

HEALTH CARE LAW ADVISOR ALERT: ESTABLISHED U.S. PUBLIC HEALTH PRECEDENT ON MANDATORY VACCINATION REQUIREMENTS UPHELD (AT LEAST FOR NOW)

American law long has recognized the authority of government officials to address public health emergencies. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 205 (1824) (recognizing the “power of a State, to provide for the health of its citizens”).

More than a century ago, the U.S. Supreme Court decided the seminal case on the power of the states to respond to a public health crisis in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), where it affirmed the constitutionality of a state statute authorizing local health boards to require residents to be vaccinated against smallpox. As explained in *Jacobson*, the authority to respond to a public health crisis must be “lodged somewhere,” and it is “not an unusual, nor an unreasonable or arbitrary, requirement” to vest that authority in officials “appointed, presumably, because of their fitness to determine such questions.” *Id.* at 27. The Court intermittently emphasized the necessity of the state’s smallpox vaccination regulation, as well as the utilitarian aspect of rules protecting the many at the expense of the few, but ultimately seemed to rely on the basic police power of the state to regulate public health as the basis for its decision upholding the vaccination requirement. *Id.* at 26, 28, 29, 31.

Due to the COVID-19 pandemic, courts around the country have had the opportunity to revisit the *Jacobson* decision. Last year, the U.S. Supreme Court discussed *Jacobson* in a decision enjoining an executive order by New York’s governor establishing certain occupancy limits to combat the spread of COVID-19. In *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S. Ct. 63 (2020), Justice Neil Gorsuch explained *Jacobson*’s imposition on individual rights was “avoidable and relatively modest” and “easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs [to the smallpox vaccine requirement] available to certain objectors.” *Id.*, 141 S. Ct. 63 at 71 (Gorsuch, J., concurring). And Chief Justice John Roberts quoted from *Jacobson*, stating that “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” *Id.* at 76 (Roberts, C.J., dissenting) (quoting *Jacobson*, 197 U.S. at 38).

Jacobson also played a pivotal role in two cases addressing COVID-19 vaccination requirements recently considered by the U.S. Supreme Court.

In the first case, *Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind. July 18, 2021), *Pls.’ mot. for inj. pending appeal denied*, 7 F.4th 592 (7th

Cir. 2021), eight students filed a federal lawsuit seeking to bar enforcement of Indiana University's requirement that its faculty, staff and students be vaccinated against COVID-19, unless exempt from the requirement for religious or medical reasons. Students who do not get vaccinated are restricted from participation in on-campus activities and their class registrations and university identification cards are cancelled. Exempt students are required to wear masks in public spaces while on campus and be tested for COVID-19 two times a week. The plaintiffs claim the University's rules violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *Klaassen*, slip. op. at *1.

In July 2021, the district court denied the plaintiffs' request for a preliminary injunction. *Id.* at *45. It ruled Indiana University's COVID-19 vaccination requirement "isn't forced vaccination" and that the U.S. Constitution permits the school to pursue vaccination "in the legitimate interest of public health for its students, faculty and staff." *Id.* at *46. A few days later, the plaintiffs filed a notice of appeal with the Seventh Circuit Court of Appeals and moved for an injunction against the university's requirements pending appeal. *Klaassen*, 7 F.4th 592.

In early August 2021, the Seventh Circuit denied the plaintiffs' injunction request, citing *Jacobson*. Judge Frank Easterbrook, writing for the three-judge panel, found the case "is easier than *Jacobson*" for two reasons. *Id.* at 593. First, *Jacobson* upheld a vaccination requirement that lacked any exception for adults, but the university's requirement has certain religious and medical exceptions. Second, unlike *Jacobson*, the university's requirements do not require any adult member of the public to be vaccinated. Instead, they are "a condition of attending Indiana University. People who do not want to be vaccinated may go elsewhere." *Id.* The court recognized that "vaccination requirements, like other public-health measures, have been common in this nation" and that "given *Jacobson* . . . which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2." *Id.* The court found that:

Each university may decide what is necessary to keep other students safe in a congregate setting. Health exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenza, and more) are common requirements of higher education. Vaccination protects not only the vaccinated persons but also those who come in contact with them, and at a university close contact is inevitable.

