Legal INSIGHTS
Ottosen DiNolfo Hasenbalg & Castaldo, Ltd.
Volume 29, No. 1 ~ Winter 2022

Health Care Right of Conscience Act Made Inapplicable to COVID-19 by General Assembly

by Michael Castaldo III

The Health Care Right of Conscience Act ("HCRCA") was enacted to enable certain professionals to refuse to receive or participate in healthcare practices that are contrary to their personal or religious beliefs. (745 ILCS 70/1 *et seq*.) The Act recognizes that people and organizations hold different beliefs about whether particular healthcare services are morally acceptable and thus protects the right of conscience of all persons who refuse to obtain, receive, or accept health care services and medical care. In furtherance of that public policy, the Act prohibits all forms of discrimination against those refusing to act contrary to their conscience in providing—or refusing to obtain, receive, or accept—health care services and medical care.

Recently, some employees have cited the HCRCA in attempting to circumvent COVID-19 vaccination and testing requirements. In such situations, employees would claim in one way or another that it is against their sincerely held religious beliefs to receive any vaccination related to COVID-19. These type of objections often involve "moral concerns" about injecting a "harmful foreign substance" into their bodies, or the manufacturing and testing process used in the development and creation of the COVID-19 vaccines.

To close the arguable loophole created by the HCRCA, Governor Pritzker signed P.A. 102-0667 (the "Amendment") into law on November 8, 2021. The Amendment clarifies the Act's intent such that it cannot be abused or misinterpreted to jeopardize workplace safety. The Amendment is also aimed at foreclosing on the possibility that the Act will be used to defeat employers' COVID-19 vaccination requirements.

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Tougher Times Defending Injury Cases in Cook County

by W. Anthony Andrews

When a plaintiff files a lawsuit alleging they have been injured, it is common for defendants to subpoena the relevant medical records. Most health care facilities will not provide a plaintiff's records unless the judge has entered a Qualified Protective Order ("QPO") that assures compliance with the Health Insurance Portability and Accountability Act ("HIPAA"). Recently, the Circuit Court of Cook County's standing QPO was gutted by the Illinois Supreme Court's decision in *Haage v. Zavala*, 2021 IL 125918. Thereafter, Cook County made drastic changes to its stock QPO, which in turn have made defending personal injury cases there more challenging.

In *Haage*, the Illinois Supreme Court held that liability insurers are now prohibited from using or disclosing protected health information ("PHI") for any purpose other than litigation. Furthermore, such PHI must be destroyed following the end of the case.

Following *Haage*, the Law Division of the Circuit Court of Cook County issued a new general administrative order 21-33 (the "GAO") along with a corresponding QPO in November. The new QPO follows *Haage* by requiring that parties and their attorneys—plus the liability insurer which may also receive that PHI during litigation—may

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Conscience Act

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The Amendment accomplishes this by stating that it is not a violation of the Act to impose measures intended to prevent contraction or transmission of COVID-19. The Amendment further reinforces the recent mandates of employers who, in many cases, have been taking similar workplace measures to prevent the spread of communicable diseases for decades.

In particular, the Amendment states that it is not a violation to enforce any requirements that, among other things, involve provision of services by a physician or health care personnel intended to prevent contraction or transmission of COVID-19 or any pathogens that result in COVID-19 or any of its subsequent iterations. Given the existing guidance provided for by the Centers for Disease Control and Prevention ("CDC"), this legislation can be interpreted to mean that it is not a violation of the Act to terminate or exclude an employee due to non-compliance with an employer's COVID requirements.

Moreover, the clarifications provided for in the Amendment are "declarative of existing law and are not to be construed as a new enactment." Although this Act does not become effective until June 1, 2022, by declaring that the Amendment is intended to clarify existing law, the Amendment is expected to apply to all litigation on this issue.

Lastly, the Amendment reiterates it is not intended to affect any right or remedy under federal law. Although challenges to COVID-19 prevention measures will no longer be available under the Act, there still exists some potential form of relief under federal laws such as the Title VII of the Civil Rights Act or the Americans with Disabilities Act. However, an individual's ability to prevail is much more difficult under their federal laws compared to the pre-Amendment Act.

Employers still must carefully weigh requests for exemption from any COVID-19 prevention measures, but can now reject arguments that the HCRCA prohibits them from enforcing mandatory vaccination requirements. If you have any questions or concerns related to the implications of this Amendment, we recommend you contact your attorney.

