The Firehouse Lawyer

Volume 19, Number 8

August-September 2021 Edition

Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-590-6628

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Inside this Issue

1. Vaccinations are Mandatory!
2. The Non-Delegation Doctrine
3. Liability Questions Regarding Unvaccinated Personnel

Governor Inslee Orders Mandatory Vaccinations (Continued)

Proclamation 21-14 applies to all health care providers

On Monday, August 9, 2021, Governor Inslee issued Proclamation 21-14.[1] The purpose of the proclamation is to require all health care providers, which include those who "actively provide" health care regardless of holding a credential, or "workers in health care settings", to be "fully vaccinated" no later than October 18th, or else they are prohibited from working as health care providers, unless exempted.[2]

A person is fully vaccinated against COVID-19 two weeks after they have received the second dose in a two-dose series of an authorized vaccine or two weeks after they have received a single-dose of an authorized single dose vaccine.

Public employers should begin to notify their health care workers that the process needs to begin right away, because as we know from personal experience, it may take some time to get the first shot and it is recommended with Moderna for example that 28 days should expire between

---

1 https://www.governor.wa.gov/sites/default/files/proclamations/21-14%20-%20COVID-19%20Vax%20Washington%20%28tmp%29.pdf

2 https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/505-160-VaccinationRequirementFAQs.pdf

shot #1 and shot #2. Besides, you need to allow for the 14-day period (two weeks) after your final shot. Time is of the essence.

The foregoing statements were included in our Extra August edition, but we thought we would reiterate them in case a reader was on vacation or living in a cave somewhere for the last few weeks. Needless to say, this proclamation by the Governor has caused an explosion not only in our workload, but also in the fire service in Washington. Based on all the information we have been able to gather since August 9, 2021, it seems that between 25% and 30% of the fire department health care providers are unvaccinated at this point. More importantly, since the COVID-19 vaccines have been readily available for months to any age group except the very young, we surmise that this lack of vaccination is intentional.

Many fire departments have engaged in "impact bargaining" with their represented medical providers' unions. As to the non-union paid personnel and the volunteer health care providers, most fire chiefs have been discussing the issue and dealing with the common issues. Since the proclamation itself recognized that employees could apply for exemptions for disability-related reasons (medical) and/or religious exemptions, much of the discussion and legal work has revolved around the interpretation and application of these two exemptions.

The fire service and labor attorneys we know have been applying the case law and EEOC guidance to these exemptions under the laws that apply—the First Amendment to the U.S. Constitution and state constitution clauses that protect the Free Exercise of religion, Title VII of the Civil Rights Act, and of course the Americans with Disabilities Act and the state equivalent, the Washington Law Against Discrimination. In applying those laws it will be a matter of granting (or denying) reasonable accommodations, unless of course such accommodation would cause undue hardship to the employer or a direct threat to the health and safety of the public, or co-workers, or the workers themselves.

It may seem obvious but we will state it anyway: the employee has to ask for an exemption/reasonable accommodation. If that is not done, the employer cannot consider what accommodations might be reasonable. If an employee simply adamantly refuses to be vaccinated, or does nothing, then the exemptions are irrelevant and the options left seem to be retirement (assuming eligibility), resignation, leave of absence, or even termination.

To us, the really difficult issue for the fire department employers will be whether or not to grant accommodations,[3] and if granted, will the employee be allowed to interact with patients? Thus far, as this is written on September 3, 2021, the fire departments seem to be dividing into two "camps". In most cases we are familiar with through talks with clients and other attorneys, it seems that departments that grant reasonable accommodations to their health care provider employees will allow patient contact by these unvaccinated employees **but only** upon full compliance with one or more special preventive conditions. In some instances, a medical program director of the county or a physician advisor has provided input approving the special preventive

[3] https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/631-100-SourceControlHealthcare.pdf

conditions. In many cases the conditions are based on the measures taken since the COVID-19 pandemic began in March 2020. These measures have been, for the most part, effective. (Of course, it may be noted that the Delta variant was not raging and contributing to community spread of the virus until 2021.)

We include within the definition of "special preventive conditions" at least the following and one or more of them might be used of course:

- Wearing masks of various types
- Testing for COVID-19 often
- Social distancing of 6 feet or more

Creative fire chiefs and health care providers might think of many more preventive conditions, but you get the point.

As noted above, we think most departments will use this approach (assuming exemptions are applied for) to maintain their work force, with the goal of ensuring that 25-30% of the health care providers do not separate from employment over this issue, while at the same time trying to protect the public and co-workers from the unvaccinated.

