

19 OCHDL LAWYERS SELECTED AS 2023 BEST LAWYERS®; ANOTHER 4 NAMED BEST LAWYERS: ONES TO WATCH

We are pleased to announce 19 of our lawyers have been included in the 2023 Edition of *The Best Lawyers in America*, and an additional four have been selected as 2023 *Best Lawyers: Ones to Watch*.

The following are the O'Neil, Cannon, Hollman, DeJong and Laing lawyers named to the 2023 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.

JOSEPH GUMINA, GRANT KILLORAN, AND ERICA REIB PUBLISHED IN THE WISCONSIN LAWYER

An article by Attorneys Joseph Gumina, Grant Killoran, and Erica Reib entitled “COVID-19 Vaccination Mandates: What Now?” is featured in the March edition of the State Bar of Wisconsin publication *Wisconsin Lawyer*. In their article they detail the challenges mandates create and the current legal status of workplace vaccination requirements.

Read the full article [here](#).

ATTORNEY GRANT KILLORAN PUBLISHED BY THE ASSOCIATION OF CORPORATE COUNSEL

Attorney Grant Killoran recently published an article for the Association of Corporate Counsel's (ACC) resource library. Headquartered in Washington, D.C., the ACC is a global legal association serving the needs of in-house legal counsel around the world.

The article, entitled "Ten Considerations Regarding State Government Public Health Powers to Mandate COVID-19 Protective Measures and Vaccination in the United States," discusses the existing public health law framework in the United States and summarizes recent decisions by the United States Supreme Court arising from cases challenging public health measures to combat the COVID-19 pandemic.

Read the full article [here](#).

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.

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.

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.

ATTORNEY GRANT KILLORAN PUBLISHED IN THE WISCONSIN LAWYER

Grant Killoran authored an article in the June, 2021 edition of the *Wisconsin Lawyer* magazine, entitled “The Legal Treatment of Vaccine Injury Claim.” Their article analyzes how claims for vaccine injury, including claims related to the newly-developed COVID-19 vaccines, are handled under existing law, including the statutory processes applicable to such claims.

Read the full article [here](#).

ATTORNEY GRANT KILLORAN FEATURED IN THE ABA JOURNAL

Grant Killoran is featured in the June/July edition of the *ABA Journal* along with the other nominees for the American Bar Association’s Board of Governors. Grant is the nominee for the District 9 seat on the ABA Board of Governors, which includes the states of Wisconsin, Minnesota, and Missouri. The election for the ABA Board of Governors will take place at the ABA’s Annual Meeting in Chicago in August, 2021.

You can read the full article [here](#).

HEALTH CARE LAW ADVISOR ALERT: DID THE UNITED STATES SUPREME COURT JUST SUGGEST A CHANGE TO THE ESTABLISHED PUBLIC HEALTH CONSTITUTIONAL FRAMEWORK?

American law long has recognized the authority of government officials to address public health emergencies. Almost 200 years ago, the U.S. Supreme Court ruled that, under the

10th Amendment to the U.S. Constitution, the power to address public health emergencies generally is held by the states rather than the federal government. See *Gibbons v. Ogden*, 22 U.S. 1, 205 (1824) (recognizing the “power of a State, to provide for the health of its citizens”). And 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. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). There, the Court affirmed the constitutionality of a state statute authorizing local health boards to require that residents be vaccinated against smallpox or pay a five-dollar fine.

As the Court 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 public health 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. *Id.* at 26, 28, 29, 31. Thus, while the *Jacobson* decision shows the high level of deference courts may give to the actions of states faced with a public health crisis, it does not set forth a clear framework for today’s courts or governmental officials, in part because the decision arose before the development of modern due process jurisprudence.

In its recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S. Ct. 63 (2020), the U.S. Supreme Court may have begun to minimize the impact of *Jacobson* today. There, the Court enjoined an executive order by New York’s governor establishing certain occupancy limits to combat the spread of COVID-19. The Court noted that although “[m]embers of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area ... even in a pandemic, the Constitution cannot be put away and forgotten.” *Id.* at *3.

In a concurrence, Justice Neil Gorsuch distinguished *Jacobson* from the case before the Court, stating it “hardly supports cutting the Constitution loose during a pandemic.” *Id.* at *5 (Gorsuch, J., concurring). He noted that people affected by the mandatory vaccination order at issue in *Jacobson* could avoid taking the smallpox vaccine by paying a small fine or identifying a basis for exemption and stated that *Jacobson*’s imposition on individual rights therefore was “avoidable and relatively modest” and “easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors.” *Id.* at *6. He concluded by calling *Jacobson* a “modest decision.” *Id.*

On the other hand, Chief Justice John Roberts quoted a line from *Jacobson* in his dissent, 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 *9 (Roberts, C.J., dissenting) (quoting *Jacobson*, 197 U.S. at 38). He concluded that “it is not clear which

part of this ... quotation today's concurrence finds so discomfoting." *Id.*

Jacobson and the cases that followed it analyzing past public health emergencies continue to provide guidance today about how to administer public health measures to combat contagious diseases, including current COVID-19 programs. This established law has guided government officials, public health experts, physicians, the public, attorneys and the courts for over a century. But the SARS-CoV-2 virus that causes COVID-19 (and the vaccines and treatments for it) are new. The novel nature of COVID-19, as well as the significant advances in medicine and science since the *Jacobson* decision was issued over a century ago, may lead to new and differing public health jurisprudence governing public health measures to combat the spread of disease. While the recent discussion of the limits of public health authority found in the *Roman Catholic Diocese* does not change established public health precedent, the comments made in the decision suggest the Court may be open to some sort of change in the law in the future.

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.

ATTORNEYS MARGUERITE HAMMES AND GRANT KILLORAN PUBLISHED IN THE WISCONSIN LAWYER

Attorneys Marguerite Hammes and Grant Killoran authored an article in the February, 2021 edition of the *Wisconsin Lawyer* magazine, entitled "COVID-19 Vaccination: Legal Landscape and Challenges." Their article analyzes the authority of Wisconsin public health officials regarding mass vaccination for COVID-19 and the circumstances under which individuals can object to vaccination requirements.

Read the full article [here](#).