Lawsuit Seeking Adequate State Funding for Illinois Schools Ends at Supreme Court

by Maureen A. Lemon

On October 21, 2021, the Illinois Supreme Court dealt the final blow to a lawsuit filed by Illinois school districts seeking adequate State funding in *Cahokia Unit School District No. 187 et al., v. Pritzker et al.*, 2021 IL 126212. The lawsuit was first filed in 2017 by 22 school districts against then-Governor Rauner and the State of Illinois. The plaintiffs sought a judgment declaring that the State has a constitutional obligation to provide the funding necessary to meet the Illinois Learning Standards established by the Illinois State Board of Education ("ISBE"). The Illinois Supreme Court did not oblige.

In 1997, ISBE first adopted learning standards that identify the knowledge and skills that Illinois students must possess at each grade level. The learning standards have been revised through the years, including the 2010 adoption of the Common Core State Standards for English, language arts, and math. School districts are "evaluated" by the State based on the percentage of students who meet or exceed the learning expectations on State assessments.

The *Cahokia* lawsuit alleged that students are held accountable for meeting the learning standards, but the State has failed to give adequate funding to the school districts to assist with this effort. In fact, the combined state and local revenue per student in the school districts is below the State average and far below the revenue per student in the State's wealthiest school districts.

The *Cahokia* complaint included detailed tables comparing the disparity between school districts in funding to the disparity in achieving the learning standards. Based on the data, the plaintiffs alleged that there was a direct correlation between the level of funding received by a school district from the State and the achievement of that school district's students on the learning standards.

The *Cahokia* plaintiffs hoped that their arguments would be bolstered by the 2017 adoption of the Evidence-Based Funding for Student Success Act ("EBF law"). That law set forth an evidence-based formula to calculate the additional funding necessary to allow underresourced school districts to achieve the learning standards. Each school district is given an adequacy target and the State was directed to allocate additional funding to the low-wealth districts to help them to achieve their adequacy target.

The EBF law established a goal of meeting the adequacy targets for all school districts by June 30, 2027. Yet, that goal cannot be met given the State's pre-pandemic level of additional funding set at $350 million per year. According to the plaintiffs, ISBE calculated that an additional $7.2 billion in State aid annually would be necessary to provide students in all school districts the capacity to meet or achieve the learning standards.

For those reasons, the plaintiffs requested the specific additional funding calculated as owed to them under the EBF law in a two-count complaint. Count I alleged that the State had unlawfully failed to provide the required funding required by the Education Article of the Illinois Constitution. Count I also alleged that the Governor exceeded his authority by "operating a public education system that operates in this constitutional manner."

Count II of the complaint alleged that the plaintiffs and their students had been deprived of the right to equal protection in violation of Article I, Section 2, of the Illinois Constitution. Plaintiffs argued that the disparities in expenditures between Illinois school districts (which ranged as high as $10,000-$15,000 per student) were "shocking," had no legitimate basis in law, and could not be justified by the State's goal of local control over education in light of the State-imposed learning standards.

In October 2018, the St. Clair County Circuit Court dismissed the case as barred by the doctrine of sovereign immunity. The court also held that the complaint failed to state a cause of action, relying on the 1996 Illinois

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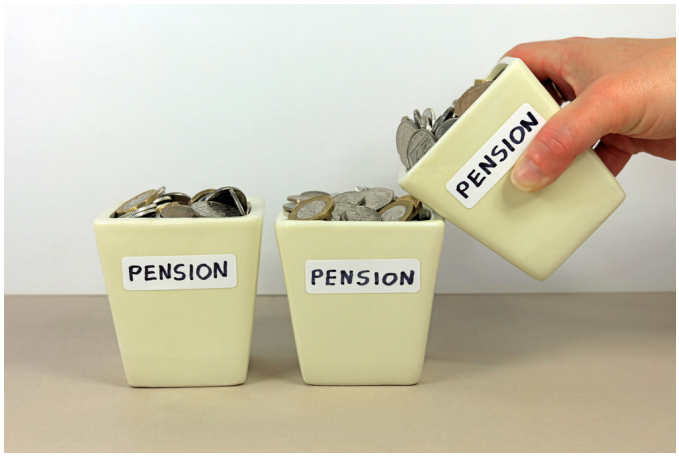
Illinois Police Officers' Pension Investment Fund Begins Transfer Process

by John E. Motylinski

When the General Assembly passed Public Act 101-610 in 2019, it commanded all downstate fire and police pension funds to consolidate their investment assets no later than July 1, 2022. So far, the Illinois Firefighters' Pension Investment Fund ("FPIF") has completed five tranches of asset transfer. In late December 2021, the Illinois Police Officers' Pension Investment Fund ("IPOPIF") announced it will begin its transfer process in the coming months.

