

LABOR & EMPLOYMENT ISSUES FACING THE HEALTHCARE INDUSTRY

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AUTHORS

Rob Wolff	Jessie Brown
Jody Boquist	Lucas DeLoach
Craig Brown	Katie Fearn
David Goldstein	Tessa Gelbman
Ben Huggett	Lisa Kathumbi
Bruce Millman	Melissa McDonagh
Angelo Spinola	Adam Primm
C. Eric Stevens	Roger Scruggs
Sherry Travers	Jeff Seidle
	Meredith Shoop

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INTRODUCTION

Public discourse on “healthcare” has focused primarily on health insurance and the significant changes made by the Affordable Care Act. But what about the providers of healthcare—the doctors, nurses, hospitals, pharmaceutical and medical device companies, home care agencies—that make up the industry itself? As the healthcare landscape shifts, so do the risks and challenges healthcare industry employers face.

Healthcare employers have historically had to contend with a number of demanding labor and employment-related issues, including increased attempts at union organizing, rising wage and hour class actions, negligent hiring and discrimination claims, and the complexities of healthcare mergers and acquisitions. Recent legislative, regulatory and litigation changes have compounded these challenges, and created new industry obstacles. Whistleblower lawsuits against healthcare employers have risen to an unprecedented level. Changes to wage payment regulations have home healthcare employers scrambling to understand and comply with the evolving law. Federal agencies are redefining which healthcare entities should be covered by and subject to government contracting regulations. Mass hysteria over disease outbreaks has put healthcare safety practices under the microscope. Meanwhile, the demand for quality healthcare grows.

This paper is intended to provide healthcare employers with an overview of key labor and employment issues facing the industry. Topics include traditional labor law issues, business restructuring, employment discrimination, whistleblower claims, wage and hour matters, workplace safety, federal contract compliance, negligent hiring, antitrust and price-fixing claims, potential concerns stemming from credentialing and peer review, and doctor privilege and immunity matters.

These chapters are not intended as a panacea for all healthcare industry legal concerns, but rather a guide to some of the most common and challenging issues that may arise. The goal of this paper is to provide a greater understanding of these issues, and help foster discussion within your organization.

I. WAGE & HOUR CONCERNS FOR HEALTHCARE EMPLOYERS

The Fair Labor Standards Act (“FLSA”), the federal wage and hour law, requires that employees receive overtime payment for all hours worked in excess of 40 in a given week unless certain narrow exceptions apply.¹ Exceptions include employees engaged in “bona fide” executive, administrative, or professional capacities, outside salespersons, and computer professionals.² FLSA misclassification lawsuits involve employees who claim they were improperly classified as FLSA-exempt and, therefore, improperly deprived of overtime. While some employees in the healthcare industry may be classified properly as exempt, alleged misclassification of nonexempt employees as exempt is a common basis for class and collective actions.

Exemptions to the FLSA are “narrowly construed against the employers seeking to assert them.”³ Accordingly, employees in the healthcare industry who traditionally are considered exempt from overtime, such as registered nurses and pharmacists, may not automatically be so classified. Whether employees qualify for certain exemptions depends not solely on their job titles, but on their primary job responsibilities and manner of compensation.⁴

This section highlights the most significant issues facing healthcare industry employers with respect to FLSA misclassification and presents several approaches that employers may consider pursuing to potentially reduce their risk of litigation and liability.

A. Factors Employers Should Consider for FLSA Classification Purposes

To be classified as exempt under the FLSA, employees usually must satisfy both the duties and compensation requirements of the applicable exemption. However, some courts have found that certain pay practices in the home healthcare industry have invalidated the exemption, even when the duties test—explained below—has been satisfied. As such, healthcare industry employers should always consider both employees’ duties and their compensation and never automatically label employees as exempt based solely on their job titles.

1. Duties Requirements for FLSA Exemptions

Healthcare employers should be familiar with the different types of exemptions commonly applicable in the healthcare industry. One of the most common FLSA exemptions is the “learned professional” exemption, which often applies to registered nurses,⁵ certified registered nurse anesthetists,⁶ nurse practitioners,⁷ certain pharmacists,⁸ and certain physician assistants,⁹ but specifically excludes licensed practical nurses and employees with similar duties.¹⁰

For the learned professional exemption, an employee’s primary duty must involve: (1) work requiring advanced knowledge; (2) in a field of science or learning; (3) that must be acquired customarily by a prolonged course of specialized intellectual instruction.¹¹ Having the requisite degree or license alone is often not enough to satisfy this

1 29 U.S.C. § 207(a)(1).

2 29 U.S.C. §§ 213(a)(1), (15), (17).

3 *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 396-97 (1960).

4 99 C.F.R. § 541.2.

5 29 C.F.R. § 541.301(e)(2) (addressing registered nurses); see *Fazekas v. The Cleveland Clinic Found. Health Care Ventures, Inc.*, 204 F.3d 673, 679 (6th Cir. 2000) (holding that plaintiffs — registered nurses making home healthcare visits — were bona fide professionals, exempt from the FLSA’s overtime requirements because their duties required advanced knowledge and discretion).

6 Opinion Letter, Wage and Hour Division, United States Dep’t of Labor, 1999 DOLWH LEXIS 127, at *4 (Dec. 29, 1999).

7 Courts and the DOL have not squarely addressed whether nurse practitioners meet the duty component of the professional employee exemption to the FLSA’s overtime requirements. However, The Department of Labor Occupational Outlook Handbook describes nurse practitioners as “advanced practice registered nurses,” and reports that nurse practitioners must obtain a higher level of education than a registered nurse. Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook (Jan. 8, 2014), available at <http://www.bls.gov/ooh/healthcare/home.htm>. Consequently, it is likely that the duties of nurse practitioners meet the duty requirements of the learned professional exemption.