Id.

After the Seventh Circuit's ruling, the plaintiffs filed an emergency application for writ of injunction with the U.S. Supreme Court, again seeking to enjoin enforcement of Indiana University's vaccination requirements. See *Klaassen*, Emergency Appl. 21A15 (Aug. 6, 2021). The plaintiffs argued that the university "is coercing students to give up their rights to bodily

integrity, autonomy, and of medical treatment choice in exchange for the discretionary benefit of matriculating at IU.” *Id.* at 14. But Justice Amy Coney Barrett, the Circuit Justice for the Seventh Circuit, denied the plaintiffs’ application without referring it to the full Court for consideration. *Id.*, *denied* (Aug. 12, 2021) (Barrett, J.). At the time of the writing of this article, the plaintiffs’ case continues at the district court.

In the second case, *Maniscalco v. New York City Dep’t of Educ.*, No. 21-CV-5055 BMC, 2021 WL 4344267 (E.D.N.Y. Sept. 23, 2021), *Pls.’ mot. for inj. pending appeal denied*, 2021 WL 4437700 (2d Cir. Sept. 27, 2021), four New York City public school employees filed a federal class action lawsuit seeking to bar enforcement of New York City’s requirement that its public school teachers provide proof of COVID-19 vaccination or face suspension without pay. This requirement does not contain a provision allowing teachers to opt-out of vaccination through COVID-19 testing. The plaintiffs claimed different reasons for not wanting to get the vaccine, including the concern of its long term side effects, and argued that the requirement violates their substantive due process and equal protection rights under the Fourteenth Amendment. *Id.*, slip. op. at *1.

On September 23, 2021, the district court denied the plaintiffs’ motion for a preliminary injunction against the requirement, ruling that the plaintiffs could not show a likelihood of success on the merits of their claims. Citing *Jacobson*, the court found that the law allows a state to “‘curtail constitutional rights in response to a society-threatening epidemic so long as the [public health] measures have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plan and palpable invasion of rights secured by fundamental law.’” *Id.* at *3 (citation omitted). The court noted that requiring teachers to “take a dose of ivermectin as a condition of employment” might qualify as an improper invasion of rights, but that “mandating a vaccine approved by the FDA does not.” *Id.* The court stated “‘the Due Process Clause secures the liberty to pursue a calling or occupation, and not the right to a specific job.’” *Id.* (citation omitted).

Later that day, the plaintiffs filed a notice of appeal with the Second Circuit Court of Appeals and moved for an expedited injunction against New York City’s vaccination requirement pending appeal. The Second Circuit issued a temporary injunction in favor of the plaintiffs for administrative purposes so that their motion could be considered by a three-judge motions panel. But on September 27, 2021, that three-judge panel denied the plaintiffs’ motion and dissolved the temporary injunction. *See Order of USCA as to [No.] 17*, No. 21-CV-5055, No. 19 (E.D.N.Y. Sept. 24, 2021).

After the Second Circuit’s ruling, the plaintiffs filed an emergency application for writ of injunction with the U.S. Supreme Court, again seeking to enjoin enforcement of New York City’s vaccination requirement. *See Maniscalco*, Emergency Appl. 21A50 (Sept. 30, 2021). Justice Sonja Sotomayor, the Circuit Justice for the Second Circuit, denied the plaintiffs’ application without even waiting for New York City to reply to it, and without referring it to

the full Court for consideration. *Id.*, *denied* (Oct. 1, 2021) (Sotomayor, J.). This case also continues at the district court at the time of the writing of this article.