IPOPIF has assigned each downstate police pension fund a transfer date of March 1, April 1, or May 2, 2022. On a pension fund's transfer date, control of investment assets will shift permanently to IPOPIF. This aggressive timetable will undoubtedly cause logistical issues for police pension funds.



First, IPOPIF has requested each police pension fund to execute a resolution appointing authorized agents prior to February 28, 2022. Many police pension funds already executed a similar authorized agents resolution last year. However, the new resolution requested by IPOPIF is different and must be completed nonetheless. IPOPIF has also directed local funds to notify their asset custodians of the impending transfer. Once these two items are complete, copies should be sent to IPOPIF.

Moving forward, police pension funds will also need to answer other questions like:

- **How much cash they should keep on hand during the asset transition phase?** It is anticipated that, for at least a few months during the transition process, local pension funds will not be able to access or liquidate their investment assets. This may pose problems in the event these assets are needed to fund pension benefits or administration expenses. Accordingly, police pension funds should carefully determine how much cash they need to keep in a local account when assets are moved to IPOPIF.
- **What local accounts should be maintained?** After the transfer date, local funds will no longer be able to invest money themselves—that will need to be done via IPOPIF. However, local funds are always able to maintain checking and non-investment bank accounts. Police pension funds should therefore determine which accounts should carry forward following consolidation.
- **When the relationship with the fund's current investment professionals should end?** Regrettably, with consolidation comes the end of many valuable partnerships with investment professionals. Pension funds will need to develop a vision for what the post-consolidation landscape will look like without these trusted advisors.
- **Whether proper precautions need to be taken if the fund's checking account will carry more than $250,000?** After consolidation, many police pension funds will experience checking account balances that exceed the $250,000 insured by the FDIC. Many Article 3 and 4 pension funds are entering into additional collateralization agreements with banks to ensure that, in the event of a bank failure, their assets will still be secure. However, like all processes, this will take time to set up and eventual Board action.

Arriving at answers to these questions will require the input of a pension fund's investment and accounting professionals. IPOPIF's accelerated timeframe for asset transfer will undoubtedly cause many pension funds to scramble to stay ahead. If your pension fund needs assistance in navigating the consolidation process, please contact your attorney.

The Rise and Fall of OSHA's Vaccination Mandate

by Joshua B. Rosenzweig

On November 5, 2021, the Occupational Safety and Health Administration ("OSHA") issued an Emergency Temporary Standard ("ETS") concerning COVID-19 vaccination and testing. The ETS, more commonly known as OSHA's "vaccination mandate," prescribed vaccination, masking, and COVID-19 testing requirements for certain employers. After significant litigation, the United States Supreme Court stayed enforcement of the rule, telegraphing it would soon be struck down. As a result, OSHA withdrew its vaccination rule on January 25, 2022. This article surveys the rise and fall of OSHA's vaccination measure.

OSHA's ETS applied to employers with 100 or more employees (including part-time, minor, seasonal, and temporary employees) that were covered by the federal Occupational Safety and Health Act. These employers were required to establish, implement, and enforce one of two kinds of written policies: (1) a mandatory vaccination policy in which all employees must be vaccinated, subject to medical and religious exceptions, or (2) a policy allowing employees who are not fully vaccinated to undergo weekly testing as a prerequisite of coming to work.

The ETS also forced employers to ensure that non-vaccinated employees properly wear a face covering when indoors and when occupying a vehicle with another person for work purposes, except in limited circumstances. It additionally restricted employers from preventing an employee, customer, or visitor from wearing masks.

Moreover, the ETS imposed requirements on employees to provide prompt notification when they received a positive COVID-19 test or were diagnosed with COVID-19. In such situations, employers had to remove the infected employee—regardless of vaccination status—from the workplace until the employee received a negative test, met the CDC's return to work criteria, or was allowed to return to work by a licensed healthcare provider.

Significantly, OSHA warned that failure to adhere to the ETS would have resulted in stiff penalties, which could have included monetary sanctions.

On November 6, 2021, the Fifth Circuit Court of Appeals (which covers Louisiana, Mississippi, and Texas) issued an order stopping the ETS from being implemented. The court later found that the ETS exceeded OSHA's statutory authority, in that OSHA has no power to issue an ETS to address an airborne virus that is not particular to any workplace and non-life-threatening to most employees.

The case ultimately made its way to the United States Supreme Court. Although the question before the Court was whether the ETS should be allowed to go into effect while lower courts analyzed its validity, the Court took the opportunity to all but strike the rule down. The Court reasoned that OSHA had "ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense," which was in excess of the authority granted to it by Congress. In the Court's words, OSHA has the power to "set workplace safety standards, not broad public health measures." Thus, OSHA could not force all private employers to require COVID vaccination or testing.