8 Pharmacists compensated on a “salary or fee basis” have been considered bona fide professionals exempt from the FLSA’s overtime requirements. See, e.g., *De Jesus-Rentas v. Baxter Pharm. Servs. Corp.*, 400 F.3d 72, 74, 77 (1st Cir. 2005); *Caperci v. Rite Aid Corp.*, 43 F. Supp. 2d 83, 84-85, 98 (D. Mass. 1998) (adopting appended Report and Recommendation) (no parties disputed that the pharmacists’ duties fell under the professional exemption, but the pharmacists disputed that they were paid on a salary basis).

9 29 C.F.R. § 541.301(e)(4) (specifying that physician assistants who have four years of specialized post-secondary school instruction, have graduated from an accredited program, and who are board-certified generally meet the duties requirements for the learned professional exemption).

10 29 C.F.R. § 541.301(e)(2).

11 29 C.F.R. §§ 541.301(a)(1)-(3).

exemption.¹² The employee's primary duty must involve work that requires his or her advanced knowledge.¹³ For example, nurses who frequently perform nontraditional nursing duties, such as case-management functions, have challenged their exempt classification.¹⁴ Healthcare employers should take care to review whether possibly exempt employees primarily engage in duties related to their training.

Healthcare industry employers should also be familiar with the executive and the administrative exemptions to the FLSA. The executive exemption applies to employees who (1) have management of the enterprise or of a customarily recognized department or subdivision as his/her primary duty; (2) customarily and regularly direct the work of two or more other employees; and (3) have the authority to hire or fire other employees, or have their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees given particular weight.¹⁵ The administrative exemption applies to employees whose primary duties are (1) the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (2) the exercise of discretion and independent judgment with respect to matters of significance.¹⁶

Even if the above exemptions seem applicable to all employees with certain job titles, employers cannot assume that all employees who are supervisors qualify for the executive or administrative exemption or that all employees with specialized degrees qualify for the learned professional exemption. For example, the front desk supervisor in a medical practice argued, albeit unsuccessfully, that she did not satisfy the executive exemption because she did not have the authority to hire or fire employees, her recommendations on hiring and firing had no "particular weight," and she was not involved in scheduling or training her supervisees.¹⁷ Therefore, in evaluating whether a particular FLSA exemption applies, courts will scrutinize employees' actual duties and functions, rather than depend on job titles or descriptions.

2. Compensation Requirements for FLSA Exemptions

In addition to the duties requirement, employees must meet certain compensation requirements to be properly classified as exempt employees.¹⁸ Generally, under the FLSA, an exempt employee must be compensated either on a salary basis of not less than \$455 per week, which cannot be reduced because of variations in quality or quantity of work,¹⁹ or, for the professional and administrative exemptions, on a fee basis if the employee is paid an agreed-upon sum for a unique job regardless of the time required for completion of the task.²⁰ An exempt employee paid on a fee basis must earn fees at a rate that would result in compensation equal to or exceeding \$455 per week if the employee worked 40 hours.²¹

For any employees who ostensibly receive pay on a salary basis, healthcare employers should take care to review whether those employees' pay is subject to variations based on the quantity or duration of the work performed. This is often an issue in the healthcare industry where employees are frequently incentivized to take less desirable shifts through

12 See, e.g., *Rieve v. Coventry Health Care, Inc.*, 870 F. Supp. 2d 856, 868 (C.D. Cal. 2012) (noting that the FLSA exemption inquiry does not end merely because the employee has an RN degree).

13 *Rieve*, 870 F. Supp. at 862-63.

14 See, e.g., *Id.* at 863-65 (finding that a field case manager had duties similar enough to a registered nurse and exercised enough independent judgment and discretion that the "case manager" title did not invalidate the professional exemption); *Winthrow v. Sedgwick Claim Mgmt. Servs., Inc.*, 841 F. Supp. 2d 972, 987 (S.D. W. Va. 2012) (finding that a utilization review nurse used her advanced knowledge and discretion to determine if a requested treatment related to the compensable injury and, thus, fell within the professional exemption); *Powell v. Am. Red Cross*, 518 F. Supp. 2d 24, 27, 39-43 (D.D.C. 2007) (finding that a Wellness Associate, also known as an Occupational Health Nurse, exercised discretion in determining if personnel met the medical requirements for deployment and addressing their health issues, such that she qualified for the professional exemption).

15 29 C.F.R. § 541.100.

16 29 C.F.R. § 541.200.

17 *Goff v. Bayada Nurses, Inc.*, 424 F. Supp. 2d 816, 820-23 (E.D. Pa. 2006).

18 One exception to the salary/fee compensation requirement is the medical exemption for "physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners," 29 C.F.R. § 541.304; but *not* "pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession." 29 C.F.R. § 541.600.

19 29 C.F.R. 541.600(a). This amount may be translated into equivalent amounts for periods longer than one week. *Id.* at § 541.600(b). It bears noting, however, that the proposed white collar overtime exemption regulations seek, among other things, to increase the minimum salary level for the administrative, executive and professional exemptions at the 40th percentile of weekly earnings for full-time employees. This equates to \$921 per week or \$47,892 annually. The DOL has estimated that by the time the final rule is issued later this year, this amount will increase to \$970 per week or \$50,440 per year. 80 Fed. Reg. 38515 -38612 (July 6, 2015).

20 29 C.F.R. § 541.605.

21 *Id.*

additional premiums or differential payments. These programs must be carefully scrutinized and documented to mitigate the risk of a misclassification claim. Furthermore, as plaintiffs' employment lawyers have increased their focus on various aspects of compensation for exempt healthcare employees, it is critical that employers review their pay practices and compensation policies for clarity—not only legality. For example, to reduce legal risk, if employees are paid on a per-visit or similar fee basis, employers should avoid including fee components that directly tie compensation to the number of hours or days worked. While certain pay practices may be legal, employers should consider whether it is ultimately wiser to change practices that are currently being targeted for litigation to reduce potential exposure. To further limit their risk of litigation, healthcare employers should also consider policy and training acknowledgment forms, carefully drafted job descriptions, periodic self-evaluations, and mandatory arbitration agreements with class action waivers.

Finally, changes in laws and regulations and certain court decisions can alter how employers comply with wage and hour laws and follow steps to help minimizing litigation. One key development anticipated for 2016 involves proposed changes to the Department of Labor's regulations on the FLSA, released to the public for comment on June 30, 2015.