While the rise of various COVID-19 requirements inevitably will lead to additional litigation in various courts around the country, at least for now it seems clear that the *Jacobson* decision continues to provide guidance to public health officials, attorneys and the courts around the country on vaccination issues, as it has for over a century.

Grant Killoran is a shareholder in O'Neil, Cannon, Hollman, Dejong and Laing's Milwaukee office with a practice focusing on complex business and health care disputes and is the immediate past Chair of its Litigation Practice Group. He can be reached at 414.291.4733 or at grant.killoran@wilaw.com.

OCHDL IS PLEASED TO ANNOUNCE TWO NEW ATTORNEYS HAVE JOINED THE FIRM

We are pleased to announce Attorney Michael M. Kennedy and Attorney Jason R. Meehan have joined O'Neil Cannon

Attorney Michael M. Kennedy, a graduate of Marquette University Law School, will join the firm's Business Law Practice Group, where he will assist clients in a wide variety of business law matters. Drawing upon his experience as in-house counsel for a large construction company, Michael provides a high-level understanding of contract management and regulation.

Attorney Jason R. Meehan, a graduate of the University of Wisconsin Law School, will join the firm's Litigation Practice Group, where he will assist clients in a wide variety of litigation matters. Prior to joining the firm, Jason was working at the Wisconsin State Public Defender's office, where he managed and represented hundreds of clients charged with misdemeanor and felony cases in Milwaukee County.

We are very pleased to have Michael and Jason join OCHDL.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service law firm that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions, and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next.

TAX AND WEALTH ADVISOR ALERT: WHAT SHOULD YOU DO IF YOU ARE NAMED TRUSTEE?

Perhaps a friend or loved one has recently passed away and has named you as the trustee of their trust. You may be wondering, “What does it mean to be a trustee?”

Your job as “trustee” makes you responsible for carrying out the terms of the trust. In a nutshell, think of this job as stepping into the grantor’s shoes and making the same decisions he or she would have if they were alive. The grantor likely chose you to be his or her trustee because they trusted you to take care of their loved ones and their finances after they died.

The trustee owes a fiduciary duty to the beneficiaries to put their needs above the trustee’s, protect and invest trust assets prudently, and treat beneficiaries fairly. This fiduciary duty means that the trustee must comply with the trust terms, as well as the applicable state and federal laws. By doing so, a trustee can avoid potential liability for breach of that fiduciary duty.

You can prepare yourself for the trustee’s role with the following overview of a trustee’s job.

Be Knowledgeable of the Trust Provisions and Your Responsibilities.

If you accept the role of trustee, it is important to understand the trust document and your responsibilities. The trust document will tell you what the grantor’s intentions were, who the beneficiaries are, and when they receive distributions of trust assets and under what circumstances.

You should consult with an attorney about your responsibilities and how to execute the terms of the trust in a timely manner. Take the trust document and any information you have about the trust assets to your meeting. To protect yourself from potential liability, do not sell trust assets or make distributions to the beneficiaries until you fully understand the trust document and your responsibilities.

Take Control Over the Trust Assets.

As trustee, you are responsible for managing the trust assets and need to take control over the trust assets. This means that you should contact the decedent’s financial advisor, accountant, and attorney to locate any trust assets. Next, work with the decedent’s financial advisor and banker to update the titles of assets to reflect that you are now the trustee. Make sure you collect any death benefits due from any life insurance policies, Social Security,

or any other agency or association. Assets that were titled in the name of the decedent may be subject to a probate proceeding before they can be titled in the name of the trust. Once assets are titled in your name as trustee, you have the ability to manage and invest the assets.

Create a Budget.

Make sure you understand the costs of administering the trust and that you have adequate liquidity to pay for taxes and other expenses. For example, a trust that owns real estate will need to pay for property taxes and any water, electric, and lawn maintenance bills to preserve its value.

Keep Accurate Records and Prepare a Trust Accounting.

