BoardmanClark

Municipal Law Newsletter

VOLUME 30, ISSUE 6 NOVEMBER/DECEMBER 2024

In this issue

Read us online at:
BOARDMANCLARK.COM/PUBLICATIONS

Flouridation of Public Drinking Water in Question

For decades many public water utilities throughout the world have added fluoride to their drinking water supplies as a public health matter to help prevent tooth decay. Many public health agencies, including the Wisconsin Department of Health and Human Services,[1] continue to advocate for the fluoridation of drinking water.[2]

However, fluoridation has not been without controversy with vocal advocates, including some prominent ones,[3] opposed to adding fluoride to water and various commercial products like toothpaste. Opponents of fluoridation recently notched a victory in a case before the United States District Court for the Northern District of California (District Court): *Food & Water Watch, Inc. et al. v. United States Environmental Protection Agency, et al,* case no. 17-cv-02162-EMC.

On September 24, 2024, the District Court issued its findings of fact and conclusions of law stemming from its judicial review of the EPA's denial of a citizen's petition under the Toxic Substances Control Act (TSCA) related to the fluoridation of drinking water. The District Court found that, under the strictures of TSCA, fluoridation of water at the optimal level of 0.7 milligrams per liter poses an unreasonable risk of reduced IQ in children. While the court could not order the EPA to take any specific regulatory action under TSCA—including, for example, restricting or limiting the fluoridation of drinking water—the court did order the EPA to take some form of TSCA authorized action.

In Wisconsin, whether or not to fluoridate a community's drinking water is a local—and a political—decision. Understanding the ruling, the TSCA, public health agency responses, and potential future public health agency responses may be key to charting your community's future with water fluoridation. This article provides some background to help understand the ruling and current public health agency responses.[4]

Toxic Substances Control Act

The TSCA provides the EPA with the authority to regulate certain chemical substances. Once the EPA determines that a chemical poses an unreasonable risk to health or the environment, the EPA can promulgate a rule to impose a variety of requirements, including but not limited to labeling

Continued on page 2

Flouridation of Public Drinking Water in Questions

Continued from front page

and the prohibition, restriction, or limitation of the general use, specific use, and/or manufacturing of the chemical. 15 U.S.C. § 2605(a). The TSCA prescribes the process that EPA must follow to evaluate risk.

The evaluation process involves a risk assessment and a risk determination. The risk assessment includes (1) a hazard assessment which determines at what "point of departure" the chemical becomes hazardous; (2) an exposure assessment, which determines the level at which populations are exposed to the chemical; and (3) a risk characterization, which compares the point of departure and the exposure level and includes a margin of safety due to uncertainty in data. The risk characterization involves a summary of findings from the assessment and a determination of whether the chemical presents an unreasonable risk to health or the environment, taking into account the type of harm and number of people exposed.

Congress amended the TSCA in 2016 to allow a citizen to petition the EPA to evaluate and initiate rulemaking related to a specific chemical substance. A petitioner may seek judicial review if the EPA denies such a citizen petition. The court then considers the petition without granting deference to the EPA's denial. To succeed at judicial review, a petitioner need only prove to the judge that it is more likely than not that a chemical presents a risk of injury to human health and that such a risk is unreasonable.

Citizen Petition and Subsequent Action Related to Fluoride in Drinking Water

In 2016, a group of organizations, which included Food & Water Watch, Inc., petitioned the EPA to regulate the fluoridation of drinking water, asserting that the ingestion of fluoride poses an unreasonable risk of neurotoxic harm to humans including IQ loss.

In 2017, the EPA denied the citizen petition "primarily because EPA concluded that the petition has not set forth a scientifically defensible basis to conclude that any persons have suffered neurotoxic harm as a result of exposure to fluoride in the U.S. through the purposeful addition of fluoridation chemicals to drinking water or otherwise from fluoride exposure in the U.S."

The petitioners then sought judicial review. Beginning in June 2020, the parties built the court record, resulting in an initial bench trial. The court stayed the case, in part to consider the imminent publication of the National Toxicology Program's "Monograph on the Systematic Review of Fluoride Exposure and Neurodevelopmental and Cognitive Health Effects" (NTP Monograph). The court lifted the stay in 2022 and held a second bench trial in January of 2024. On September 24, 2024, the court issued its findings of fact and conclusions of law.

