

## EEOC

### Employers can mandate vaccine

The U.S. Equal Employment Opportunity Commission says in its recent guidance employers can require workers to get a COVID-19 vaccine. Employers can also ask workers if they have COVID-19 symptoms and whether they have been tested, and employees who refuse to answer may be barred from the workplace.

Such considerations have become important in the wake of reports a large number of Americans are reluctant to take a vaccine. In a survey conducted between January 6-18, the U.S. Census Bureau found 25% of unvaccinated adults will probably not, or will definitely not, take a COVID-19 vaccine when it becomes available. The bureau will continue to gauge sentiment and plans to release findings every two weeks.

Other polls have reported similar conclusions. In a January 2020 poll conducted by the Kaiser Family Foundation, 41% said they will “definitely” get a vaccine, 31% said they will wait and see, another 13% said they will definitely not take it, and 7% said they would take the vaccine only if it is mandatory (6% said they had already received the vaccine).

Some are hesitant because although vaccines are safe and effective, they are neither perfectly safe nor perfectly effective. Additionally, some people are unable to take a vaccine because of health considerations, and a number object on religious or philosophic grounds. Many employers are therefore reluctant to make vaccines mandatory. Several large companies – including Facebook and Marriott – have said they will rely on persuasion and incentives to encourage workers to get vaccinated.

The *Washington Post* reports Dollar General, Trader Joe’s, Aldi, and Lidl, as well as Instacart, have announced plans to promote the vaccine among employees, including flexible work schedules, paid time off to take the vaccine, and bonuses of up to \$200. The newspaper adds the restaurant industry may also be moving toward incentives. Darden Restaurants, which employs more than 175,000 workers in Olive Garden, LongHorn Steakhouse, and other brands, has said it would offer workers up to four hours of paid time to get the vaccine.

“Vaccine hesitancy” concerns public health officials because studies indicate 70% - 80% of the population must develop immunity to control the spread of the virus. Some observers say there are compelling reasons to make vaccines mandatory. COVID-19 vaccines remain the best way to reduce illness and deaths, and an effective way to reduce employee absences and lost productivity. For some businesses – restaurants, hotels, sports teams - even one positive test can halt operations. A monograph from the international law firm of Gibson Dunn notes as vaccines become freely available, employers may come under pressure from OSHA, and perhaps from private litigants, to ensure a safe environment through a robust vaccination program.

Employers who decide to make vaccinations mandatory must contend with several considerations. Is it worth it to provoke a backlash from workers? How would exemptions be granted for medical or religious reasons? “Despite signaling that an employer may require COVID-19 vaccinations of its employees, the EEOC’s guidance does not give employers carte blanche to vaccinate their employees,” notes employment-lawyer Benjamin Widener in an analysis in *National Law Review*.

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## MSAs in Denied Workers' Compensation Settlements

By: Daniel Hayes, JD, MSCC, CMSP

As workers' compensation professionals, we are all too familiar with Medicare Set Asides (MSAs) in settlements. But are we required to include a fully-funded MSA in a compromise settlement? According to the Centers for Medicare & Medicaid Services (CMS), the answer is no.

### **CMS Approval of Zero-Dollar Allocation**

We know that CMS will issue Zero Set-Aside Letters. But the formal approval process is not always simple. At one point, CMS had forecasted it would make the process more challenging, requiring a court order indicating the employer had no further medical liability, a physician's note indicating no further need for treatment, or medical records showing claimant is no longer treating for the injury. CMS quickly announced there had been no such procedural change in the way it reviews zero-dollar proposals.

Zero-dollar requests submitted to CMS must include essentially the same supporting documentation as full WCMSA proposals, including the carrier's complete payment ledger (showing no indemnity or medical payments), verification of denial, medical records (if requested), and a Consent to Release form completed by the claimant. Failure to include any documentation may delay a determination or result in a denial. CMS also reserves the right to not only deny the request, but also generate its own counter-higher WCMSA demand.

### **CMS Submission is Voluntary**

The parties may elect to participate in the CMS voluntary submission program, but it is never required.