Until the Governor, the State Department of Health, or a court decides otherwise, we think this approach is workable or defensible.

However, we must acknowledge that we know of several departments—and some of them are clients of ours—that are taking a more conservative approach. In these departments, we believe that the decision has been made (usually by the board of commissioners) to not agree to any accommodations that would allow unvaccinated health care providers to see patients. In other words, these departments have decided that no such accommodation should be granted, either because they have found it presents an undue hardship to the employer or a direct threat to the public health or safety. Of course, other accommodations might still be available such as transferring eligible employees to a "non-combat" position or a post without any health care duties. Unfortunately, most departments we know of do not have many (if any) positions like that, at least with any significant duration.

Since the Governor's deadline is October 18, 2021, time is running out for health care providers to make a choice from among the many options available. We cannot stress enough that the employee (or volunteer), not the employer, initiates the interactive process of requesting one of the two exemptions. In other words, you do not get an exemption or accommodation unless you ask for it!

We have developed, as have other law offices, various forms, FAQs, and checklists for dealing with the exemptions (particularly the religious exemption). Ask your department lawyer for those kinds of guidance materials and if you have no department attorney then contact us and we can provide them.

An Interesting Non-Delegation Doctrine Case

It is very seldom that one of our Washington appellate courts relies upon the established non-delegation doctrine of administrative law to make a legal decision. However, in late August Division 2 of the Court of Appeals did just that in

Association of General Contractors v. State of Washington, No. 54465-2-II.[4]

Our state constitution vests the power to make laws in the state legislature, and it is unconstitutional for the legislature to delegate that power to others, such as an administrative agency of the state. *State v. Batson,* 196 Wn.2d 670, 674, 478 P.3d 75 (2020). But the legislature may delegate to boards or agencies to determine some facts or state of things upon which the law is made to depend. *Diversified Inv. P'ship v. Dept. of Social & Health Services,* 113 Wn. 2d 19,25 775 P.2d 947 (1989)

Delegation is proper if two elements are met: (1) the legislature must provide standards or guidelines which indicate generally what is to be done and the administrative body which is to do it and (2) and adequate procedural safeguards must be provided in regard to the procedure for promulgation of the rules and for testing the constitutionality of the rules. *Barry & Barry, Inc. v. Dept. of Motor Vehicles,* 81 Wn. 2d 155, 163, 500 P.2d 540 (1972)

What led to this case is that the legislature amended the prevailing wage law (that we have written about a few times in the *Firehouse Lawyer* in the past) altering the method used by the industrial statistician of the Department of Labor and Industries to set the prevailing wage. The statistician used to conduct wage surveys on a county-by-county basis. But in 2018 the legislature changed the law so that now the prevailing wage is determined for a geographic region using the collective bargaining agreements (CBAs) for those trades and occupations that have CBAs. If there is more than one CBA for that locality the higher wage rate will prevail.

In this decision announced August 31, 2021 the Court of Appeals reversed a summary judgment in favor of the State, holding that this law is unconstitutional.

The AGC argued that the statute violated the non-delegation doctrine because it mandated the use of wage rates in CBAs not yet in place, to establish the prevailing wages. The industrial statistician admitted that under that law he would be adopting future wage rates from private parties' CBAs that did not exist. The Court agreed with that argument, noting that courts in other states (Wisconsin, Ohio and Montana) had also rejected the use of CBAs to set prevailing wages, holding that process unconstitutional. Finally, the Court held there were no procedural safeguards and therefore the legislature could not delegate this function within our constitution.

This doctrine, in a slightly different context, can also be applied to local governments and their elected leaders. It is worth considering whether a board of elected officials can delegate a function to an executive, such as a fire chief or a city manager, in certain forms of government. Some duties are nondelegable. We might go into some detail about that in a future article.

President Biden Issues Executive Order Mandating Vaccinations

While the ink is not yet dry, we have seen one executive order signed September 9, 2021, in which President Biden mandated vaccination

[4] https://www.courts.wa.gov/opinions/pdf/D2%2054465-2-II%20Published%20Opinion.pdf

against COVID-19 by all federal employees. Many news media outlets[5] also stated that the order, or one to follow it, mandates that agencies or companies, such as hospitals and nursing homes, receiving reimbursement for treating Medicare and/or Medicaid patients ensure that all of their employees get such vaccinations. This makes me wonder if that includes EMS agencies that do receive money through CMS (the Center for Medicare and Medicaid Services) such as the GEMT program, and if that means mandatory vaccines by federal mandate at some point, and not just due to Proclamation 21-14 of Governor Inslee, discussed above. Stay tuned while we study this unfolding situation.