You are responsible for keeping accurate records of all trust transactions. Many trusts require the trustee to give an annual trust accounting to the beneficiaries. The trust accounting will show the fair market value of all trust assets, earned income, taxes, and expenses, and any trust distributions. Keep all receipts, bank statements, brokerage statements, and closing statements on hand to help you prepare a trust accounting. Even if the trust does not require you to prepare a trust accounting, you will still need to keep records of all trust transactions to communicate your decisions to the trust beneficiaries and protect yourself from liability.

Invest the Trust Assets Wisely.

A trustee has a fiduciary duty to invest the trust assets prudently. It is often understood that this means that the trustee will invest the assets to achieve reasonable growth with minimal risk. Diversification is the key to ensuring a proper allocation of liquid assets, capital preserving assets, and income producing assets. An attorney and financial advisor can help you determine the proper investment allocation.

File Tax Returns.

You should work with an attorney and accountant to ensure that all tax returns are filed and paid in a timely manner, including the decedent's final income tax return and annual trust tax returns. Finally, you should work with an attorney to determine whether an estate tax return is due. If an estate tax is owed, an estate tax return must be filed within nine months of the decedent's date of death.

Trustee Compensation.

Trustees can be paid "reasonable" compensation for their services. You should consult with

an attorney to determine what this means in your situation.

Distribute the Trust Assets.

Finally, the trustee is responsible for distributing the trust assets to the beneficiaries in the manner described in the trust document. For example, the trust could say that the trust assets are to be divided equally between beneficiaries and given to them outright, free of trust. Other trusts may provide that the assets be divided equally between the beneficiaries, but held in a separate trust share for each beneficiary's benefit. Each separate trust share will need to apply for an Employer Identification Number (EIN), file annual tax returns, and prepare annual trust accountings (if required) for the trust beneficiary(ies).

If you have any questions, please contact Kelly M. Spott at kelly.spott@wilaw.com or 414-276-5000.

OCHDL HIGHLIGHTED FOR ORAL ARGUMENTS BEFORE WISCONSIN SUPREME COURT

In a recent article authored by a professor at Marquette University, O'Neil Cannon was prominently mentioned for its activity and success before the Wisconsin Supreme Court. In the [article](#), the professor discusses what law firms were most active and successful before the Court during the Court's past three terms (2018-2021).

The article notes that 13 law firms, including OCHDL, have had at least three oral arguments before the Court during the Court's past three terms and, of those firms, OCHDL had the third most oral arguments. The article also notes that only two of these 13 law firms prevailed in all of their cases before the Court, with OCHDL being one of them.

Additionally, the article examined how each law firm won (or lost) the support of each individual justice in the respective cases they argued. Only one of the firms—OCHDL—was successful in obtaining at least two-thirds of the votes cast by every justice who participated in their cases.

OCHDL is honored to be recognized for its success in representing clients before the Wisconsin Supreme Court.

CAN I REALLY BE SUED THERE?

'Can I really be sued there?' If you have ever asked that question, you're not alone—many defendants sued outside of their home state wonder the same thing. For example, if a small family-owned Wisconsin business is sued in a Nevada court, its owners may rightly question whether that is proper.

The answer likely depends on the jurisdiction of the court in question. Personal jurisdiction—that is, a court's authority over parties to a lawsuit—can be broad, but it is not unlimited. Without jurisdiction over a party, the court does not have authority to decide the dispute. However, if a defendant does not challenge personal jurisdiction at the beginning of a case, that party may forfeit its right to do so, and the case may proceed anyway.

Whether a court has personal jurisdiction depends on an analysis of the United States Constitution, applicable statutes, and the many cases interpreting those sources. As a result, there is not always an easy answer to whether a given court has personal jurisdiction over a party.

In general, a court will typically have personal jurisdiction over an individual whose permanent residence is in the state where the court is located or a corporation incorporated in that state. Beyond those relatively straightforward situations, a court may still have jurisdiction over a party who has sufficient contacts with that state, which depends on many factors.

