diarrhea – 11% |
| ▫ Headache - 42% | ▫ Muscle Pain – 21% |
| ▫ Chills - 14% | ▫ Joint Pain – 11% |



* After first dose

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Systemic Reactions

- Lymphadenopathy?
- Cardiovascular incidents?
- Bell's Palsy?



Yes, does happen, but it is at the same as the background rate of the general population so the CDC does not conclude there is a causal relationship



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Medical Evidence of Injury

- How do we know if the side effect is caused by the vaccine or is otherwise occurring?
 - Medical evidence required



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Medical Evidence of Injury

- Possible PQME evaluation
- Ask doctor to cite medical literature that connects the side effect to the vaccine
- Like COVID claims, we cannot accept all claimed body parts without medical evidence



Liability Factors

What are the circumstances under which an employer would be liable for a vaccine injury?



Liability Factors



- How involved was the employer in setting up the vaccination?
- Does the employer pay for the vaccination?
- Did the employer set up the appointment?
- Did the employer arrange a vaccination location for employees?



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But remember...



- However, (usually) none of this happens in CA with COVID vaccines!!!
- What are the circumstances under which they would not be liable for a vaccine injury?
 - Employer has no involvement



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Case Summary

- Roberts – Employer Required the Vaccination
- Maher – Employer Required TB Testing
- St Agnes – Employer Provided Preventative Care



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Vaccine Injuries - Not Compensable?

CA Supreme Court in *Maher*

- “If the requirement of the test or inoculation applied to everyone regardless of his employment, for example, if everyone were required to have a smallpox vaccination during an epidemic, no special work-connection would exist.”
- Some doubt regarding industrial causation if the vaccination is during an epidemic



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Preventing COVID claims?

- Can requiring the vaccine rebut the claim of a COVID injury?
- Early opinions from other states say yes since the EEOC and OSHA allow employers to mandate the vaccine – But if you don't, then what? Labor Code 3212.88 still applies, and rebutting the presumption in California is a factual inquiry into exposure



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Dual Capacity Doctrine

- Health care employers that provide care for employees may avoid civil liability for negligence if the care is provided as an employer/employee benefit, and not as a health care provider
- If an employee is injured by the vaccine which was administered by their healthcare employer, workers' comp exclusivity applies.



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National Vaccine Insurance Compensation and the Countermeasures Injury Compensation Program

- The counter measures insurance compensation program covers injury from COVID-19 vaccines
- The counter measures program has a 1 year SOL
- The countermeasures program is known as a payor of last resort and will only reimburse or pay for medical expenses or lost income that are not covered by other third-party payers- such as workers compensation!



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