Can Your Fire Department Be Found Liable for Employing an Exempt but Unvaccinated Employee that infects another person?

The following is taken from a legal opinion we issued today, September 10, 2021, just to frame the policy debate that is alluded to in the first article in this edition…

You have requested a legal opinion from me respecting the potential liability of the fire district and its personnel, based upon claims of patients or co-workers, alleging the spread of communicable disease (namely, COVID-19) by unvaccinated health care providers employed by your agency who allegedly infected the plaintiff. This concern is heightened somewhat by the recent revelation that an insurance carrier may exclude from coverage any such claims of negligence based upon the alleged spread of communicable disease. Apparently, such exclusions are not at all unusual, and would apply to bar coverage, whether the agent or employee was vaccinated or not.

The district is in the process of implementing Governor Inslee's Proclamation 21-14, which prohibits Washington health care providers, public and private, and workers in health care settings (which expressly includes ambulances and aid cars) from providing health care after October 18th, unless they are vaccinated or exempted. There are two recognized exemptions, for which reasonable accommodations are allowed: a medical exemption, for anyone whose health might be endangered by the vaccination according to their health care provider, and a religious exemption. The proclamation made it clear that the Governor included those two exemptions as a matter of constitutional necessity or due to federal or state statutes.[6]

Many fire departments in Washington are receiving multiple requests for religious exemption, and trying to determine what reasonable accommodations might be provided, unless of course to provide a requested accommodation would present an undue hardship to the employer or a direct threat to the public health and safety. Many of the departments appear to be poised to grant such accommodations and to allow the exempted health care provider to

[5] https://www.nytimes.com/2021/09/09/us/politics/biden-mandates-vaccines.html

https://www.cbsnews.com/live-updates/biden-covid-19-vaccine-mandates-announcement/

[6] Proclamation 21-14 referenced the First Amendment to the U.S. Constitution's Free Exercise clause protecting the free exercise of religion, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Washington Law Against Discrimination, among other laws.

treat patients, subject to required work conditions, restrictions or protocols, which I will refer to herein generically as "preventive measures". Most of these departments are concerned that because 25-30% of their health care provider employees are unvaccinated, and have stated they have no intention of being vaccinated—they will lose upwards of 20% of their workers, thus creating a public health crisis in the EMS system, since replacement workers cannot be hired, trained and placed in service quickly enough to avoid a drastic drop in the level of service.

A minority of departments in Washington have taken a different approach. While complying with the proclamation by considering reasonable accommodations, such as finding other positions within the department, not including health care duties, these departments have publicly stated that no reasonable accommodation will be approved if it allows the unvaccinated employees to continue to treat patients. As a practical matter, since treating patients in the EMS system is a condition of employment and an essential job function for an EMT or paramedic in Washington, if no such accommodation is allowed, that means the employee must retire, resign, take a leave of absence or be separated from employment. Apparently, these governing boards or fire chiefs have decided that such accommodations would present an undue hardship or a direct threat to public health or safety.

Due to the majority of departments allowing the accommodated providers to continue to see patients, the question has been asked:

What are the liability implications of allowing such unvaccinated providers to treat patients and perform their usual duties, which might lead to infection of patients or co-workers, due to the spread of a highly contagious/communicable disease?

The concern may be heightened right now, as statistics seem to show that the Delta variant of the COVID-19 virus is significantly more virulent than earlier versions of the virus.

The law is well established in the United States that there can be negligence liability for the spread of communicable disease. While the cases have historically involved AIDS and other contagious diseases or conditions, it seems impossible to distinguish such cases.[7] Most courts find there can be a cause of action if the defendant knew or reasonably should have known they were infected with the disease.[8] The basics of negligence law in Washington require four elements: (1) the defendant owed the plaintiff a duty of due care; (2) the defendant breached that duty, harming the plaintiff; (3) the defendant's negligence proximately caused the harm; and (4) the plaintiff has provable damages. In these potential cases, we believe the duty requirement would be satisfied if we assume the health care provider is acting within the scope of their employment and doing their job. I am going to assume herein that the public duty doctrine will not shield the employee, and the employer is therefore exposed at that juncture due to the doctrine of *respondeat superior*. That doctrine

[7] See, e.g. *Billo v.. Allegheny Steel Co. (Pa.1937)* 195 A. 110; *Earle v. Kuklo,* 26 N.J. Super. 471, 475, 98 A.2d 107 (1953); *Mussivand v. David,* 45 Ohio St. 3d 314, 544 N.E. 2d 265 (1989); *Berner v. Caldwell,* 543 So. 2d 686 (1989).