However, the Court also acknowledged that OSHA did have authority to regulate COVID mitigation efforts in certain contexts. For instance, "risks associated with working in particularly crowded or cramped environments" are certainly within OSHA's purview. But the rule, as drafted, clearly exceeded that standard. So, the Supreme Court found the ETS was all but doomed and should be stayed.

Approximately two-weeks later, OSHA withdrew the ETS. Presently, there is no federal vaccination mandate outside the context of health care. However, there is still a possibility that OSHA will reformulate and reissue its vaccination rule in a way that accords with the Court's recent opinion. For this reason, employers should keep a lookout for more federal efforts to mandate COVID-19 vaccinations.

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use medical data only for the litigation. Additionally, this sensitive information must be returned or destroyed within sixty days after the conclusion of the litigation.

However, there are more nettlesome provisions of the new Cook County standing HIPAA order that go much further than contemplated by the Illinois Supreme Court. For example, Cook County's new QPO imposes a variety of new restrictions on how defendants can issue subpoenas, including:

- Preventing defendants from issuing subpoenas for "any and all records";
- Requiring that subpoenas be limited to within five years prior to the incident;
- Requiring that a subpoena specifically relates to the condition(s) and portion(s) of the plaintiff's body complained of;
- Requiring that plaintiffs or their counsel receive at least fourteen days' notice before defendants issue subpoenas; and
- Requiring that defense counsel provide a copy of all records received in response to any subpoena within seven days of receipt.

Each of these restrictions present obstacles to parties defending personal injury actions in Cook County.

Previously, defendants would commonly request "any and all records" to ensure that all medical records are received at once and in the order in which they are kept by medical providers. This formulation eliminates doubt that certain records were left behind due to semantical issues, as medical providers often use varying words or phrases to classify certain medical records. A request for "any and all records" is also in line with Illinois' discovery rules, which explicitly reiterate the importance of full disclosure of relevant information to a case.

Moreover, where a plaintiff claims a permanent disability as a result of the injury in question, it is appropriate to assess what other body parts or conditions may also contribute to the plaintiff's asserted disability. Yet, under the new HIPAA QPO in Cook County, defense attorneys are limited to issuing subpoenas for medical records related only to "the condition(s) and portions of the Plaintiff's body complained of."

As a result, Cook County's new order has been criticized as unrealistic, as medical providers do not collect or store a patient's records by specific body part or condition. This will undoubtedly delay record production and yield fewer records that do not fully reflect the full medical picture.

Additionally, it was previously typical to request records from many years prior to get a full picture of their prior medical history—particularly where the plaintiff denies prior problems. Now, the default limit is arbitrarily set at five years for all bodily injury cases. This shifts the burden of arguing relevance from plaintiffs to defendants, who must now affirmatively seek modification of the QPO's default five-year period before requesting such documents. This restriction will yield more expense by the defendant to expand the scope of the medical history that has affirmatively been placed at issue.

In sum, the revised HIPAA QPO severely alters the discovery landscape for all Cook County cases involving bodily injury. Now, the heightened participation required of medical providers to review, separate, and maybe even redact medical records will likely lead to inescapable delays and a lesser medical picture of the plaintiff.

Illinois Supreme Court Strikes Down Ordinance Modifying PSEBA

by Karl R. Ottosen and Hayley Loufek

In *International Association of Firefighters v. City of Peoria*, 2022 IL 127040, the Illinois Supreme Court recently held that a Village's home rule ordinance cannot supersede its prior interpretations of the Public Safety Employee Benefits Act ("PSEBA") (820 ILCS 320/1 *et seq*.).

PSEBA requires public employers to pay the entire premium of its health insurance plan for full-time firefighters and police officers who suffer a "catastrophic injury" during a qualifying event. In addition, PSEBA requires employers to pay the premiums of the employee's spouse and dependent children. As a result, the costs of these benefits can be very expensive.

Unfortunately, PSEBA does not define the term "catastrophic injury." Thus, the meaning of that phrase has repeatedly been the subject of litigation. In 2003, the Illinois Supreme Court held that "catastrophic injury" means an injury that results in a line-of-duty disability pension. *Krohe v. City of Bloomington*, 204 Ill. 2d 392 (2003). This interpretation has been unpopular with municipalities and fire protection districts since it requires them to intervene in pension board proceedings if they wish to contest that a firefighter or police officer is "catastrophically injured." However, the Illinois General Assembly has not legislatively disturbed the Supreme Court's definition since.

Recently, the City of Peoria attempted to use its home rule powers to define "catastrophic injury" differently. Local governments with home rule authority are allowed to enact laws by passing ordinances. These ordinances can even overrule laws passed by the General Assembly, unless the Assembly expressly says they cannot.

