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Can Employers Require Employees to Get a Covid-19 Vaccine? Possibly, but Legal and Policy Questions Remain.

PLEASE NOTE: The following additional information became available, relating to the second sentence of the second paragraph of this article, the day after this newsletter was originally posted: Wisconsin Health Services Secretary Andrea Palm stated on December 3, 2020 that the administration currently has no plans to mandate that employers require vaccinations for anyone in the state, including health care workers. A few days prior to that, Wisconsin's Assembly Speaker Robin Vos announced that the Republicans' package of COVID-Relief legislative proposals included specific provisions prohibiting employers from requiring their employees to receive COVID-19 vaccinations, and prohibiting the governor from issuing an order mandating vaccines for anyone.

In November 2020, the world received some long-awaited good news in the battle against the COVID-19 pandemic. Three of the groups working furiously to produce vaccines announced very promising results in their initial trials. The three groups have announced that their vaccines have produced an immune system response ranging from 70 to 95% of the individuals vaccinated so far. For employers, this brought a new question to mind: "May I require my employees to be immunized against COVID-19 as a condition of employment?" As explained below, there are both legal and policy questions that must be answered before employers can make that decision for their own employees.

No specific law or government agency guidance definitively answers the question as to whether an employer may require employees to receive a COVID-19 vaccine. It also remains to be seen whether any states will pass legislation requiring mandatory vaccination. Such a law was upheld by the U.S. Supreme Court in 1905. Despite this uncertainty, employers can look to previous interpretations of applicable or similar laws, as well as policy considerations, to gain an understanding of the issues and make tentative decisions about their own policies, with final decisions to be based on updated information and governmental guidance about the vaccine as it becomes available.

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Can Employers Require Employees to Get a Covid-19 Vaccine?

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Legal Issues

In response to the 2009 H1N1 pandemic, the Equal Employment Opportunities Commission (EEOC) issued guidance in 2009, stating that employers may require workers to receive a flu vaccine, provided employers take care to provide reasonable accommodations to employees with disabilities that prevent them from receiving the vaccine. Reasonable accommodations are required under the Americans with Disabilities Act (ADA) and similar provisions under the Wisconsin Fair Employment Act (WFEA).

In addition, under Title VII and the WFEA, employers must provide reasonable accommodations to employees whose sincerely held religious beliefs prohibit them from receiving the vaccine.

In March 2020, the EEOC updated its guidance in response to the COVID-19 pandemic. The EEOC guidance includes a discussion of the concept of "direct threat" under the ADA:

> A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

The EEOC guidance stated that, based on the information from the CDC and public health authorities available in March 2020, the COVID-19 pandemic met the "direct threat" standard, based on community spread of the disease and precautions and restrictions on public gatherings that were in place at that time.

In the case of an employee who is unable to receive a COVID-19 vaccine, that person could become infected, and in turn pass on COVID-19 to employees who took the vaccine, but were in the minority group that did not develop an immune response. This could mean that an employer may not be required to accommodate an unvaccinated employee by allowing the person to work without the vaccine, because the unvaccinated employee may pose a "direct threat" to other employees present in the workplace.

The EEOC guidance concludes by stating, "At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists." In other words, employers must continue to monitor the guidance available from the EEOC, the CDC, and public health agencies on the question of "direct threat." Additionally, before denying accommodations to employees based on "direct threat," employers must explore whether any other reasonable accommodation could mitigate that "direct threat" without posing an undue hardship on the employer. This requires an individualized, fact-specific analysis.

Although the EEOC has acknowledged that Title VII and the ADA do not prohibit employers from requiring employees to receive a flu vaccine as long as reasonable accommodations are provided, it has not issued any guidance that is specific to a vaccine for COVID-19. In addition, after discussing the reasonable accommodation obligations, the EEOC went on to include the following recommendation in its guidance issued in 2009: "Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it." It remains to be seen whether EEOC will update this guidance once COVID-19 vaccines become available to the general public, and employers seek further guidance on this important issue.

Policy Considerations

Whether employers should require employees to take the vaccine also involves important policy considerations.

- **Political and Social Issues.** The COVID-19 pandemic has become a highly politicized issue and a rallying cry for some individuals and groups. Vaccines in general have become a social and political issue for a number

of people, sometimes referred to as "anti-vaxxers." Employers should consider the effect on workforce morale and workplace atmosphere if they impose a vaccine mandate. Additionally, availability of the vaccine will initially be limited to certain categories of individuals. Employers might not immediately have the option to require vaccines of all employees.