[8] See, e.g *John B. v. Superior Court,* 38 Cal. 4th 117 (2006).

simply means that you are vicariously liable whenever your employee is negligent and harms someone unless they were not even acting within the scope of their employment.

Breach of duty in such a case would not be obvious. Indeed, it may be difficult to prove. Let us suppose that the unvaccinated employee has been duly granted an accommodation by the employer because they qualified for one of the two exemptions and the parties engaged in an interactive process as required by law before the accommodation was granted. Let us further assume that the employee, while unvaccinated, did follow all preventive measures imposed by their employer, such as masking, periodic testing for COVID-19, reporting daily any symptoms at start of shift, etc. Unfortunately, they are asymptomatic and are infected unbeknownst to the defendant health care provider and his/her employer. Breach of duty in that case seems very difficult to prove.

The third element—proximate cause—may be an even higher hurdle to jump for the plaintiff. First, the plaintiff should have to prove cause in fact, sometimes referred to as "but for" causation. In other words, could the plaintiff have become infected by someone else's action or inaction, or on the other hand, is the interaction with defendant the only likely cause of the infection. If the plaintiff has attended a concert or just socialized indoors with unvaccinated friends, one can well imagine the proof problems inherent in this third element. This type of evidence is admissible because Washington is a comparative negligence state, so that a plaintiff's negligence in not keeping himself or herself safe can lead to a percentage of negligence finding. Simplistically, it could lead to a jury finding the plaintiff 50% or more "at fault" for the loss.

Damages is the fourth element of a negligence claim. Presumably, if the plaintiff has medical bills, pain and suffering, and permanent disability, or even death, the defendant and his/her employer had better hope that the case does not proceed to that point of fixing the amount of damages.

One can see from the foregoing discussion that it might not be easy to establish liability for the spreading of communicable disease. We might also want to mention that there is another affirmative defense in the state of Washington to such claims: qualified immunity predicated upon RCW 18.71.210. Unless an EMS worker treating a patient is grossly negligent, reckless or guilty of intentional harm, there is ordinarily no liability in such circumstances, due to that statutory qualified immunity. Of course, if a provider was symptomatic, went to work anyway, failing to inform his employer and a patient was infected, that might well be gross negligence or reckless. It might even lead an employer to deny that employee any indemnification or insurance coverage in an extreme case.

You might ask: Have there been any reported cases where EMS providers, health care workers, or their employers have been found liable (after trial) for spreading COVID-19? There is no reported case in Washington yet, but the theory of the case would not be one of first impression. In *Hanstad v. Canadian Pac. Ry. Co.,* 44 Wash. 105 (1906) the Supreme Court of Washington upheld a jury verdict against the railroad defendant for failing to take sufficient measures to prevent the spread of scarlet fever among travelers. The court found the company failed to abide by the prevailing societal wisdom regarding how to limit the spread of that disease (sound familiar?). They found the car was not properly ventilated or

heated. Also, travelers who were obviously sick with scarlet fever were negligently and carelessly allowed to remain in the same car with the decedent and in close proximity to her (social distancing). The case suggests that the result might have been different if the defendant had imposed strict preventive measures such as masking, testing, social distancing, etc. [9]

In the last year or so, about 30 states have enacted legislation designed to provide immunity to businesses, due to fears of such suits by workers, clients, vendors or others who interacted with their business. Those lawsuits have never really materialized; some might argue it is due to these laws being passed, but we speculate that the difficult proof problems outlined above are a substantial factor. [10]

The question remains: Does our allowance of unvaccinated health care providers (with exemptions and approved reasonable accommodations) to continue to treat patients and mingle with co-workers increase our risks and potential liability exposures to both patient claims and co-worker claims, despite our taking preventive measures? If so, are we covered by insurance for such claims regarding communicable diseases? My conclusion is that such allowance does increase risk and liability exposure by some amount, but it is impossible to discern the *degree* of that increase. What alternatives does the district/employer have in this regard? The department could emulate the minority of departments cited above that will under no circumstances allow an unvaccinated responder to treat patients. But what if 25-30% of your health care providers refuse and resign or otherwise separate from employment? Is that a better solution for the public served by the department? Surely, you might argue, they could be replaced quickly as firefighter and EMT jobs are highly sought after in our state due to the very good pay and benefits. However, many chiefs have pointed out that such new employees do not "hit the ground running" but need training and orientation, and may even need to attend fire academy first, taking months to accomplish. There is no good answer to these questions as no one knows exactly how many health care providers will ultimately refuse vaccination and give up their job or even their career.

