BoardmanClark

Municipal Law Newsletter

VOLUME 27, ISSUE 5 SEPTEMBER/OCTOBER 2021

In this issue

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COVID-19 Vaccine Mandates

On August 23, 2021, the Food and Drug Administration (FDA) fully approved the Pfizer COVID-19 vaccine for prevention of the disease in individuals 16 years of age and older. This means that the Pfizer COVID-19 vaccine meets high standards for safety and effectiveness. It also means that Wisconsin employers can implement a vaccine mandate with less legal risk, provided they consider reasonable accommodations for employees who cannot get the vaccine due to disability or sincerely held religious beliefs.

Wrongful Discharge Claim Risk Diminished

Wisconsin employers that now decide to mandate the COVID-19 vaccine will likely no longer face a risk of wrongful discharge claims if they terminate employees for failing to get the vaccine. The previous risk of liability for wrongful discharge derived from the vaccine being only approved for emergency use by the FDA, which may have given individuals a right to refuse the vaccine on the grounds that they were objecting to getting a vaccine that was not fully authorized by the FDA. Forcing employees to get the vaccine under these circumstances could violate public policy because FDA emergency use authorization allowed individuals to refuse the vaccine. Now, the FDA has fully approved the Pfizer vaccine. Any employee subject to an employer's COVID-19 vaccine mandate can no longer realistically object to receiving the vaccine on that basis. Therefore, terminating an employee for refusing to get a COVID-19 vaccine that has been fully authorized by the FDA is unlikely to result in a viable claim for wrongful discharge.

Disability and Religious Accommodations Still Required

Mandating the COVID-19 vaccine, however, still implicates legal issues related to disability and religious discrimination under the Wisconsin Fair Employment Act, the Americans with Disabilities Act (ADA), and Title VII of the Civil Rights Act of 1964. Despite full FDA

Continued on page 2

COVID-19 Vaccine Mandates

Continued from front page

approval, employees may still claim they cannot get vaccinated due to a disability or sincerely held religious belief. The law imposes constraints on the questions employers can ask employees and the documentation employers can request. Therefore, employers may wish to consult with legal counsel if an employee asks for an exemption to the vaccine mandate based on a disability or sincerely held religious beliefs.

If an employee informs an employer that they are unable to receive the COVID-19 vaccine due to a disability or sincerely held religious belief, the employer generally cannot terminate the employee without first engaging in an interactive process with them as to whether a reasonable accommodation is available that does not pose an undue hardship on the employer. Because the legal standards for undue hardship are different depending on whether the employee is requesting an accommodation due to disability or religious belief, employers may wish to consult with legal counsel when assessing the accommodation.

Conclusion

Full FDA approval of the Pfizer COVID-19 vaccine means that employers are now on stronger legal footing to require employees to be vaccinated. However, to avoid potentially viable discrimination claims, employers must still consider reasonable accommodations for employees who cannot be vaccinated due to a disability or sincerely held religious belief. If individual questions arise, an employer may wish to reach out to legal councel for assistance in identifying a reasonable accommodation request, conducting an individualized direct threat analysis when appropriate, and assessing undue hardship under the appropriate legal standards.

— Sarah J. Horner and Brian P. Goodman

Municipality Wins Again in Dark Store Tax Case

The City of Delavan is the latest Wisconsin municipality to win in a tax assessment challenge based upon the "dark store" theory. *Lowe's Home Centers, LLC v. City of Delavan,* Appeal No. 2019AP1987, (July 28, 2021, unpublished per curiam opinion, Dist. II).

The series of court cases and the specific language against dark store theory in the *Wisconsin Property Assessment Manual (WPAM)* should mean that such challenges begin to go away. However, it does not appear that the owners of big box establishments are willing to abandon the discredited legal theory.