- **Reasonable Accommodation.** Employers will have to go through the reasonable accommodation process for each person who refuses the vaccine on medical or religious grounds. The reasonable accommodation process can be both time consuming and contentious, depending upon the number of employees claiming a right to reasonable accommodation.
- **Cost.** Employers who choose to require vaccines as a condition of employment will be required to pay for the cost of the vaccines.
- **Legal Claims.** As noted above, the process of responding to requests for reasonable accommodation under the ADA, WFEA and Title VII religious beliefs can be both time consuming and contentious. In addition, employers may create potential liability if they do not carefully observe the reasonable accommodation requirements of these laws.

This article does not explore issues of potential liability for adverse reactions to a vaccine required by an employer. It would be prudent for employers to check with their worker's compensation insurers on this issue.

Conclusion

In light of the unanswered legal questions on the issue of "direct threat" and the possible recommendation of the EEOC to encourage, rather than require, the COVID-19 vaccine, we are advising employers to become educated on these issues and be prepared to make a final decision about vaccinations as more information becomes available.

-- JoAnn M. Hart

Village of Plover Wins Tax Case; Dark Store Argument Fails

The Village of Plover won a big property tax assessment case when the Wisconsin Court of Appeals affirmed the Circuit Court's approval of the valuation made by the Village. The taxpayer, a large Lowe's store, had argued that its value should be based on empty big box developments, the so-called "Dark Store" theory. *Lowe's Home Centers LLC v. Village of Plover*, 2019 AP 974 (Fourth District, October 29, 2020, not recommended for publication).

Lowe's built its big box store in Plover in 2005. It was assessed at $7.35 million every year since then. In 2016, Lowe's challenged the assessment, arguing that the property was only worth $4.62 million. After a trial, Judge Flugaur of the Circuit Court for Portage County found that Lowe's had not overcome the presumption of correctness in the Village's assessment, rejecting each argument made by Lowe's.

The Court of Appeals affirmed, agreeing with the Circuit Court that each of Lowe's arguments lacked merit.

First, Lowe's argued that Plover had failed to examine the value of the property each year and that it just let the original assessment stand. Plover showed that it has used the "mass appraisal" method, authorized under Wisconsin law (see *Metropolitan Assocs. v. City of Milwaukee*, 2018 WI 4, ¶40, 379 Wis. 2d 141, 905 N.W.2d 784, and the *Wisconsin Property Assessment Manual (WPAM)*). The Court of Appeals agreed that Plover properly used the mass appraisal method, which allows for adjustments of assessments based on data applied uniformly across the jurisdiction. Since Plover properly used a legal method of appraisal, the fact that the value did not change was not dispositive.

Second, Lowe's argued that the property should be assessed by comparison to other similar sales. But Lowe's used only sales of properties

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City Cannot Appeal Reduction in Assessed Value by Board of Review

In a surprising decision, the Wisconsin Court of Appeals ruled that a city may not seek court review of an unfavorable ruling by the Board of Review. Effectively, when the Board of Review reduces the assessed value of a taxpayer's property, thereby reducing the funds available to the municipality and shifting the tax burden to other taxpayers, the municipality has no right to ask for review of that determination by the courts. *City of Waukesha v. City of Waukesha Board of Review*, Appeal No. 2019AP1479 (2d District, November 20, 2020).

The Waukesha taxpayer was the Salem United Methodist Church. The city assessor had valued the property, which was not used for religious purposes, at $51,900. When the church accepted an offer to sell the property for $1 million, the assessor adjusted the value to $642,200. As set forth in sec. 70.47, Wis. Stats., the taxpayer appealed to the statutory Board of Review. Under the law, the Board holds a hearing and accepts or modifies the assessment of the city assessor.

Here, the Waukesha Board of Review ruled for the taxpayer, adjusting the assessed value to $108,000. The City filed for an appeal of the Board of Review action by commencing an action for certiorari, pursuant to sec. 70.47(13), which states:

> (13) CERTIORARI. Except as provided in [WIS. STAT. §] 70.85, appeal from the determination of the board of review shall be by an action for certiorari commenced within 90 days after the taxpayer receives the notice under sub. (12).

Despite admitting in its ruling that nothing in the cited statute limits who may file the appeal, the court reasoned that, since only the taxpayer was entitled to receive notice of the decision, only the taxpayer could appeal the ruling. In so doing, the court found that sec. 70.47(11), Wis. Stats., did not give the city the right to appeal, even though that section states that "In all proceedings before the board the taxation district shall be a party in interest to secure or sustain an equitable assessment of all the property in the taxation district." The court reasoned that the taxation district – the city – might be a party in interest before the Board of Review, but that did not give the city the right to appeal. The court also relied upon the fact that the Board of Review was appointed by the Waukesha mayor and confirmed by the common council,

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that that were vacant or "dark." The Court of Appeals, like the Circuit Court, relied on explicit language in the *WPAM* that the assessor "should avoid using sales of improved properties that are vacant ('dark') or distressed as comparable sales unless the subject property is similarly dark or distressed." Since Lowe's was a fully operational store in a thriving commercial area of Plover, Lowe's use of the Dark Store theory was wrong.