Because courts can dismiss lawsuits if they do not have personal jurisdiction over a party, this is an important consideration in the early stages of a dispute. Whether you're contemplating bringing a lawsuit, defending a claim, or negotiating a contract and considering including a clause addressing where parties must resolve any disputes, it is important to keep the principles of personal jurisdiction in mind.

If you are faced with a lawsuit, or need an analysis of jurisdictional issues before a dispute arises, contact [Christa Wittenberg](mailto:christa.wittenberg@wilaw.com) at 414-276-5000 or christa.wittenberg@wilaw.com.

GRANT KILLORAN ELECTED TO THE AMERICAN BAR ASSOCIATION BOARD OF GOVERNORS

Grant Killoran of O'Neil, Cannon, Hollman, DeJong and Laing was elected to the Board of Governors of the American Bar Association at the ABA's Annual Meeting in Chicago in August

2021. Grant will serve a three-year term and represent District 9, which includes the states of Wisconsin, Minnesota, and Missouri.

The 43-member Board of Governors is comprised of 19 District representatives, 18 members-at large, and the following officers of the ABA (serving *ex-officio*): the ABA President, President-Elect, Chair of the House of Delegates, Secretary, Treasurer, and Immediate Past President. The Board of Governors oversees the general operation of the ABA and develops specific plans of action. Grant also has been appointed as the Board of Governors' liaison to the ABA's Section of Health Law, Commission on the American Jury, and Forum on Housing and Community Development Law.

With his election to the ABA Board of Governors, Grant also becomes a member of the ABA House of Delegates. The House of Delegates is the ABA's policymaking body and is responsible for control and administration of the ABA. Grant previously served in the House of Delegates for many years as a representative of the State Bar of Wisconsin.

FOUR OCHDL ATTORNEYS NAMED 2022 “LAWYER OF THE YEAR” IN THE MILWAUKEE AREA BY BEST LAWYERS®

Attorneys Seth Dizard (Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization), Pete Faust (Mergers and Acquisitions), Greg Lyons (Litigation - Insurance), and Steve Slawinski (Construction) have been named by Best Lawyers® as the 2022 “Lawyer of the Year” in Milwaukee for their area of practice.

Only one lawyer in each practice area and designated metropolitan area is honored as the “Lawyer of the Year.” Lawyers are selected based on the assessments of other leading lawyers in the same category.

This designation reflects the high level of respect lawyers have earned for their abilities, professionalism, and integrity.

19 OCHDL LAWYERS SELECTED AS 2022 BEST

LAWYERS®; ANOTHER 5 NAMED BEST LAWYERS: ONES TO WATCH

We are pleased to announce 19 of our lawyers have been included in the 2022 Edition of *The Best Lawyers in America*, and an additional five have been selected as 2022 *Best Lawyers: Ones to Watch*.

The following are the O'Neil, Cannon, Hollman, DeJong and Laing lawyers named to the 2022 lists:

Best Lawyers in America

- Douglas P. Dehler - Litigation - Insurance
- James G. DeJong - Corporate Law, Mergers and Acquisitions Law, and Securities / Capital Markets Law
- Seth E. Dizard - Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation - Bankruptcy
- Peter J. Faust - Corporate Law and Mergers and Acquisitions Law
- John G. Gehringer - Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
- Joseph E. Gumina - Employment Law - Management and Litigation - Labor and Employment
- Dennis W. Hollman - Corporate Law and Trusts and Estates
- Grant C. Killoran - Commercial Litigation and Litigation - Health Care
- JB Koenings - Corporate Law
- Dean P. Laing - Commercial Litigation, Personal Injury Litigation - Plaintiffs, and Product Liability Litigation - Defendants
- Gregory W. Lyons - Commercial Litigation and Litigation - Insurance
- Patrick G. McBride - Commercial Litigation
- Joseph D. Newbold - Commercial Litigation
- Chad J. Richter - Business Organizations (including LLCs and Partnerships) and Corporate Law
- John R. Schreiber - Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation - Bankruptcy
- Jason R. Scoby - Corporate Law

- Steven J. Slawinski – Construction Law

Best Lawyers: Ones to Watch

- Trevor C. Lippman – Litigation – Trusts and Estates
- Erica N. Reib – Labor and Employment Law – Management and Litigation – Labor and Employment
- Kelly M. Spott – Trusts and Estates
- Christa D. Wittenberg – Commercial Litigation

About Best Lawyers

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals.