As for the insurance question, we have seen one or two insurance policies already that provide an exclusion from coverage as to any claim predicated on the negligent spread of communicable disease. It seems to us that the exclusion pre-exists COVID-19 and of course bars such a request for coverage whether the provider was vaccinated or not. Yet this does seem to increase the potential for loss to the district because the risk of an unvaccinated worker actually transmitting the infection seems higher than the risk attributable to a vaccinated provider/worker.

[9] See the US Law Network, Inc. "State of Washington General Liability COVID -19 Quick Guide" by attorneys at Williams Kastner, a Seattle law firm, which discusses the *Hanstad* case: https://www.uslaw.org/files/Compendiums2020/COVID19_General_Liability_QuickGuide/Washington_USLAW_Compendium_COVID19_General_Liability_2020.pdf

[10] See www.pewtrusts.org.

As to the co-worker liability exposure, this too is very real, but would more likely be handled by the existing laws and procedures pertaining to workers compensation. While not insignificant, at least this potential problem is covered by a type of insurance so there is less exposure of the public treasury.

Although the Congress of the United States has studied this problem of liability and one or more bills have been introduced, to date no legislation has been enacted into law to provide immunity or deal with this phenomenon at the federal level.[11] Although numerous legal actions have been filed based on negligence or medical malpractice, there are few if any results yet. Very few of the articles reviewed thus far specifically addressed the liability exposures to health care facilities such as hospitals and nursing homes (or EMS providers). One article noted that there have been two types of litigation so far: (1) actions brought by patients or family members for the negligence at health care facilities and (2) actions by employees.[12]

One of the cases mentioned in the above-cited article arose from a Seattle nursing care facility due to the COVID-related death of a resident. The plaintiffs argued that the facility knew of or suspected its first case of infection on February 19, 2020, but failed to quarantine until early March, allowing the spread of the disease in the facility unchecked. The suit also alleged violation of Washington's Abuse of Vulnerable Adults Act and the Consumer Protection Act. This illustrates that the plaintiff in such cases need not limit the claims to negligence or medical malpractice. Since the duty to defend by an insurance company that might try to deny coverage is judged solely by the allegations of the complaint when filed in court, this could affect the insurance company's actions to deny a defense altogether or provide a "reservation of rights" letter. Supposing that a plaintiff might allege in their filed Complaint more than mere negligence, we conclude that the insurance company would not be "off the hook" altogether and would probably provide an attorney to defend the litigation if other claims are included. The above case is ongoing and has not gone to trial, we believe.

Considering all of the issues, we do conclude that allowing unvaccinated employees to continue to treat patients does increase liability risk to an undetermined degree, even if the employer has preventive measures in place. Those measures, if strictly followed by the employees, could significantly ameliorate that risk, partly because the proclamation does contemplate exemptions and reasonable accommodations. There is no universally accepted standard of due care directly applicable to this scenario, other than the general standard of care in negligence cases. This is a duty to show "reasonable care" under the circumstances. As noted above, it may be difficult to show that reasonable care was **not** exercised if the provider (1) was asymptomatic; (2) did not know or have reason to know they were carrying the virus; (3) followed all preventive measures prescribed by the employer; and (4) had an exemption/reasonable

[11] See "COVID-19 Liability: Tort, Workplace Safety, and Securities Law," a publication of the Congressional Research Service, published September 24, 2020: https://crsreports.congress.gov/product/pdf/R/R46540

[12] See "Potential Liability of Healthcare Facilities Stemming from COVID-19", by Quinn Emanuel Urquhart & Sullivan LLP, February 18, 2021: https://www.jdsupra.com/legalnews/potential-liability-of-healthcare-2711114/

accommodation in place as allowed by the proclamation and the employer. Although the determination is a matter of policy for the board and the Fire Chief to make, rather than a lawyer, my opinion is that the answer depends largely on the likelihood that a greater harm is being avoided by not allowing them to perform their duties and therefore the provider and maybe many of their colleagues quit and cause a different sort of public health problem—lack of timely response to EMS calls, some of which might be life-threatening.

Unfortunately, there is no easy answer or choice in this policy dilemma, but this letter is intended to frame the issues for the board to consider.