B. Proposed Changes to the White Collar Exemption

On July 6, 2015, the U.S. Department of Labor ("DOL") issued a proposed rule that drastically changes the "white collar" exemption under the FLSA, which applies to executive, administrative and professional employees. The Obama administration estimates 4.5 million workers will become non-exempt under the new regulations. The current law applies both a job duties test as well as a minimum salary (\$455 per week or \$23,660 annually) to qualify any employee for the white collar exemptions. The DOL has not modified these exemptions since 2004. The proposed rule is currently centered on raising the minimum salary level, and the DOL may ultimately modify the duties requirements of the applicable exemptions as well.²² The proposed rule considers setting a minimum amount or implementing a formula that would automatically update the salary level "to prevent the [salary] level from becoming outdated with the often lengthy time between rulemakings." The DOL further invited comments on whether the job duties test should also be altered. Any comments regarding the job duties test or the minimum earnings calculation were due to the DOL by September 4, 2015.

The proposed rule increases the \$455 minimum salary requirement to \$921 per week or \$47,892 annually, which the DOL states represents the 40th percentile of weekly earnings for full-time employees. However, by the time the final rule is expected to be issued in 2016, the DOL estimates the 40th percentile of weekly earnings will increase to \$970 per week or \$50,440 per year. Additionally, the proposed rule also seeks to raise the compensation requirement for the highly compensated employee exemption to equal the 90th percentile of weekly earnings, or \$122,148 annually.

In anticipation of the final rule, employers should evaluate the cost of estimated overtime for formerly exempt employees versus increasing the weekly earnings for such employees so that they still qualify. It is strongly recommended that any such review be conducted with an attorney so it can be protected from disclosure, to the extent possible, by the attorney-client privilege.²³ The review should also identify exempt positions likely to be impacted if the duties test is modified, e.g., if the primary duty requirement is increased to more than 50% in exempt work. Further, employers should consider modifying the job duties of borderline positions to bolster the exemption requirements.

C. Home Healthcare Exemption Litigation

In 1974, when extending FLSA coverage to "domestic service" workers, Congress also created an exemption from the minimum wage and overtime requirements for "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves,"²⁴ and created an exemption from the overtime requirement for "any employee who is employed in domestic service in a household or who resides in such household."²⁵ The DOL subsequently issued the regulations at 29 C.F.R. Part 552

22 The DOL is seeking comments on whether the standard duties tests are working as intended to screen out employees who are not bona fide white collar exempt employees. In the notice of the proposed rule, the DOL notes that it is concerned that in some instances the current tests may allow exemption of employees who are performing such a disproportionate amount of nonexempt work that they are not white collar exempt employees in the meaningful sense.

23 Attorney-client privilege does not guarantee the evaluation will not need to be disclosed. See *Scott v. Chipotle*, 2014 U.S. Dist. LEXIS 175775 (S.D.N.Y. Dec. 18, 2014) (holding that to assert a good faith defense based on attorney advice, the company must waive attorney client privilege on all legal advice received regarding the classification decision). However, if a company does not rely on privileged communications or testimony in support of its defense, it may still be able to maintain its attorney-client privilege. See *McKee v. PetSmart*, 2014 WL 5293703, *2-3 (D. Del. Oct. 15, 2014).

24 29 U.S.C. § 213(a)(15).

25 29 U.S.C. § 213(a)(21).

to define the scope of these regulations. Section 552.109 of the 1975 regulations established that the companionship exemption applies to employees “who are engaged in providing companionship services” and “who are employed by an employer or agency other than the family or household using their services.”²⁶ It also established that the live-in domestic service worker exemption applies to “employees who are employed by an employer or agency other than the family or household using their services.”²⁷

According to the DOL, approximately 90% of home health aides and personal care aides, which include those providing companionship services, are employed by third parties, rather than by the individual or family needing services. In the 39 years since Congress enacted the companionship exemption, home care workers employed by third parties have been exempt from the FLSA minimum wage and overtime requirements.

However, in revised regulations published on September 17, 2013, the DOL amended section 552.109(a) to provide that the companionship exemption and live-in domestic service worker exemption are not available to home care workers employed by a third-party company, thereby dictating that employers must begin paying such employees minimum wage and/or overtime under federal law. The revised regulations also radically narrowed the definition of what services come under the exemption. In particular, the DOL removed the term “care” from the definition of companionship services. While providing some care would still be allowed, the regulations stated that in order to qualify for the exemption, the care activities could not exceed 20% of the time worked. Care activities were defined as assisting with “activities of daily living (such as dressing, grooming, feeding, bathing, toileting and transferring)” or with “instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medication, and arranging medical care).”

The effect of the new Home Care Rule is to require overtime to be paid for the first time to more than 90% of all home caregivers throughout the country. All third-party home care employees covered by the new rule must be paid overtime for hours worked over 40 in a week or they must be scheduled so that they do not work over 40 hours.

In January 2014, several home care associations joined together and filed a lawsuit against the DOL seeking to stop the regulations from going into effect.²⁸ In *Home Care Association of America v. Weil*,²⁹ the co-plaintiffs challenged the DOL’s authority to re-write these exemptions out of the law. On December 22, 2014, the U.S. District Court for the District of Columbia struck down portions of the DOL’s final rule eliminating the FLSA minimum wage and overtime exemptions for home care workers employed by home care agencies and other companies. Finding that the DOL’s revised regulation as applied to third-party employers, “not only disregard[ed] Congress’s intent, but seize[d] unprecedented authority to impose overtime and minimum wage obligations in defiance of the plain language” of the FLSA, the court granted the co-plaintiffs’ motion for summary judgment and vacated that portion of the regulation. On January 14, 2015, the court also vacated the DOL’s new rule that purported to narrow the definition of “companionship services” exempt from overtime under the FLSA.

