Healthcare Update

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A Look Ahead

Four Trends Healthcare Employers Should Continue to Watch

By A. Kevin Troutman (Houston)

With the year drawing to a close, this is a good time to examine four significant trends in employment law and consider how to safeguard your healthcare organization from threats associated with them. While this list is not exhaustive, it represents an excellent starting point for ensuring a solid foundation from which to manage risks during the coming year.

The trends include: 1) increasingly aggressive (and overreaching) investigations by the Equal Employment Opportunity Commission (EEOC); 2) issues emerging from employee leave and accommodation requests; 3) more whistleblower and retaliation claims; and finally, 4) continuing challenges emerging from actions by the National Labor Relations Board (NLRB). In meeting these threats, one theme is critical: supervisors must be able to recognize early-warning signs and know when to seek assistance from their human resources representatives.

An Aggressive EEOC

After a record number of EEOC charges last year, an even more serious trend seems to be gaining momentum. The Commission has become more demanding and sometimes confrontational in seeking information from employers, sometimes presenting requests that considerably exceed the scope of allegations contained in the original charge. Investigators are also conducting more onsite investigations and interviewing more employees in the process. This can obviously be distracting and intimidating for workers, most of whom are unfamiliar with the process.

Additionally, the EEOC is emphasizing so-called "systemic" or allegedly widespread violations in employer practices. This means, for example, that language in a single hospital policy could result in the Commission launching a much broader and deeper investigation. Thus, even if that policy has little to do with the underlying charge, the EEOC could broaden its investigation, if it suspects something about that policy could result in discrimination that affects employees across the organization.

For employers, this means it is more important than ever to ensure that policies are up-to-date, accurate, and well worded. Ensure that all employees are familiar with the company's equal opportunity, non-discrimination and no-retaliation policies, and how to voice questions or complaints about workplace issues. It is not enough that these policies are contained in a manual. You must be able to show that workers are aware of them and that the policies are indeed followed.

Supervisors also need to know your policies and when to seek guidance from HR. This is true not just when they are contemplating disciplinary action or a termination, but when they sense grumbling or discontent among the ranks. Additionally, the persons who prepare responses to EEOC charges must carefully review all documents to be submitted, especially if they are only marginally related to the charge. You can certainly expect the EEOC to scrutinize your exhibits, especially policies, with a critical eye.

Tricky Leave And Accommodation Requests

The Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Uniformed Services Employment and Reemployment Rights Act (USERRA) and workers' compensation law can each be complicated when viewed in isolation. When one or more of these laws are implicated at the same time – which often happens – they can become even trickier.

Seasoned HR professionals sometimes find compliance difficult, particularly in the areas of intermittent FMLA leave and requests for accommodation. Even when attempting to err on the side of caution, the process can be especially challenging for supervisors who are responsible for the operational goals of their departments. While attempting to avoid violations of the ADA or FMLA, bear in mind that you may still ask employees to try to schedule leaves in a manner that is less disruptive to the workplace, and that employees who *are* able to work should be expected to perform the essential functions of their jobs.

Considering recent revisions to applicable regulations, broader coverage, and an aging workforce, leave issues will continue to arise more often. Ensure that supervisors avoid making promises they cannot keep and that they involve trained HR representatives early in the process. This will help manage expectations, ensure compliance, maintain medical privacy and protect the rights of everyone involved.

Unique Challenges Of Whistleblower Claims

On top of laws that were already in place, healthcare reform has added new whistleblower protections for employees. Most states also have their own whistleblower laws, some unique to healthcare workers. The federal False Claims Act (FCA) often crops up in healthcare settings, too. State laws such as Nurse Practice Acts include similar protections, such as no-retaliation provisions. Finally, retaliation allegations continue to appear on EEOC charges more often than any other category. In short, this broad category of claims continues to create headaches for employers and the trend shows no signs of changing.

Such claims are especially challenging for hospitals and other healthcare providers because they can be easy to overlook in a fast-paced environment and the variety of statutes creates a large pool of potential plaintiffs. To reduce risk, it is especially important for employers to publicize effectively all the ways employees can ask questions or lodge internal complaints. It's also critically important for hospitals to conduct (and document) thorough investigations of complaints. Anyone who reports a concern or provides information related to an investigation should be reminded of your no-retaliation policies.

Before taking an adverse action against an employee, you must conduct an objective review of the facts, including whether the employee has recently engaged in any protected activity. Such reviews may not change the final decision, but they can ensure the accuracy and integrity of the process and protect against whistleblower claims.

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Are Pharmaceutical Sales Reps Exempt As "Outside Salesmen"?

