



ACCNJ LEGAL & INSURANCE UPDATE

LEGAL: NEW JERSEY DOL APPROVES EMPLOYER'S RIGHT TO MANDATE VACCINES

On March 19, the [New Jersey Department of Labor \(NJDOLE\)](#) issued [guidance](#) that supports an employer's right to require COVID vaccinations for its workforce. The guidance was published in the form of a Q&A, which asks – “Can I require my employee to get the COVID-19 vaccine in order to enter my workplace?” The answer is YES, and the rationale is closely aligned with [guidance previously issued by the EEOC](#) regarding mandatory vaccinations. The NJ Division on Civil Rights also published additional Q&A guidance, which can be found [here](#).

Under New Jersey's newest guidance, employers will be able to require employees to be vaccinated so long as they accommodate (1) disabilities, (2) sincerely held religious beliefs, and (3) pregnancy or breastfeeding. Employers can request medical documentation to confirm a disability or confirm an employee was instructed not to take the COVID vaccine by a medical provider. Like the EEOC guidance, assessing the sincerity of a religious belief is a bit murkier. Employers may not question the validity of the belief unless the employer has an objective basis for doing so.

If an employee cannot receive the COVID vaccine because of one of the above reasons, a reasonable accommodation must be provided unless doing so would impose an “undue burden” on operations. The NJDOLE guidance goes on to say that, under New Jersey's Law Against Discrimination, “if there is no reasonable accommodation that an employer can provide that would mitigate the risk of COVID-19 transmission to its employees and customers, then an employer can enforce its policy of excluding unvaccinated employees from the physical workplace, even if they are unvaccinated because of a disability, pregnancy, or breastfeeding, or a sincerely held religious belief.”

For unionized workforces, the CBA carries collective bargaining obligations before implementation of a mandatory policy. This issue, along with many others surrounding vaccinations, will be addressed in an upcoming ACCNJ webinar on April 28. Registration will be distributed later this month and we highly encourage all members to sign up.

INSURANCE: COVID LITIGATION STATISTICS AND A LOOK AT ASSEMBLY BILL 4805, WHICH WILL REQUIRE INSURERS TO DISCLOSE WHETHER POLICIES COVER PANDEMIC-RELATED LOSSES

A year ago, the COVID-pandemic was in full force. Businesses hit with shutdowns quickly scrambled for their insurance policies to assess whether insurance could absorb some of the losses. Holders of business interruption and civil authority policies likely felt they were in a good place. But this was not the case. Several policies contained virus exclusion clauses and, even in the case of those that did not, there was still the overriding issue of whether a holder of business interruption coverage must prove physical damage to the property in order to recover. Insurers denied claims and an onslaught of litigation ensued. So a year later, where do we stand?

1. COVID Insurance Litigation Statistics (as of April 2, 2021)

The first court decisions regarding COVID-related insurance litigation began to trickle in during the

summer and fall of 2020. However, in the past few months, several courts decided a flurry of decisions all around the country. The University of Pennsylvania Law School continues to operate a [COVID-Coverage Litigation Tracker](#), which provides a snapshot of how litigants have fared thus far. The Penn Law resource indicates that insurers had great success in getting cases dismissed in federal court, while experiencing less success in state courts. As of April 2, insurers successfully won 204 motions to dismiss in federal court, compared to only 17 denials. That figure was more evenly divided in state court, where insurers had 29 successful motions to dismiss compared to 27 denials. Based on national statistics, virus exclusion clauses continue to be the downfall of most policy holders. This is especially true in federal court, where policies with virus exclusions resulted in 144 successful motions to dismiss when compared to just 6 denials.

In New Jersey, the story is similar to the national trend. Insurers have done very well in federal court. Of the 19 motions to dismiss filed in the Federal District Court of New Jersey, 18 resulted in a full dismissal and 1 resulted in a partial dismissal. Virus exclusion clauses were present in 18 of the 19 federal cases resulting in dismissals. In New Jersey state court, policyholders saw some success as motions to dismiss were denied in 2 cases and granted in 4. Surprisingly, virus exclusion clauses were present in the policies at issue in the two cases where policyholders prevailed.

2. A-4805: Proposed Pandemic Disclosure Requirements

Very few businesses will recover COVID-related losses under their existing policies based on the litigation statistics presented above. Not surprisingly, New Jersey's legislature responded with a proposed bill ([A-4805](#)), which requires certain insurers to disclose to prospective buyers and current policyholders whether their business interruption policies cover pandemics. Specifically, the legislation requires the Department of Banking and Insurance to publish a one-page summary of common insurance clauses concerning coverage for business interruption and the loss of use and occupancy of a commercial property that may be used in a commercial insurance policy. The publication shall be made available on or before the 90th day after the date of enactment of the bill. The summary is to be developed through a public stakeholder process and include certain information, statements, and disclaimers written in easily understandable language. Under the bill, an authorized insurer is to provide the summary to any potential purchaser of, or any policyholder seeking renewal of, a policy that provides coverage for business interruption and the loss of use and occupancy of a commercial property in this State. The summary must be delivered to policyholders within 90 days of the summary's original publication.

A-4805 passed the state Senate and Assembly and now awaits Governor Phil Murphy's signature. ACCNJ will of course continue to bring you the latest information on A-4805 and insurance litigation surrounding COVID.

ACCNJ'S LEGAL & INSURANCE WEBINAR SERIES

Upcoming installments of ACCNJ's Legal and Insurance Webinar Series include:

- **Vaccinations – Employment and CBA Considerations** – April 28th
- **Strategies for Staying Afloat in a Distressed Economy** – May 4th

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