The DOL, however, appealed the district court’s ruling. On August 21, 2015, the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) upheld the DOL’s Home Care Rule and reversed the lower court’s decisions vacating the new rule. Accordingly, the D.C. Circuit held that third-party employers of home care “companions” or live-in caregivers for the elderly and disabled could no longer avail themselves of the longstanding statutory exemption from overtime requirements. The D.C. Circuit also held that the DOL could set a maximum 20% threshold for any caregiving services to be provided by home care companions, regardless of their employer, to qualify for exempt status.

The co-plaintiff associations filed a petition for a *writ of certiorari* asking the U.S. Supreme Court to review the D.C. Circuit’s decision. The DOL filed its own motion asking the court of appeals to allow the rule to go into effect before the October 13, 2015, deadline. The court of appeals denied both motions on September 18, 2015. A few weeks later on October 6, 2015, the U.S. Supreme Court denied the home care industry coalition’s application to stay the effective date of the new rule pending its filing of a petition for certiorari. Therefore, the appeals court’s “mandate” became effective on October 13, 2015.

26 29 C.F.R. § 552.109(a).

27 29 C.F.R. § 552.109(c).

28 Littler represented the Home Care Association of America, the International Franchise Association, and the National Association of Home Care & Hospice, the co-plaintiffs in the case.

29 1:14-cv-00967, U.S. District Court for the District of Columbia.

Meanwhile, according to a DOL policy statement signed on September 9, 2015, the WHD announced it would not bring enforcement actions against any employer for violations of FLSA obligations resulting from the amended domestic service regulations for 30 days after the date the court of appeals issued a mandate making its opinion effective.³⁰ On October 27, 2015, the agency published an updated *Federal Register* notice clarifying that its non-enforcement period would conclude on November 12, 2015, and from November 12, 2015 through December 31, 2015, the WHD would “exercise prosecutorial discretion pursuant to its previously announced time-limited nonenforcement policy.”³¹ This temporary enforcement stay and period of “prosecutorial discretion” has now ended and does not prevent the plaintiffs’ bar from independently seeking damages based upon the actual effective date of the rule.

On November 18, 2015, the home care industry coalition filed a petition for a *writ of certiorari* asking the Supreme Court to review the D.C. Circuit’s decision upholding the Home Care Rule, and it is still possible that the Court will agree to hear the case. The Supreme Court is expected to make a decision on whether it will review the D.C. Circuit’s decision by mid-March. But this will not delay the effective date of the new rule, so it is recommended that affected employers take all steps necessary to comply with the new rule as soon as possible.³²

Irrespective of the outcome of the litigation, there are important measures employers should take even under the old regulations. Notably, many states require employers to pay minimum wage and/or overtime to employees who are otherwise exempt under federal law. Therefore, employers should understand what state law requirements may exist, e.g., whether travel time and sleep time are considered “hours worked.” All hours worked should be documented and certified now that caregivers employed by third parties are entitled to minimum wage and overtime.

The current exemption to the FLSA’s overtime requirement for live-in domestic workers is only applicable to caregivers hired directly by a family and is no longer available to third-party employers. However, third-party employers who employ caregivers who qualify as true “live-in” employees have more flexible payment options than compensating extended shift employees who work longer shifts but do not meet the definition of a true live-in. For the domestic worker to be considered a true live-in, he or she must reside on the premises “permanently” or for “extended periods of time.” The DOL has advised that a worker resides “permanently” on an employer’s premises seven days a week such that he or she has no other home, and a worker resides on an employer’s premises for “extended periods of time” when: (i) he or she lives, works, and sleeps on the premises five days per week and 120 hours or more; or (ii) if he or she spends less than 120 hours working and sleeping on the employer’s premises, he or she spends five *consecutive* days or nights residing on the premises. Therefore, it is advisable for home healthcare employers to determine whether the overnight caregivers they employ qualify as true live-in domestic service workers or extended shift employees. There also exists for employers an independent recordkeeping requirement to track hours worked by live-in workers.

D. Pay-Per-Visit Compensation Under the FLSA

A frequent target of recent litigation against home healthcare providers is the practice of paying home health clinicians on a “per-visit” basis, in which a flat fee is paid for work related to a particular visit.³³ Payment on a fee basis is defined by federal regulations as the payment of “an agreed sum for a single job regardless of the time required for its completion.”³⁴ In general, under federal regulations, a “fee” is paid as compensation for a “unique” job, as opposed to “a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again.”³⁵ Whether the compensation is paid for a “unique” job in the home healthcare industry has been the subject of litigation.³⁶

If healthcare employers wish to compensate employees on a fee basis, they must make such compensation independent of the time required for the task’s completion.³⁷ Combining per-visit and hourly compensation or varying

30 80 Fed. Reg. 55,029 -55,030 (Sept. 14, 2015).

31 80 Fed. Reg. 65,646 -65,647 (Oct. 27, 2015).

32 This is an extremely fluid situation and there are a multitude of potential outcomes. Please contact the authors of this white paper for an update concerning this litigation.

33 Pay-per-visit compensation also must satisfy criterion described above, paying at a rate of at least \$455 per week if the employee worked 40 hours. See 29 C.F.R. § 541.605(b).

34 29 C.F.R. § 541.605(a).

35 *Id.*

36 See, e.g., *Fazekas v. Cleveland Foundation Health Care Ventures, Inc.*, 204 F.3d 673, 676-77 (6th Cir. 2000); compare former 29 C.F.R. § 541.313, with current 29 C.F.R. § 541.605.

37 *Elwell v. University Hospitals Home Care Services*, 276 F.3d 832, 838 (6th Cir. 2002).

visit fees based on the time required for certain tasks puts employees' exempt status at risk.³⁸ Similarly, per-visit compensation that takes duration into account, even if not entirely based on duration, increases an employer's risk of litigation.³⁹

One promising alternative to the pay-per-visit model is a "salary-plus" system. "Salary-plus" compensation means that employees are paid a guaranteed weekly salary and also are eligible to earn incentive compensation above the guaranteed salary based on productivity.⁴⁰ Potential benefits of salary-plus compensation include more cost predictability (with no availability of overtime) and increased protection against off-the-clock work claims. While implementing a new compensation system does impose costs on the front end, a salary-plus system likely will be less burdensome going forward given the litigation risks associated with pay-per-visit systems and overtime calculation and tracking. One potential "con" of a salary-plus system arises from its newness as a pay practice, which makes it subject to challenge as a developing area of law.