Best Lawyers: Ones to Watch recognizes associates and other lawyers who are earlier in their careers for their outstanding professional excellence in private practice in the United States.

Lawyers on *The Best Lawyers in America* and *Best Lawyers: Ones to Watch* lists are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and they undergo an authentication process to make sure they are in current practice and in good standing.

HEALTH CARE LAW ADVISOR ALERT: NEW FEDERAL REGULATIONS TAKE AIM AT HEALTH CARE PROVIDER BILLING

Health care providers should be aware of new regulations the U.S. Department of Health and Human Services (HHS) and other agencies issued in July that relate to medical billing practices.

Part I of the long-awaited regulations to implement the federal No Surprises Act was published on July 13, 2021. The regulations are applicable for plan or policy years beginning on or after January 1, 2022. HHS, along with the Department of the Treasury and Department of Labor, issued rules that implement the statutory provisions in the No Surprises Act. This federal law, enacted in 2020, was discussed in an earlier [blog article](#). The new regulations mirror the statutory provisions and provide guidance on interpreting and applying the No

Surprises Act. In particular, the new regulations clarify the methodology for calculating the qualifying payment amount (QPA)—a calculation that will often be used to evaluate the amount health plans pay providers for treatment that falls under the No Surprises Act, including out-of-network emergency care. The regulations also outline requirements for certain health care providers to post and provide consumers with a notice related to balance billing restrictions, and the criteria for providers to obtain the consent necessary to balance bill for non-emergency out-of-network services.

The new regulations do not yet address the independent dispute resolution (IDR) process applicable when health plans and providers do not agree on the amount to be paid for out-of-network care that falls under the Act. This IDR process is an important aspect of the No Surprises Act, and the continued uncertainty may make it difficult for health care providers to plan for the coming year. Regulations on this topic are expected to be issued soon.

The federal government is accepting public comments through September 7, 2021, and may modify the regulations based on those comments.

The attorneys who contribute to the Health Care Law Advisor are available to assist health care providers with a variety of legal matters. Please contact us if you need assistance navigating the new regulations.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- A Recent Supreme Court Decision Narrows the Scope of Trespasser Immunity
- Wisconsin Landlord Subjected to Tenancy in Jail
- Estate Planning Considerations for Second Marriages
- What Does President Biden's Executive Order on Non-Competes Mean for Wisconsin Employers?
- Did the United States Supreme Court Just Suggest a Change to the Established Public Health Constitutional Framework?

Firm News:

- Attorney Greg Lyons Named Fellow with the American Bar Foundation
- Attorney Grant Killoran Published in the *Wisconsin Lawyer*

Click the image below to read more.



The Obama Care Health Coverage Pledge (HCP)

It's Time. Support Good Care in America. In Support of the American People.

As a Fidelity client, we are pleased to announce that we have joined the Obama Care Health Coverage Pledge (HCP) to support the American people's right to affordable, quality health care.



Learn More



Obama Care Health Coverage Pledge (HCP)



As a Fidelity client, we are pleased to announce that we have joined the Obama Care Health Coverage Pledge (HCP) to support the American people's right to affordable, quality health care.

Learn More



Obama Care Health Coverage Pledge (HCP)

As a Fidelity client, we are pleased to announce that we have joined the Obama Care Health Coverage Pledge (HCP) to support the American people's right to affordable, quality health care.



Learn More



Obama Care Health Coverage Pledge (HCP)