

Employers May Have To Pay For Vaccine Time If It's Required

By **Jon Steingart**

Law360 (January 25, 2021, 9:12 PM EST) -- Employers that tell staff they have to get vaccinated against the novel coronavirus should consider paying employees to do so with wages or sick leave, even if it happens outside normal work hours, experts told Law360.

The question of whether vaccine time is compensable is especially pronounced as doses become available in irregular bursts, increasing the likelihood that someone who snags a coveted appointment will make keeping it a priority. That could mean taking a slot during work hours or landing an appointment on short notice and dropping everything to go get a shot.

Dollar General is one of several retailers that has announced plans to reduce barriers for employees who want to get vaccinated, with the discount chain saying it will provide workers with up to four hours of paid time off to get a shot.

"We understand the decision to receive the COVID-19 vaccination is a personal choice, and although we are encouraging employees to take it, we are not requiring them to do so," Dollar General said in a statement.

Walmart, which plans to partner with the federal government to leverage its footprint throughout the country to administer vaccinations at its thousands of retail locations, has told its associates that it encourages them to get vaccinated. But the world's biggest retailer also said in an FAQ document that they must do so off the clock.

Requirements vs. Suggestions

The key question for evaluating if an employer must pay for vaccine time is whether the business requires workers to get vaccinated or simply encourages doing so, according to Shannon Antle Hamilton, who advises employers as chair of Stites & Harbison PLLC's employment law service group.

An employer that requires a vaccine opens itself up to a claim that it should pay for time an employee spends meeting its mandate, she said.

"If you're going to require your employees to get the vaccine as quickly as they can, but you're not going to help them, you could be putting yourself at risk for that kind of wage and hour claim," Hamilton told Law360.

Hamilton noted that claims potentially would include not only time spent going to get the shot, but time spent making arrangements to get an appointment. That could include hours spent on hold in pursuit of an employer-mandated vaccination, she said.

However, Randi May, a partner at Hogue Newman Regal & Kenney LLP who advises employers, said simply fulfilling a condition of employment doesn't automatically make the time compensable.

"If you have to provide that you're eligible to work in the United States or you have to have certain licensing, [then] those are things you have to take care of on your own," May said. "Your employer doesn't pay for that time that it takes in order for you to meet an essential element of work."

Sick Leave Or Incentives Are Another Option

May suggested that employees could avoid a reduction in income by using sick leave, noting the uptick in states and local jurisdictions that mandate paid time off for medical reasons. Using sick hours to get vaccinated would help an employer avoid having to pay time and a half to an employee who works more than 40 hours in a week because paid time off doesn't count toward the overtime threshold, she added.

May also suggested that employers could add sweeteners to getting vaccinated without outright requiring it: "Instead of making it mandatory that employees have the vaccine, what about doing incentives?"

Pandemic-focused guidance from the U.S. Department of Labor would help employers understand their obligations, May said.

The DOL has previously weighed in to say that **midday breaks** to assist with children's remote schooling while working from home during the pandemic are not compensable, and employers do not need to take **"impractical efforts"** to determine whether workers log all of their telework hours.

"The bottom line is there is no DOL guidance on this issue," May said.

Stites & Harbison's Hamilton said that her advice to employers is to start by thinking about the end result they want to see and working backward from there. She added that employers should always communicate to their employees that anybody who has special circumstances should feel free to speak up about their needs.

"If your No.1 goal is to get as many people [as possible] vaccinated and get them back in, I think that kind of answers your question on whether or not you should pay them," Hamilton said.

"If you're going to pay them, they'll pretty much do it," she said.

Just Pay For the Time Anyway

Even if it isn't required, paying people for the time it takes to get vaccinated would remove a barrier, said María Perales Sanchez, the migrant women advocate at Centro de los Derechos del Migrante Inc. The organization supports immigrant workers and provides training about rights on the job.

"A big concern for [workers] is if they take the vaccine they will miss out on work," Perales Sanchez said.

She noted that workers in certain low-wage industries perform manual work that can only be performed in person, and they face a potential loss in income for the time it takes to get vaccinated, as well to recuperate from side effects that may follow, such as arm pain or fever.

"We look at it as a public health problem," Perales Sanchez said.

Many of the people her organization supports work in low-wage industries that have been hit especially hard by the pandemic, such as seafood processing, meat processing and agriculture, she added.

"In order to protect workers and prevent the spread of infectious disease like COVID, we need to make sure that workers have all the tools and access to protections such as the vaccine," Perales Sanchez said. "Without the cost of it being covered, it will be very hard for workers to be in a position to take that action."

--Editing by Abbie Sarfo.