A recent case addressing a salary-plus system is instructive on such a system's potential benefits. In *Guardia Clinical & Support Options, Inc.*,⁴¹ the plaintiff was a home health therapist who was paid under a "salaried plus" model. She was guaranteed a salary of \$24,750 per year, or \$475.96 per week, which was not subject to reduction, but once she reached 75% of her productivity goal she received an additional \$34 for each visit completed. The court found this compensation scheme satisfied 29 C.F.R. §§ 541.602 and 541.300(a), the DOL's salary basis and professional exemption regulations, because the plaintiff "regularly receive[d] each pay period...a predetermined amount constituting...part of her compensation in excess of \$455 per week."⁴² The court further explained that pursuant to 29 C.F.R. § 541.604, an employer may provide "additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount on a salary basis."⁴³

Another alternative to treating healthcare employees paid per visit as FLSA-exempt is to simply treat employees as non-exempt, *i.e.*, paid hourly or per-visit but entitled to overtime. Employers still must guard against litigation involving off-the-clock work, overtime calculation,⁴⁴ compliance with minimum wage laws, and state-mandated breaks, etc., but such a system would be easy to implement administratively and have more established treatment by the law.

Lastly, another tool for healthcare industry employers to help minimize risk of litigation is a mandatory arbitration agreement with a class waiver. While there are possible cons, the principal advantage of mandatory arbitration with a class action waiver is significant—the avoidance of class litigation—which often results in employers paying significant settlements if only to avoid potential disruption, bad publicity, and steep damage awards. If carefully worded, such mandatory arbitration agreements can act as a strong preventative measure for the most costly types of wage and hour lawsuits.

Each of the compensation systems and recommended strategies described above has detailed requirements that are beyond the scope of this summary. Before assessing an existing system or implementing a new system, please consult with your Littler contact.

E. Mandatory Overtime

It is not uncommon for hospitals to schedule nurses to work 12-hour shifts. Indeed, many nurses prefer the 12-hour shifts as it allows them to consolidate their workweeks. In many states, when nurses work in excess of 12 hours in a 24-period period, it is considered overtime. Concerned that nurses working overtime may experience fatigue, causing them to make mistakes in patient care or increase the likelihood of them injuring themselves, 17 states have enacted some form of legislation prohibiting mandatory overtime for nurses, including Alaska, Arkansas, California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New York, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia. In addition, Maine provides an exception for nurses in its overtime law. Significantly, this legislation generally applies to hospitals rather than nursing homes or home healthcare.

³⁸ See *id.*

³⁹ See, e.g., *Rindfleisch v. Gentiva Health Svcs., Inc.*, 962 F. Supp. 2d 1310, 1320-21 (N.D. Ga. 2013).

⁴⁰ See 29 C.F.R. § 541.604

⁴¹ 25 F. Supp. 3d 152 (D. Mass. 2014).

⁴² *Id.* at 159-60 (agreeing with the employer's characterization).

⁴³ *Id.* (quoting 29 C.F.R. § 541.604(a) (additional citation omitted)).

⁴⁴ While federal law generally considers overtime working more than 40 hours per week, 29 U.S.C. § 207(a)(1), some states have more stringent requirements. For example, California requires that non-exempt employees be paid overtime if they work more than eight hours per day. Cal. Lab. Code § 510; California Dept. of Indus. Relations, IWC Order 4-2001 sec. 3.

Generally, the state laws prohibit mandatory overtime or any adverse employment action against a nurse who refuses overtime. Some legislation allows for exceptions for emergencies or will allow voluntary overtime. For example, in Massachusetts, mandatory overtime is defined as hours worked by a nurse in a hospital setting beyond the predetermined and regularly scheduled number of hours that the hospital and the nurse agreed the nurse shall work, provided that in no case shall such predetermined and regularly scheduled number of hours exceed 12 hours in any given 24-hour period.⁴⁵ Exceptions are allowed whenever there is an emergency situation where the safety of a patient requires the work and when there is no reasonable alternative. Nurses in Massachusetts are also permitted to work overtime if they choose to do so but are prohibited from working more than 16 hours; if they work 16 hours, they must have 8 consecutive hours off duty. Similarly, Illinois prohibits any nurse from working more than 16 hours and requires 8 consecutive hours off duty following any 12-hour shift.⁴⁶ Maine has legislation prohibiting employers from disciplining nurses who refuse to work more than 12 hours, unless there is an emergency affecting patient care.⁴⁷ Any nurse working a 12-hour shift in Maine must have 10 consecutive hours off duty following the shift. In Oregon, in addition to no mandatory overtime over 12 hours, the law also prohibits hospitals from requiring a nurse to work more than 48 hours in a week.⁴⁸ New Jersey caps the number of hours for a nurse to 40 hours in a workweek.⁴⁹

Due to the variations, it is prudent to review the specific statute or regulation for each state. For example, in New Hampshire employers may be exempted from the law if there is a written agreement between the employer and the employee, though the agreement must be submitted to the commissioner of the department of labor. In states where there is no law prohibiting overtime, it is likely that the state nursing association is lobbying for one, e.g., the Georgia Nurses Association, Michigan Nurses Association and the Wisconsin Federation of Nurses & Health Professionals all have webpages detailing their efforts to lobby for legislation prohibiting mandatory overtime.

Some legislation specifically states that it does not alter the terms of any collective bargaining agreement, suggesting if the terms of the CBA conflict with the statute, the CBA governs. Notably, in states where there is no statute prohibiting mandatory overtime, it may still be restricted through CBAs. For example, in Ohio, where there is no legislation prohibiting mandatory overtime, 52 nurses filed grievances in June of 2015 alleging their hospital employer violated their CBA by mandating overtime. At the time of the June arbitration, the arbitrator indicated the decision could take two to six months. No decision has been reached at the time of this publication.