Lowe's challenged the City of Delavan's assessments for the tax years 2016 and 2017. Lowe's presented evidence of the sales of other big box stores, but all of the sales were of stores that were not operating or "dark." The circuit court and the court of appeals rejected that evidence because the sales were not of comparable properties. The court of appeals relied upon the published decision in *Bonstores Realty One, LLC v. City of Wauwautosa,* 2013 WI APP 131, and the specific 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." *WPAM*, at 9-12.

The court went on to cite Lowe's prior attempts to use the dark store theory against them in this case (¶35):

> Again, for the reasons articulated in Lowe's other excessive assessment challenges involving the appropriate legal analysis of the same expert's, MaRous', reliance on "distressed" properties, we reject Lowe's challenge here. *Lowe's Home Ctrs., LLC v. Village of Plover,* No. 2019AP974, unpublished slip op. ¶¶42-43 (WI App Oct. 29, 2020); see also *Lowe's Home Ctrs., LLC v. City of Wauwatosa,* No. 2020AP393, unpublished slip op. ¶¶68-69 (WI App July 7, 2021).

Continued on page 3

Municipality Has a Right to Be a Party to Its Neighbors' Cooperative Boundary Plan

In *City of Mayville v. Dept. of Admin.*, 2021 WI 57, the Wisconsin Supreme Court unanimously held that the City of Mayville had the right to be a party to a cooperative boundary plan between the Village of Kekoskee and the Town of Williamstown. The opinion issued by the Supreme Court raises a question about the future use of Wis. Stat. § 66.0307 cooperative boundary plans.

The Village and Town entered into a cooperative boundary plan pursuant to which the Town would be absorbed into the Village and be renamed the Village of Williamstown. The new Village completely surrounded the City. The City objected to the plan. After several iterations, the plan was approved by the Wisconsin Department of Administration. The final version of the approved plan included a "detachment area" that could be detached from the new Village and attached to the City in the future if certain conditions were met.

The City challenged the DOA's approval of the plan. The circuit court reversed DOA's approval of the plan because it determined that the cooperative plan statute did not permit municipalities to use cooperative plans to absorb an entire town into a village. The court of appeals affirmed the reversal but on different grounds. 2020 WI App 63. The court of appeals concluded that the plan included an optional boundary line change and that Wis. Stat. § 66.0307 did not permit such a boundary line change unless the municipality affected by the change was a party to the plan. Since the City was not a party to the plan, the court of appeals held that the DOA could not approve the plan. The court of appeals did not address the issue whether the cooperative plan statute permits municipalities to use cooperative plans to absorb an entire town into a village.

The Supreme Court reached the same result but its opinion included language suggesting that the City's right to be a party to a cooperative plan between its neighbors could be more far-reaching than what was recognized by the court of appeals. Section 66.0307(2) provides that "[n]o boundary of a municipality may be changed or maintained under this section unless the municipality is a party to the cooperative agreement." According to the opinion, the term "change" as used in this context means "a physical alteration of, or difference in" a boundary line. The Supreme Court (as had the court of appeals) found that the City was entitled to be a party to the plan because the plan included an optional physical alteration of the City's boundary line.

The Supreme Court opinion, however, also mentions that the plan resulted in other differences affecting the City's boundaries. Because of the plan, the City would no longer possess the right to annex and its ability to grow would be limited. The Supreme Court stated that the plan "not only contemplates a change to Mayville's boundary lines, it also has the effect of precluding Mayville's expansion if the Plan's conditions for changing its boundary line are not met. *Mayville should have been a party to, and had a voice in, proposed alterations to its municipal authority.*"

Time will tell; however, the Supreme Court's opinion may suggest an opening for a municipality to demand the right to participate in its neighboring municipalities' cooperative plan.

— Lawrie Kobza

Municipality Wins Again in Dark Store Tax Case

Continued from page 2

Thus, Lowe's has now lost three cases in a row on the discredited dark store theory.

This third court ruling against Lowe's is an unpublished per curiam opinion and, per the rules of appellate procedure, may not be cited to a court in any litigation.

— Michael P. May

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Municipal Law Newsletter

The Municipal Law Newsletter is published by Boardman & Clark LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group—Water Division.

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