*There are no statutory or regulatory provisions requiring that you submit a WCMSA amount proposal to CMS for review. If you choose to use CMS' WCMSA review process, the Agency requires that you comply with CMS' established policies and procedures in order to obtain approval.*

The parties may always fulfill their obligation to consider Medicare's interests through alternatives that do not involve formal submission, even with zero-dollar proposals.

### **Compromise Settlement (Not Commutation)**

If the settlement is a true compromise, then an MSA may not be indicated. CMS has long recognized the right of parties in workers' compensation claims to resolve denied claims by compromise settlement, as follows:



Lump sum compromise settlements represent an agreement between the WC carrier and the injured individual to accept less than the injured individual would have received if he or she had received full reimbursement for lost wages and lifelong medical treatment for the injury or illness. In a typical lump sum compromise case between a WC carrier and an injured individual, the WC carrier strongly disputes liability and usually will not have voluntarily paid for all the medical bills relating to the accident. Generally, settlement offers in these cases are relatively low and allocations for income replacement and medical costs may not be disaggregated. Such agreements, rather than being based on a purely mathematical computation, are based on other factors. These may include whether there was a preexisting condition, whether the accident was really work related, or whether the individual was acting as an employee, or performing work-related duties at the time the accident occurred.

According to the Code of Federal Regulations, Medicare has different responsibilities for payment of medicals depending on the type of settlement. "If a lump-sum compensation award stipulates that the amount paid is intended to compensate the individual for all future medical expenses required because of the work-related injury or disease, Medicare payments for such services are excluded until medical expenses related to the injury or disease equal the amount of the lump-sum payment."

To the contrary, "if a lump-sum compromise settlement forecloses the possibility of future payment of workers' compensation benefits, medical expenses incurred after the date of the settlement are payable under Medicare."

A fully-funded MSA is only indicated when admitted claims with ongoing medical exposure are settled. If a denied claim is settled on a compromise basis, meeting the criteria recognized by CMS, then a zero-dollar allocation may be appropriate.

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*Daniel Hayes is a Partner in Teague Campbell's Asheville office. He provides Medicare Secondary Payer settlement consultation, including MSA reports and legal opinion letters.*

## President's Note

### Ray of Sunshine

It seems it has been one step forward and two steps back ever since last March but now, finally, hope is on the horizon. The U.S. is on pace to vaccinate by the end of summer just about everybody in the eligible groups. Barring bad luck, we expect the pandemic to be controlled well enough by the time of our 2021 annual conference, scheduled for September 7 & 8 in Wrightsville Beach.

As we have announced, this year's conference will be a shorter one since we expect to get back to our normal schedule in 2022. We will begin the conference around noon on Tuesday, September 7 and conclude by 3:00 p.m. the next day. To mark our 30th anniversary, we are offering a spectacular deal: registration fees of \$30 per person for members and exhibitor fees of \$300 per booth. For non-members, registration rates will be \$450 per person and \$750 for an exhibition booth. Exhibitor fees include registrations for two people.

Hotel rates are as follows: \$159 per night for oceanfront rooms, and \$139 per night for standard rooms. For Labor Day, the



day before the conference, the hotel is making available a total of 20 rooms at the conference rate. You can book hotel reservations and register now for the conference.

If you are interested in making a presentation or wish to see particular topics addressed, please contact me or our executive director Moby Salahuddin. We also have room for employers who would be willing to participate in panel discussions. With so much chaos in our work routines, such disruption to our business models, we are all eager to learn about and learn from your success stories.

I am looking forward to seeing you at the conference. Let's make it a special one!

Stephanie Gay

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He adds employers who choose to require vaccinations must: (i) exercise due care in administering it; (ii) refrain from asking any unnecessary screening questions; (iii) keep confidential any medical information received from employees; and (iv) be prepared to engage in an interactive process with any employees who request accommodation or seek exemption from being vaccinated for health-related or religious reasons.

"Given the foregoing, employers should think twice before requiring employee vaccinations," he concludes.