Penalties attached to these mandatory overtime laws vary, but the penalties allowed under certain statutes can affect the hospital's license. The mechanism for enforcement, however, is unclear. In 2012, for example, five Texas nurses filed a lawsuit seeking enforcement of the no-mandatory-overtime statute at their hospital, arguing that a mandatory overtime shift scheduled two weeks in advance could not qualify as an emergency "unforeseen event," the only exception to the Texas statute prohibiting mandatory overtime. Although the Texas Department of State Health Services has jurisdiction over mandatory overtime rules for nurses, the nurses were permitted to proceed directly to court.⁵⁰

In July 2015, when nurses from one Massachusetts hospital complained to the Massachusetts Department of Public Health that the hospital was improperly using overtime to make up for staff shortages, the Department stated that it was not its job to analyze the hospital's overtime reports. The Massachusetts Nurses Association indicated it planned to submit the matter to arbitration.

Ultimately, there are often no clearly defined monetary penalties within these statutes, and therefore, they have not yet been the source of the wage and hour class actions typically filed by plaintiffs' attorneys. Nonetheless, any hospital requiring their nurses to work overtime due to emergency circumstances should still comply with their respective state law by filing any required reports with the appropriate state regularly agency/department defending the decision. It would also be prudent to provide an explanation to the nurses when making the request to try to avoid the costs of later defending the decision with the state or in court.

45 M.G.L.c 111, section 226.

46 210 ILCS 85/10.9; 250 Ill. Adm. Code pt.1110.

47 Me. Rev. Stat. Ann. tit. 26, § 603.

48 ORS 441.166.

49 N.J.S.A. 34:11-56a33.

50 In May 2013 the plaintiffs voluntarily dismissed the lawsuit.

F. “Rounding” for Employees Compensated Hourly

Although not per se unlawful, rounding practices are increasingly being challenged in class litigation under federal and state law. “Rounding” refers to the practice of not paying “to the minute,” but instead rounding employees’ start and stop work times to the nearest five minutes, ten minutes, or quarter hour. For example, if a non-exempt employee clocks in seven minutes before a scheduled shift, that employee’s time is “rounded up” to the nearest quarter hour (generally the scheduled shift start time). If an employee clocks in eight minutes before a scheduled shift, that employee’s time is “rounded down” to the nearest quarter hour (generally fifteen minutes before the scheduled shift start time). The same practice also applies at the end of the shift. Under the Department of Labor’s FLSA regulations, a rounding practice is lawful as long as the rounding policy does not consistently result in a failure to pay employees for time worked. Despite these regulations, plaintiffs’ attorneys are increasingly challenging rounding practices.

Two common claims arise from rounding practices. The first is that an employee claims to begin working at the moment of clocking in (for example, clocking in and starting to work at 8:55 a.m. even though the time clock rounds the paid time “up” to 9:00 a.m.). It is very easy for employees to claim that they were working during the rounded period even if they were not, and very difficult for employers to prove an individual employee was not, in fact, working during this unpaid period. The second claim arises if the rounding policy itself is facially neutral, but is not applied neutrally in practice. For example, if employees are allowed to “clock in” seven minutes before the start of a shift without being penalized (a practice benefitting the employer), but are disciplined for clocking in eight minutes early or even one minute after the start of a shift (a practice preventing a benefit to the employee), then employees may argue that a facially neutral policy is really a non-neutral practice.

Plaintiffs’ attorneys target rounding practices for litigation because such practices are often built into timekeeping systems as a “work rule,” making the practice applicable to large numbers of employees in order to establish a class action. Moreover, potential damages can be established by using the employers’ own time records to compare what employees were actually paid based on rounded time records versus what they allegedly “should” have been paid based on “to the minute” clocking records.

Claims challenging an employer’s rounding practices often endure through the full litigation cycle—whether such claims are pursued in FLSA collective actions, class actions, or hybrid collective-class actions.⁵¹ After potentially lasting for years, these cases ultimately can result in very large settlements.

For these reasons, employers are increasingly choosing to eliminate rounding practices and to instead pay hourly employees “to the minute.” Healthcare industry employers should consider implementing a contemporaneous timekeeping system. Although such a system does pose challenges for home healthcare services, online system access makes such systems feasible regardless of the location. Contemporaneous timekeeping systems greatly reduce an employer’s risk of litigation by employees claiming they were not paid for time actually worked. In addition, employers also should consider mandatory arbitration agreements with class action waivers, noted above, with reference to claims involving FLSA misclassification and pay-per-visit compensation, but equally applicable to FLSA claims concerning rounding.

G. Automatic Meal Deduction

Many healthcare employers utilize “auto-deduct practices” where the employer’s electronic timekeeping system automatically deducts time for a non-exempt employee’s meal break unless the employee actively “reverses” that deduction. The electronic timekeeping system is assuming the employee’s meals were taken without interruption, an assumption that may be incorrect in a healthcare setting where clinicians may not always receive a complete, uninterrupted, 30-minute meal break. Although on its face the auto-deduct practice is not unlawful, under the FLSA (and corresponding state wage law) employers must pay their employees for all hours worked. If an employer automatically deducts a meal break, but the employee then works part of the meal break, the employee is not being compensated for all hours worked. Of course, employees can also claim to have worked through part of their meal break even if they have not, and employers utilizing auto-deduct practices may not have sufficient documentation to disprove these claims.

Consequently, the “auto-deduct” practice is increasingly being challenged in class litigation under federal and state law. Indeed, because many healthcare employers use the same auto-deduct mechanism for large numbers of non-exempt employees, a few plaintiffs can sue alleging a system-wide auto-deduct “pattern and practice” that in turn allows them

⁵¹ FLSA collective actions involve 29 U.S.C. § 216(b), while class actions involve Federal Rule of Civil Procedure 23 (or the state equivalent). Hybrid actions involve both.

to attempt to form a large “class” of underpaid employees. Moreover, these claims are often not susceptible to summary judgment because courts hold issues of fact exist regarding whether employees were properly paid for missed meals. As such, auto-deduct lawsuits can result in years of expensive litigation, and can ultimately lead to very large settlements.