Reasoning that it had the power to modify the Illinois Supreme Court's definition of "catastrophic injury" via its home rule authority, Peoria adopted an ordinance the defined a "catastrophic injury" as one resulting in the employee no longer being able to perform any gainful work. As a result, a firefighter or police officer in Peoria would have to carry a heavier burden in applying for PSEBA benefits than those in a neighboring community.

The Illinois Supreme Court struck down this effort. The Court relied on the fact that, in passing PSEBA, the General Assembly specifically included a provision prohibiting home rule communities from passing ordinances that were inconsistent with the Act's text. When the Illinois Supreme Court interpreted "catastrophic injury" in *Krohe*, it became an integral part of the Act. Therefore, Peoria did not have the authority to redefine PSEBA's terms.

The Peoria case highlights an important rule about interpreting statutes: unless the General Assembly has amended a statute that has been interpreted by courts, a court's interpretation is part of the law (especially when the interpretation is from the Illinois Supreme Court). Over the course of at least eight General Assembly sessions since the *Krohe* decision, attempts to change the definition of "catastrophic injury" to include an injury that prevents a public safety employee from performing gainful work have been unsuccessful. So, *Krohe's* definition is still the law, and not even a home rule ordinance can change that.

The *Peoria* case confirms that changes to PSEBA will need to be made by the General Assembly. Until then, public employers should continue to defend themselves appropriately by screening line-of-duty injuries and intervening in pension board proceedings if warranted.

Adequate State Funding

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Supreme Court decision of *Citizens for Educational Rights v. Edgar*, 174 Ill. 2d 1 (1996).

Applying the *Edgar* ruling, the trial court concluded that the quality of public education and the appropriation of funds to support the EBF law are exclusively within the authority and control of the Illinois General Assembly.

> *"The structure of funding public schools in Illinois represents a legislative effort to strike a balance between the competing considerations of educational equality and local control."*

In its October 2021 ruling, the Illinois Supreme Court also sided against the school districts. The high court involved its prior decisions regarding school funding. In *Edgar*, the court had considered whether the then-current general state aid school funding formula violated the Education Article and the Equal Protection Clause of the Illinois Constitution. Section 1 of Article X of the Illinois Constitution states that "the State shall provide for an efficient system of high quality public educational institutions and services," and that "the State has the primary responsibility for financing the system of public education."

In construing the Constitution's 'efficiency requirement,' the *Edgar* court concluded that the framers of the 1970 Constitution chose to address unequal educational funding and opportunity "with a purely hortatory statement of principle" rather than a meaningful mandate. The *Edgar* court also held that questions relating to the quality of education are solely for the legislate branch and not for the judicial branch to answer.

The *Edgar* court additionally rejected a similar equal protection claim, explaining that the structure of funding public schools in Illinois represents a legislative effort to strike a balance between the competing considerations of educational equality and local control. The Illinois Supreme Court reaffirmed its prior determination that a "high quality" education cannot be determined by judicially discoverable or manageable standards.

The *Cahokia* plaintiffs argued that times have changed which warrants a different outcome. Whereas there was no standard by which the court could determine whether the then current funding scheme met the "efficient system of high quality" public education constitutional standard when the court decided its prior cases, the enactment of learning standards and the EBF formula provided tangible means by which the judiciary could determine whether the Constitution had been violated.

Instead of treating these arguments on the merits, the Illinois Supreme Court dismissed the *Cahokia* case on procedural grounds. Indeed, the Court ruled that the Governor was not a proper defendant because he has no authority to spend State funds that aren't appropriated by the General Assembly. Therefore, the case did not involve an actual controversy between the parties necessary for a declaratory judgment action.

In a special concurrence, Justice Neville highlighted the significant need for equitable school funding. While the EBF law is a step in the right direction, Justice Neville opined that "the failure to take additional remedial action risks sacrificing the futures of Illinois residents. Such failure will deprive at-risk students of the opportunity to obtain a high-quality education . . . ."

Justice Neville also expressed a concern that the failure to adequately fund public schools contributes to the 'school-to-prison pipeline' phenomenon. Noting that Illinois funds its penal institutions better than it funds many of its school districts, Justice Neville strenuously urged the legislature to reprioritize its appropriations and take additional steps to remedy the dire situation facing Illinois students in underresourced school districts.

For those Illinois school districts hoping for more equitable funding, the *Cahokia* decision comes as a big disappointment. In its wake, school districts and their constituents must focus all efforts on convincing State legislators to honor the commitments made through the EBF law to adequately fund Illinois public schools.

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