The contentious nature of this issue is illustrated by the very different perspective offered by Johnny Taylor, Jr., president of the Society for Human Resource Management. In an interview with NPR on December 24, 2020, he said "what we're hearing from smaller company entrepreneurs is, sure, the big companies can take one or two people getting sick or 10 or 12 people getting sick. But if I'm a 25-person employer and three of my employees get sick and, God forbid, get the rest of them sick, I'm out of business."

He added "small and medium-sized companies, I fully predict, are going to over-index in requiring a mandate. I did an interview the other day with a small company owner, and she said the second a vaccine is available, any employee who does not take it will not work here, full stop."

After a slow start, the U.S. is making rapid progress towards widespread vaccinations and the supply will receive a boost with the expected approval of a one-shot vaccine from Johnson & Johnson. The Biden administration is eyeing a goal of vaccinating 1.5 million Americans a day. As of February 1, nearly 26.5 million Americans had received at least one dose. In North Carolina, about 7.8% of the population has received one dose and 1.5% have completed vaccination.

Although new cases and deaths have been declining in the U.S. for the past three weeks or so, public health officials are urging rapid vaccinations because of apprehensions newer strains of the virus may be more contagious and may erode hard-fought gains.

# coming up

September 7-8, 2021

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach

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## NC Industrial Commission Update

By Bruce Hamilton

### Update on In-Person Hearings, Mediations, and Other Procedural Directives.

The North Carolina Industrial Commission has adopted an Emergency Rule that in turn allows the Industrial Commission to implement Emergency Orders and Directives of the Chief Justice of the North Carolina Supreme Court. In short, the Industrial Commission wants its operating structure to be in sync with, and operate consistently with, the civil system when it comes to holding hearings, mediations and other procedural directives from the Chief Justice.

As of January 14, 2021, and consistent with the January 14, 2021 Order of the Chief Justice of the Supreme Court of North Carolina, all Industrial Commission mediations are to be conducted remotely, unless all parties and persons required to attend the mediation, including the mediator, agree to conduct the mediation in-person, or unless the Industrial Commission orders that the mediation be conducted in-person.

Additionally, all Deputy Commissioner Hearings shall be conducted remotely via WebEx video conference, unless the Deputy Commissioner grants an in-person hearing upon a showing of good cause as to why an in-person hearing should be allowed. Full Commission hearings shall continue to be conducted via Microsoft Teams video conference.

### New Chief Deputy Commissioner and Deputy Commissioner

In November 2020, Deputy Commissioner Tammy Nance was designated as the Chief Deputy Commissioner by Chair Phillip Baddour. Chief Deputy Commissioner Nance previously served as a Deputy Commissioner from 1987 to 1995. She was in private practice for several years representing both employers and employees in workers' compensation matters and in 2011, returned to the Commission and served on the Full Commission until 2018. In 2019, Ms. Nance began serving as a Deputy Commissioner assigned to head up the Claims Administration Section.

Additionally, former representative Larry D. Hall, who most recently was serving as the Secretary of the North Carolina Department of Military and Veterans Affairs, was recently appointed as a Deputy Commissioner. Deputy Commissioner Hall represented Durham County in the North Carolina House of Representatives for 10 years and served as the House Minority Leader during his final four years.

### Updates from Workers' Compensation Educational Conference

As of August 31, 2020, 1,508 Form 19's had been filed listing COVID-19 and 119 Form 18's have been filed listing COVID-19. Of the COVID-19 cases where a Form 60, 61 or 63 had been filed, 57% had been denied on a Form 61, 19% had been accepted on a Form 60, 18% had been paid without prejudice on a Form 63, section 1, and 6% had been paid without prejudice on a Form 63, section 2.

In addition, for the fiscal year 2019-2020, 27 claims had been filed for extended benefits under G. S. Section 97-29 (c). Seven of the claims had been mediated and three Deputy Commissioner Hearings had been held, but, as of the October conference, there had not yet been any decisions rendered.

*Bruce Hamilton, NCASI's legal advisor and a partner in Teague Campbell's Raleigh office, has focused exclusively on workers' compensation defense for the past 30 years.*