District Court Decision

The District Court's decision is lengthy and involves an analysis of the record built by the petitioners and the EPA as applied to the TSCA risk evaluation. The court put substantial weight on the NTP Monograph. In reviewing 72 epidemiological studies on fluoride exposure, the NTP Monograph concluded, with moderate confidence, that there is an association between lower IQ scores and populations whose total fluoride exposure approximates or exceeds the WHO Guidelines for Drinking-water Quality of 1.5 mg/L of fluoride. The NTP Monograph did not conclude cause and effect—only that an association exists. The court also considered additional studies that found an association at lower levels, while rejecting some studies that found no association or the opposite result.

After using the established record to conduct the TSCA risk evaluation process, the District Court found that fluoridation of water at the optimal fluoridated level of 0.7 milligrams per liter "poses an unreasonable risk of reduced IQ in children." The court stated that "this finding does not conclude with certainty that fluoridated water is injurious to public health … just that there is an unreasonable *risk* of such injury," requiring EPA action under the TSCA (emphasis in original). The District Court directed the EPA to take regulatory action but did not and could not mandate what that action must entail. That decision is left to the discretion of the EPA.

Governmental and National Association Responses

As of now, there have not been any official statements by the EPA or Wisconsin agencies in response to the ruling. The EPA may appeal the decision, but so far has not made any public statements on its intent. The EPA has previously described the NTP Monograph as inadequate to support revision of the current fluoride standard[5] but the new Trump

Continued on page 4

EEOC Files its First Pregnant Workers Fairness Act Lawsuit

The Pregnant Workers Fairness Act (PWFA) is a fairly new federal law which was enacted in 2023. The law requires employers to accommodate employees with a pregnancy-related health limitation. Unless there is undue hardship, employers must provide reasonable accommodations to an employee's (or applicant's) known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

While the law went into effect in June 2023 and EEOC regulations went into effect in June 2024, this is the first lawsuit the EEOC has filed to enforce provisions of the law. While this particular lawsuit is against a private company, municipalities are also subject to this law and should be aware of their legal obligations.

Facts (as alleged in the lawsuit)

Wabash National Corporation (Company) is a Kentucky-based manufacturer of semi-trailers and other commercial trucking equipment. The employee was a front plate assembler – a job that required her to bend over the tops of trailers. The employee, who was seven months pregnant, told the Company's Human Resources representatives that her pregnant stomach made bending over trailers painful. She believed the discomfort and constant pressure on her stomach might jeopardize her otherwise healthy pregnancy. She asked to be moved from the front plate assembler position to another assembly line position, for which she was trained, for the rest of her pregnancy or to have her limitation accommodated in some other way.

The Company allegedly denied her request to transfer and told her she could take unpaid leave or return to her position without any modifications. The Company allegedly provided similar changes for non-pregnant workers. The Company did not allow her a light duty assignment despite the fact it used light duty roles to accommodate disability and workplace-related injuries, and despite the fact the employee apparently had the ability to perform most light duty positions.

According to the lawsuit, the Company refused to consider the employee's request to switch positions with a co-worker in a different part of the assembly line, despite the availability of co-workers willing to switch positions with her, and her ability to perform these other assembly duties. Because the Company would not make an accommodation for her, the employee claims she resigned.

The lawsuit also claims the Company sent the employee Americans With Disabilities Act (ADA) paperwork to have her doctor fill out. However, pregnancy is not legally a disability under the ADA, and the paperwork was returned to the Company noting that fact. The lawsuit alleges the request from the Company to the doctor to have ADA paperwork filled out constituted an alleged impermissible medical inquiry under the PWFA. The EEOC General Counsel said: "If you're having morning sickness or you need to use the bathroom more often because you're pregnant, that's a pretty common sense thing and I think pregnancy is well understood and it may not be reasonable to seek medical documentation for some of these things."

A Company spokesperson has stated that the Company has always been committed to taking care of pregnant employees and complying with the law and that it will respond to the EEOC's lawsuit in due course.

Take-Aways For Employers

If you are not familiar with the PWFA you should become so. For more information, view The Latest in Accommodating Disabilities or the EEOC website. This case has not been decided yet, but it is a reminder that the EEOC is enforcing the law, and violations can be potentially costly.

PWFA claims are not quite like ADA claims. While some of the terminology in the two laws is the same, the PWFA addresses limitations related to pregnancy, childbirth, or related medical conditions, which may not rise to the level of a disability under the ADA.

Employers should be careful about what kinds of information they ask for from employees. You have more latitude under the ADA than the PWFA.