If a plaintiff presents evidence that his/her employer had actual or constructive knowledge that employees were working during automatically deducted unpaid meal breaks, courts will not grant summary judgment, requiring employers to either pay money to settle the case or go to trial. For example, in *Butcher v. Delta Memorial Hospital*,⁵² the court denied the defendant’s motion for summary judgment on the plaintiffs’ overtime claim where plaintiffs alleged they performed uncompensated work during automatically deducted meal breaks. Although the policy required an employee to notify his/her supervisor if s/he did not take a bona fide meal break, the court held that “[l]iability under the FLSA does not depend on whether plaintiffs fulfilled a duty to report overtime, but whether [defendant] knew or had reason to believe that plaintiffs performed work for which they were not compensated.”⁵³ This case was later settled for an undisclosed amount.

Even when the evidence suggests an employer had no knowledge of employees working during meal breaks, employers can still endure years of litigation before they are vindicated. In *Valcho v. Dallas County Hospital District*,⁵⁴ the court denied summary judgment even though the evidence showed the nurse never reported working through meal periods, because the plaintiff was able to introduce evidence showing it was an established practice and expectation to do so. Consequently, the court concluded a reasonable jury could find the employer was aware. Although a jury eventually found in the employer’s favor, it was not until the employer had to undergo three years of litigation.

In *Fosbinder-Bittorf v. SSM Health Care of Wisconsin, Inc.*,⁵⁵ a hospital automatically deducted 30 minutes of time after an employee worked a set number of hours. However, if a nurse did not receive an uninterrupted meal break, the nurse could cancel the deduction by pressing “cancel lunch” on the time clock, and the nurses were required to review and certify their time cards each pay period. Nonetheless, the court denied summary judgment, holding the hospital had constructive knowledge that the plaintiff regularly worked during meal periods and was not compensated for that time based on her supervisors’ testimony that the nurse regularly had to work during unpaid meal breaks. This was a collective action, and after two years of litigation, the case settled for \$3.5 million dollars, \$1,166,666.66 of which was allocated toward attorneys’ fees.⁵⁶

For these reasons, employers are increasingly choosing to eliminate or modify auto-deduct meal break practices to better insulate themselves from litigation. One way to minimize liability exposure is to utilize an “Attestation Model,” which requires each employee to affirmatively certify that s/he took a bona fide meal break (on a daily basis and at the time the employee clocks out). By requiring an employee to affirmatively confirm s/he took a meal break, the employer gains evidence to defend any future meal deduction claim by that employee. Employers should also consider including language in their handbooks regarding this practice, notifying the employees that no supervisor is authorized to require them to work during a meal period without compensation. By including this language, employers are adding additional support against any defense that the “Attestation Model” was not enforced in good faith.

52 5:12CV00241 SWW, 2013 WL 1668998, at *6 (E.D. Ark. Apr. 17, 2013).

53 *Id.*

54 658 F. Supp. 2d 802, 812-13 (N.D. Tex. 2009).

55 11-CV-592-WMC, 2013 WL 3287600, at *1 (W.D. Wis. Apr. 4, 2013).

56 In a similar FLSA automatic meal break deduction lawsuit, however, the U.S. District Court for the Northern District of Ohio decertified a collection action that potentially involved 44,000 hourly nursing home and rehabilitation center employees nationwide. The case, in which Littler represented the defendant, involved testimony concerning whether workers and managers received information about the auto-deduct policy during orientations; whether they signed documents acknowledging their receipt and understanding of the policy; and whether they were otherwise trained on how to report missed meal breaks. *Creely v. HCR ManorCare, Inc.* 920 F.Supp.2d 846 (2013). In another case in which Littler represented the defendant, *Frye v. Baptist Memorial Hospital, Inc.*, 2012 U.S. App. LEXIS 17791 (6th Cir. 2012), the Sixth Circuit upheld decertification of an FLSA collective action, in which the plaintiffs challenged the employer’s use of an automatic 30-minute deduction for unpaid meal breaks.

H. State-Specific Wage & Hour Considerations

While the FLSA plays a central role in many wage and hour lawsuits, healthcare industry employers should not overlook the potential role of state laws. As previously discussed, California state law imposes different rules on paying overtime to non-exempt employees.⁵⁷ California laws give broader protections to employees in a number of areas,⁵⁸ and other state laws vary significantly from federal law as well.⁵⁹ State-specific statutes and case law can change the landscape of employers' wage and hour compliance.

The three states with the most lawsuits filed against healthcare companies from 2010 to 2014 are California, New York, and Florida.⁶⁰ Healthcare industry employers with employees working in these states should pay special attention to state law and how it diverges from the FLSA.

A recent decision in a New York state court highlights how compliance with state wage and hour laws can vary significantly from compliance with federal law. The New York State Department of Labor ("NY DOL") has consistently enforced state law as permitting third-party employers to pay 24-hour home care attendants for 13 hours of a 24-hour shift, provided the employee is afforded certain periods for sleep and meals. But a New York state court recently rejected the NY DOL's interpretation and refused to follow a New York federal court decision that relied on a NY DOL Opinion Letter addressing wage practices for home care attendants.⁶¹ Instead, the New York state court found that sleep and meal periods must not be excluded from the hourly wages of certain home attendants, and certified a class action of over 1,000 home care attendants who worked 24-hour shifts.⁶² This decision is currently being appealed. Nonetheless, this clear departure from federal case law underscores the importance of monitoring state court cases.

Additional cases raising these same issues remain pending in New York state court, including at least one other case filed by the same plaintiff's firm.⁶³ Accordingly, home care employers operating in New York are at risk of copy-cat litigation and should be diligent with their pay practices.