Diagnosis Unclear

By Grace Horoupian And Matthew Sgnilek (Irvine)

Just last August, the U.S. Court of Appeals for the 2nd Circuit issued a ruling that sent shock waves through segments of the healthcare industry. Then, as affected employers began responding to that decision, the 9th Circuit reached an apparently contradictory decision that may have raised more questions than it answered.

Dueling Decisions

In the first, the 2nd Circuit held that pharmaceutical sales representatives (PSRs) were not exempt from overtime as outside sales persons under the Fair Labor Standards Act (FLSA). *In Re Novartis Wage & Hour Litigation.* In making its decision, the court relied heavily on a Department of Labor legal brief, which strongly urged a finding that the PSRs were not exempt as outside sales persons.

The DOL's contention that PSRs were not exempt caught the industry off-guard and seemingly contradicted the position taken by the DOL for over 70 years. Since the inception of the outside-sales exemption in 1938, the DOL had remained silent on the issue and acquiesced to findings that PSRs qualified for the outside sales exemption.

But the more recent 9th Circuit case of *Christopher v. SmithKline Beechman* indicates that the impact of *Novartis* and the DOL's newly-adopted interpretation may be short-lived. In *SmithKline*, PSRs filed a suit contending that they *were not* outside salesmen and should have been paid overtime. SmithKline moved for summary judgment contending the PSRs were exempt as outside salespersons and not entitled to overtime. Breaking with both the DOL and the *Novartis* court, the 9th Circuit agreed with SmithKline and found that PSRs were outside salespersons exempt from overtime requirements.

The Underlying Principal

To qualify for the exemption from overtime pay under the FLSA's outside sales classification, 1) an employee's primary duty must be making sales or obtaining orders or contracts for services; and 2) the employee must be primarily and regularly engaged away from the employer's place or places of business in performing this primary duty.

The key difference between the *Novartis* and *SmithKline* decisions lies in the evaluation of whether a PSR's primary duty is making sales. The PSRs and DOL take a narrow reading of the exemption and argue that because federal regulations preclude PSRs from making sales directly to physicians, their primary duty is not making sales. Federal regulations preclude PSRs from obtaining anything more than a non-binding purchase commitment from the physician that, if provided with a product, the physician will appropriately prescribe it. In adopting this narrow view, the DOL disregarded the fact that PSRs were hired for their sales experience, and trained in sales methods.

The *SmithKline* court rejected the DOL's interpretation and took a much more reasoned (and more realistic) approach. *SmithKline* found the PSRs' primary duty was making sales. The court reasoned a PSR's non-binding agreement with a physician to appropriately prescribe products provided is, in fact, a sale. The court noted that like all other salespersons, PSRs earned commissions based upon sales commitments and enjoyed a largely autonomous occupation outside the office. In so ruling, the 9th Circuit flatly rejected the DOL's rigid interpretation of the exemption as it applies to PSRs and even stated "deference is not warranted because the Secretary's position is both plainly erroneous and inconsistent with her own regulations and practices.…"

In light of the split opinion between the 9th and 2nd Circuits, and varying state laws that may impact the classification of PSRs, employers should be cautious. You should discuss with employment counsel the classification of these individuals under regional, state, and federal laws.

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An Activist NLRB

Besides its edict requiring most employers post an 11" x 17" notice of employee rights under the National Labor Relations Act, the Board continues to take other actions that should be watched closely. Its challenges to policies regarding employee use of social media sites (such as Facebook) have drawn considerable attention. The Board remains poised to question any policy that it believes intrudes upon employees' rights to communicate about workplace issues, whether or not those communications impugn their employer and are posted publicly.

Also, as we reported in a September *Labor Alert*, the Board recently issued another string of decisions making it easier for unions to organize or remain in place. With unions desperate to attract new members, and healthcare representing such a significant and inviting segment of the economy, expect to see more organizing activity, through traditional and especially corporate campaigns.

It's important for supervisors and employees to know the hospital's position regarding unionization. Supervisors must also understand their responsibility for maintaining an environment where employee concerns are addressed in a fair and timely manner. Employees need to understand the importance of protecting their signatures, because card signing is such a critical part of the organizing process and organizers' tactics are often less than above-board. In an environment where unions are desperately seeking more members and the Board is decidedly pro-labor, healthcare organizations must remain prepared for organizing attempts and carefully follow new developments.

Conclusion

Facing more cost-containment efforts, shrinking reimbursement and ever-increasing regulation, healthcare employers may find it difficult to also manage risks associated with employment litigation. Though these risks are substantial, they are also manageable, especially if you are prepared to deal with significant trends such as those discussed above.

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