The EEOC has stated protecting pregnant workers is a "strategic enforcement priority" for the EEOC. While up to this point, the EEOC has primarily been engaged in education and outreach, the EEOC Chair has said it will use enforcement to ensure that workers are aware of their rights and that employers meet their responsibilities under this new law.

If you have any questions about the Pregnancy Workers Fairness Act, please reach out to your Boardman Clark attorney.

— Douglas E. Witte and Brian P. Goodman

Flouridation of Public Drinking Water in Questions

Continued from page 2

administration could take a different stance.[6] If the District Court's decision is not appealed, what action the EPA may take under the TSCA is likely to be made by the new administration.

The American Dental Association and American Academy of Pediatrics continue to recommend fluoridation of drinking water and toothpaste and have questioned the NTP Monograph.[7] However, some communities have used the ruling as support for local efforts to stop fluoridation of their drinking water.[8]

Conclusion

The decision on whether to fluoridate your community's drinking water currently remains a local one in Wisconsin. For better or worse, that means it is up to each Wisconsin municipality with a public water utility to do its own research and decide on whether to continue, end, or start the practice of water fluoridation.

— Jared W. Smith

---

[1] Oral Health Program: Fluoride and Community Water Fluoridation, https://www.dhs.wisconsin.gov/oral-health/fluoride-community-water-fluoridation.htm (last accessed December 6, 2024)

[2] Fluoride is a naturally occurring anion of the element fluorine and is naturally present in groundwater at low levels. In rare cases, high natural occurring levels of fluoride may be removed from water sources. More commonly, fluoride is added to drinking water to increase the natural level to recommended levels of 0.7 milligrams per liter.

[3] Included in the opposition is former presidential candidate and current nominee to lead the federal Health and Human Services Department Robert F. Kenney Jr., who has made recent headlines related to his opposition to fluoride.

[4] This article is based on a memo provided to the Municipal Environmental Group - Water Division ("MEG - Water") shortly after the ruling came out. MEG - Water is a coalition of municipal water systems formed in 1991 to help shape the laws and regulations that affect municipal water utilities in Wisconsin. MEG - Water also provides updates and education to its members related to important laws, rules, and issues affecting municipal water utilities. Membership is available to any Wisconsin municipality which owns and operates a water utility. See https://megwater.org/about-meg-water/joining-meg-water/ for more information.

[5] Available at https://www.federalregister.gov/documents/2024/07/23/2024-15807/national-primary-drinking-water-regulations-announcement-of-the-results-of-epas-fourth-review-of

[6] In addition, the Center for Disease Control's and U.S. Public Health Service community water fluoridation recommendations currently remain unchanged, but could also be subject to revision based on the priorities of the new administration. See https://www.cdc.gov/fluoridation/about/community-water-fluoridation-recommendations.html and https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4547570/?report=classic

[7] See https://www.ada.org/about/press-releases/community-water-fluoridation-at-optimal-levels-is-safe-and-effective and https://publications.aap.org/aapnews/news/29918/AAP-stands-by-recommendations-for-low-fluoride?autologincheck=redirected.

[8] See e.g., https://www.naplesnews.com/story/news/local/2024/12/05/fluoride-coming-out-of-water-in-naples-some-say-decision-was-rushed/76701145007/.

Wait and See After Dane County Judge Issues Decision on Act 10

In 2011, the Wisconsin legislature enacted, and Governor Walker signed into law, Act 10 (later amended by 2015 Act 55). These laws severely limited collective bargaining for municipal bargaining units other than public safety employees (police and fire). Since that time, municipal bargaining for public employees other than police and fire personnel has somewhat disappeared.

On December 2, 2024, a Dane County judge issued a final decision striking down portions of Act 10 and Act 55 because they violated the equal protection guarantees in the Wisconsin Constitution. While Acts 10 and 55 limited the collective bargaining rights of most public employees, the collective bargaining rights of "general" employees were restricted more significantly than "public safety" employees. Back in July, this same judge ruled that there was no rational basis for how the laws classified certain groups of

Continued on page 5

Federal Court Strikes Down 2024 Salary Level Rules

The Fair Labor Standards Act (FLSA) generally requires an employer to pay an employee overtime (time-and-a-half) if the employee works more than 40 hours in a workweek. But the law exempts some employees from that requirement, notably, certain executive, administrative, and professional workers under the white-collar exemption. To qualify for the white-collar exemption, an employee must generally satisfy a three-prong test: the employee must be paid on a salary basis, *i.e.*, be paid a fixed and predetermined sum each week irrespective of the quantity or quality of the work performed (the "salary basis" test); the employee's primary work must be the performance of exempt duties (the "duties test"); and the employee must earn a minimum salary (the "salary level test").