Finally, the Court agreed with the Circuit Court's analysis of Plover's assessment method, and declined to disturb the lower Court's finding that the cost approach by the expert for Plover was more credible than the expert for Lowe's. The Court agreed that, having found the cost approach by the Village to be the best shown, it need not engage in lengthy analysis of the income approach offered by Lowe's.

The *Lowe's* case shows the importance of preparation of a detailed case, with experts, by a municipality facing a taxpayer with a well-financed challenge to the assessment. Assessment challenges often turn on the factual details of each piece of property in comparison to similar properties. The Village of Plover's work in this case was critical to the end result. Perhaps challenges based on the Dark Store theory will become less popular with more decisions like this one.

-- Michael P. May

Municipalities Must Give New Unemployment Insurance Notice to Employees

The Department of Workforce Development (DWD), the state agency responsible for administering Wisconsin's unemployment insurance program, recently announced a new notification requirement that affects all Wisconsin employers with one or more employees.

Beginning on November 2, 2020, all employers must individually notify workers about the potential availability of unemployment insurance at the time a "separation from employment" occurs. An employment separation occurs whenever an employment relationship ends or is reduced, including terminations, furloughs with the possibility of recall, or a reduction in hours that results in wage loss. This notice must be provided even if the employee was terminated for misconduct, substantial fault, or if they voluntarily quit. Employers must provide this notice when the employment separation occurs or, if immediate notice is not feasible, as soon as possible.

Providing this notice, however, does not necessarily mean employees will qualify for unemployment insurance benefits. The notice is simply intended to tell employees that unemployment insurance benefits may be available and how to apply. Even if the employer believes the employee will not be eligible for unemployment benefits, the employer should still provide the notice whenever an employment separation occurs. If an employee does not receive the required notice from their employer, there are no specific penalties, but the employee might receive additional time from DWD to file an initial unemployment benefit claim.

DWD provided suggested notice language that employers should use when an employment separation occurs. That sample language can be found at: https://dwd.wisconsin.gov/dwd/publications/ui/notice.htm. At the time of an employment separation, employers can provide the required notice to employees by email, text message, letter, or by providing a copy of DWD's printed poster in person or via mail. Employers should keep a copy of this communication for their records.

Employers were already required to display this DWD poster: https://dwd.wisconsin.gov/dwd/publications/ui/ucb-7-p.pdf in the employer's physical workplace in a suitable location where all employees will readily see it (near bulletin boards, breakrooms, time clocks, etc.) If the employer has remote workers who are not physically present in the office, the employer should also place the poster on the employer's internal intranet, website, or other readily accessible virtual space.

More information from DWD regarding this notice and Wisconsin's unemployment insurance program can be found at: https://dwd.wisconsin.gov/uitax/.

-- Brenna McLaughlin

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apparently viewing those facts as the only legal power that Waukesha had to affect the assessment.

The ruling raises many concerns. First, it is unusual for a court to find that a local body is the final arbiter of the exercise of its powers; the general rule is that any local decision must be reviewable. Second, the inability to appeal an unfavorable ruling means that the city will collect less tax revenue and that it must cover its costs by increasing taxes to other taxpayers. Yet the city cannot go to court to carry out its statutory obligation to "secure or sustain an equitable assessment."

Waukesha is considering whether to ask for review by the Wisconsin Supreme Court.

-- Michael P. May

BoardmanClark

1 S PINCKNEY ST SUITE 410 PO BOX 927
MADISON WI 53701-0927

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Eileen A. Brownlee	822-3251	ebrownlee@boardmanclark.com
Barry J. Blonien	286-7168	bblonien@boardmanclark.com
Jeffrey P. Clark	286-7237	jclark@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
Brian P. Goodman	283-1722	bgoodman@boardmanclark.com
Eric B. Hagen	286-7255	ehagen@boardmanclark.com
Kathryn A. Harrell	283-1744	kharrell@boardmanclark.com
JoAnn M. Hart	286-7162	jhart@boardmanclark.com
Richard A. Heinemann	283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	286-7210	pjohnson@boardmanclark.com
Michael J. Julka	286-7238	mjulka@boardmanclark.com
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Michael P. May	286-7161	mmay@boardmanclark.com
Kathryn A. Pfefferle	286-7209	kpfefferle@boardmanclark.com
Julia K. Potter	283-1720	jpotter@boardmanclark.com
Jared W. Smith	286-7171	jsmith@boardmanclark.com
Mark J. Steichen	283-1767	msteichen@boardmanclark.com
Catherine E. Wiese	286-7181	cwiese@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com