



## Q&A – WORKERS’ COMPENSATION LIABILITY FOR COVID-19 VACCINE REACTIONS – MINNESOTA

By: Emily LaCourse and Noelle Schubert

**1. What if an employer mandates the COVID-19 vaccination for its employees and an employee develops an allergic reaction that requires medical care and time off from work? Is the employee entitled to workers’ compensation benefits?**

**Minnesota:** Yes. In Minnesota, the general rule is that injuries sustained while participating in voluntary recreational programs, including health promotion programs, athletic events, parties, and picnics, sponsored by employers do not arise out of and in the course of employment even when the employer pays some or all of the costs of the program. Minn. Stat. §176.021, subd. 9. However, the statute creates an exception to this general rule for situations where the employee is ordered or assigned by the employer to participate in the program.

The question then becomes what qualifies as a “voluntary” program under Minn. Stat. § 176.021, subd. 9. The Minnesota Supreme Court addressed this issue in *Shire v. Rosemount, Inc.*, 875 N.W.2d 289 (Minn. 2016). In *Shire*, the employer held annual employee appreciation events for its employees. The employee handbook stated that these events were “voluntary.” However, if employees choose not attend the events, their options were to either use limited vacation time or take unpaid leave. The employee in *Shire*, decided to participate in the events because he did not want to use his vacation or leave. At the event, the employee was injured. Ultimately, the Minnesota Supreme Court found that the voluntary-recreation program exception to Minn. Stat. §176.021, subd. 9, is not satisfied when the employee’s choices are either to attend the program or risk forfeiting pay or benefits.

Under *Shire*, vaccine-related injuries that occur during participation in voluntary recreational programs are not compensable workers’ compensation claims. But if an employer requires that the employee either get vaccinated or forfeit pay or benefits if the employee chooses not to get vaccinated, and the employee sustains an injury as a result of the vaccine, the employee has a claim for workers’ compensation benefits.



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2. **What if an employer does not mandate employees to get the COVID-19 vaccination, but offers it to employees who choose to get it, with an on-site COVID-19 vaccine clinic?**

### **Is there workers’ compensation liability if the employee develops a reaction?**

**Minnesota:** If the employee develops a reaction under these circumstances, the reaction is probably not compensable in Minnesota. This is similar to how many employers offer the flu shots and/or make flu shots available through an on-site clinic but leave the choice to get the flu shot up to the individual employee. Making the vaccine available does not necessarily mean that the vaccine is mandatory. Minn. Stat. § 176.021, subd. 9 specifically states that an injury incurred while participating in voluntary programs are not compensable even if the employer pays for some or all of the cost of the program. This would include a situation where the employer is paying for an on-site COVID-19 vaccine clinic. As long as the vaccine remains voluntary and the employee will not risk forfeiting pay or benefits if they decline to get the vaccine, the reaction should not be compensable under Minn. Stat. § 176.021, subd. 9, and *Shire*.

3. **What if an employer but strongly encourages, but does not require, employees to get the COVID-19 vaccine by offering an incentive, and offers it to employees who choose to get it, with an on-site COVID-19 vaccine clinic?**

### **Is there workers’ compensation liability if the employee develops a reaction?**

**Minnesota:** It depends. The Court in *Shire* makes clear that if the employees’ options are limited to attending the program and getting paid or forfeiting pay or benefits, the program is not voluntary under Minn. Stat. § 176.021, subd. 9. Therefore, under *Shire*, if the employer is going to take away a benefit or pay that the employee otherwise would have received, choosing to get the vaccine is no longer voluntary. The question is whether the program remains voluntary where some type of bonus or additional benefit is offered for participation. Minnesota’s workers’ compensation courts have not specifically addressed this question. An employer may try to distinguish *Shire* and argue that offering an incentive or encouragement is different than requiring the forfeit of a benefit or pay. To avoid a legal challenge, the employer may want to consider offering an alternative way for employees who decline the vaccine to be eligible for the incentive, such as wellness training.



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### 4. What if an employer mandates the COVID-19 vaccine for employees and three years later the employee develops cancer as a result of the COVID-19 vaccine?

#### Is there workers’ compensation occupational exposure liability?

**Minnesota:** The general rule is that when an employee’s injury arises out of and in the course of their employment the employee is entitled to workers’ compensation benefits. The phrase “arising out of” means that there must be some causal connection between the injury and the employment. The causal connection is supplied if the employment exposes the employee to a hazard which originates on the premises as a part of the working environment, or peculiarly exposes the employee to an external hazard where she is subjected to a different and greater risk than if she had been pursuing her ordinary personal affairs. It is the employee’s burden to prove that the injury is compensable. When an extended period of time has passed between the inciting work event and the injury, this raises a question of whether there is a causal connection between the work event and the employee’s injury. However, if the employee has a medical opinion establishing that the COVID-19 vaccine was a substantial contributing factor to the development of the condition, and the COVID-19 vaccine was mandated by the employer, the employee could have a claim for benefits in Minnesota.

### 5. When should employers and insurers retain an expert to evaluate whether to accept or deny a claim for a COVID-19 vaccine reaction? What type of expert is appropriate?

**Minnesota:** Employers and insurers should consider retaining an expert once testing confirms COVID-19 and following the investigation of the work site. Questions to consider when evaluating a claim should include questions like: Did other employees test positive? Did the employee engage in outside activities including sports, eating at restaurants, or going to bars? Investigating whether the employee attended any large group settings including weddings, funerals, and other gatherings can help when deciding to accept or deny a claim.

Internal medicine doctors are appropriate experts to retain for these evaluations.

Arthur Chapman’s [Workers Compensation Group](#) is available to answer additional questions on this topic.