In April 2024, the Department of Labor issued rules (2024 Rules) that increased the salary level that had to be paid to executive, administrative, or professional employees so that the employees were not entitled to overtime pay under the FLSA. The 2024 Rules did not change the primary duties tests, nor did they change the salary basis test. On Friday, November 15, 2024, a federal court in Texas struck down the entirety of the 2024 Rules and ruled its decision applied nationwide.

The first salary level increase under the 2024 Rules took effect on July 1, 2024. The second increase was scheduled to take effect on January 1, 2025, with further increases scheduled for every three years after that. Now that the 2024 Rules have been struck down, employers no longer need to comply with those salary levels. While an appeal to the Fifth Circuit Court of Appeals is possible, any appeal is unlikely to take effect before President Trump takes office in January, and the Trump Administration is unlikely to defend the 2024 Rules in court.

The 2024 Rules being struck down means that, effective immediately, only the salary level from 2020 must be met for positions that are exempt from overtime pay under the executive, administrative, and professional exemptions. These employees need to be paid a minimum of $684 per week ($35,568 per year) to meet the salary level test.

Employees who made changes to their practices based on the July 1, 2024 salary level or who have made changes in anticipation of the January 1, 2025 salary level, can reevaluate those changes. Reducing salary increases already given might be impractical, but employers who converted salary-exempt employees to hourly non-exempt employees might want to consider whether to reclassify those positions as salary-exempt once again. Employers should be certain employees meet all three prongs of the exempt test.

Please reach out to your Boardman Clark attorney if you have questions about wage and hour compliance, including the consequences of this court action.

— Douglas E. Witte and Brian P. Goodman

Dane County Judge Issues Decision on Act 10

Continued from page 4

employees as "general" employees rather than "public safety" employees.

Many public entities are wondering what this means now. Our suggested approach is to wait and see if there are further legal developments regarding this decision. An appeal has already been filed by the defendants. As of December 6, 2024, it is likely that the defendants will request a stay of the judge's decision pending appeal. If granted, a stay would maintain the status quo of limited public collective bargaining until the Wisconsin Court of Appeals and/or the Wisconsin Supreme Court issues a final decision. It might be several months, or possibly in excess of a year, before the appeals process is completed.

This decision raises a host of significant issues regarding the impact and consequences of restoring public bargaining after 14 years. Many questions do not have answers at the present time, particularly since the appeal process is still underway.

So, our advice is to hold tight until we get some clarity. It is possible that former bargaining units might reach out to re-engage their status. Similarly, it is possible that municipalities that are currently engaged in bargaining may be asked to bargain outside the restrictions of Acts 10 and 55. Should a municipality receive such a request, you should promptly contact the municipality's labor and employment counsel to help fashion the proper response.

— Brian P. Goodman & Steve Zach

BoardmanClark

1 S PINCKNEY ST SUITE 410 PO BOX 927
MADISON WI 53701-0927

Certified ABA-EPA Law Office
Climate Challenge Partner

Municipal Law Newsletter

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

If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the attorneys listed below who are contributing to this newsletter.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanclark.com.

Maximillian J. Buckner	608-283-1787	mbuckner@boardmanclark.com
Anita T. Gallucci	608-283-1770	agallucci@boardmanclark.com
Brian P. Goodman	608-283-1722	bgoodman@boardmanclark.com
Eric B. Hagen	608-286-7255	ehagen@boardmanclark.com
Joseph J. Hasler	608-283-1726	jhasler@boardmanclark.com
Richard A. Heinemann	608-283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	608-286-7210	pjohnson@boardmanclark.com
Lawrie J. Kobza	608-283-1788	lkobza@boardmanclark.com
Storm B. Larson	608-286-7207	slarson@boardmanclark.com
Elizabeth A. Leonard	608-283-7224	lleonard@boardmanclark.com
Julia K. Potter	608-283-1720	jpotter@boardmanclark.com
Aiyanah A. Simms	608-283-1733	asimms@boardmanclark.com
Jared W. Smith	608-286-7171	jsmith@boardmanclark.com
Steven C. Zach	608-283-1736	szach@boardmanclark.com