Similarly, in *Mendiola v. CPS Security Solutions, Inc.*,⁶⁴ the California Supreme Court recently declined to read into a state wage order a federal regulation permitting employers and employees to agree to exclude sleep time from hours worked. The *Mendiola* court acknowledged the federal regulation but emphasized that state law may offer increased protection beyond what a federal law or regulation recognizes.⁶⁵ The *Mendiola* court went further and "cautioned against 'confounding federal and state labor law' and explained 'that where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced.'"⁶⁶ This case's explicit warning drives home that employers cannot rely on compliance with federal wage and hour laws to shield them against liability under state wage and hour laws and must proactively take into account such state law, especially where that law confers on employees greater benefits than does federal law.

57 Cal. Lab. Code § 510; California Dept. of Indus. Relations, IWC Order 4-2001 sec. 3.

58 See, e.g., Cal. Lab. Code § 1194 (overtime); Cal. Lab. Code §§ 202-03 (final pay and waiting time penalties); Cal. Lab. Code § 226(a) (pay stub requirements).

59 While the FLSA does not require paid meal and rest breaks for adult employees, the following states do: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. Also, the FLSA has a two-year statute of limitations for non-willful violations and a three-year statute of limitations for willful violations, 29 U.S. Code § 255; while New York has a six-year statute of limitations regardless of whether the violation was willful, N.Y. Lab. § 198.

60 Thomson Reuters, *Health Care Industry Report* (01/2010-01/2015), Court Trends & Analysis.

61 The earlier federal court decision is *Severin v. Project Ohr, Inc.*, 2012 U.S. Dist. LEXIS 85705 (S.D.N.Y. June 20, 2012).

62 *Andryeyeva v. New York Home Attendant Agency*, 45 Misc. 3d 820 (Sup. Ct. Kings County Sept. 16, 2014) (Demarest, J.). This decision is currently pending appeal.

63 *Kodirov v. Community Home Care Referral Service, Inc.*, No. 6870/11 (N.Y. Sup. Ct. Kings County) (purported class action brought by same law firm as *Andryeyeva* and pending before the same judge); see also *Moreno v. Future Care Health Servs., Inc.*, No. 500569/13 (N.Y. Sup. Ct. Kings County); *Melamed v. Americare Certified Special Services, Inc.*, No. 503171/12 (N.Y. Sup. Ct. Kings County).

64 Cal. 4th 833, 843 (Cal. 2015).

65 *Id.*

66 *Id.* (quoting *Martinez v. Combs*, 49 Cal. 4th 35, 68 (Cal. 2010)).

I. What Should Employers do to Help Minimize Risk?

As can be seen from the above discussion, plaintiffs' lawyers target specific practices within the healthcare industry that allow them to file a lawsuit. Class and collective actions are particularly attractive to plaintiffs' lawyers because they know that due to the high cost of litigating cases, companies will often entertain settlement without requiring much work by the plaintiffs' lawyers. Therefore, it is recommended that healthcare companies take proactive steps to help insulate them from litigation, to the extent possible, including:

- With legal counsel, conduct an audit of currently exempt positions, analyzing both compensation and job duties to evaluate increasing salaries or modifying job duties in anticipation of the DOL's changes to the white collar exemptions;
- Consider alternate pay systems for registered nurses, physical therapists and other professionally exempt employees in the field, e.g., salary-plus compensation;
- With legal counsel, review the job duties of home healthcare employees to determine whether they should be classified as exempt or non-exempt;
- Ensure there is a reliable system in place to track and verify all hours worked;
- Consider eliminating rounding practices;
- Consider implementation of an "Attestation Model" for tracking meal breaks and capturing all time worked; and
- Be aware of state wage hour and laws, including mandatory overtime statutes or regulations.

II. LABOR RELATIONS

In recent years, the National Labor Relations Board (“NLRB” or the “Board”) has grown more aggressive with its enforcement and protection of employees’ rights under Section 7 of the National Labor Relations Act (“NLRA”).⁶⁷ The Board has taken particular interest in three areas. First, the Board has expanded union access to employees, either in person or electronically. Second, the Board promulgated new rules and procedures regarding union elections to accelerate the process (which limits an employer’s ability to oppose union organizing efforts). Finally, the Board has closely scrutinized employer handbooks, policies and rules to determine if they can be read—in the slightest way—to restrict or “chill” employees’ Section 7 rights. All of these efforts have been applied in the healthcare setting.

A. Union Access to Employees

1. Access to Hospitals and Healthcare Facilities

Although the U.S. Supreme Court has held “[n]o restriction may be placed on the employees’ right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline[,]” it observed that “no such obligation is owed non-employee organizers.”⁶⁸ The Supreme Court allowed such restrictions on union access because (1) reasonable efforts by the union through other available channels of communication could enable it to reach employees, and (2) the employer did not discriminate against the union by allowing access to others.⁶⁹

However, the employer’s right to deny union organizers access to its property is not absolute. While noting that a union’s right to organize employees generally does not take precedence over the private property rights of an employer, the Supreme Court established a balancing test to determine a union’s right to access an employer’s private property. That balancing test comprises three parts: (1) the degree of impairment of the Section 7 right if access is denied, balanced against (2) the degree of impairment of the private property right if access is granted, and (3) the availability of reasonably effective alternative means for the union to access the employees.⁷⁰

Within the context of these precedents, courts have consistently upheld the rights of hospitals to deny union representatives access to their facilities (particularly public cafeterias) for organizing purposes. The lead case is *Baptist Medical Systems v. NLRB*.⁷¹ In that case, the hospital denied union representatives access to its cafeteria for the purpose of union organizing even though the cafeteria was located on the ground floor and open to employees, patients, and the general public. The court held that the hospital was permitted to prohibit union organizing activity in the cafeteria, reasoning that “an employer does not have an affirmative duty to allow the use of its facilities by nonemployees for organizational purposes.”⁷² The court further held that simply “inviting the public to use an area of its property...does not surrender its right to control the uses to which that area is put” because union organizing activity was not associated with the normal use of the cafeteria.⁷³ The court also noted that such union activity “could be particularly disturbing in a hospital setting.”⁷⁴

The Fourth Circuit in *NLRB v. Southern Maryland Hospital Center*⁷⁵ came to a similar conclusion when it permitted a hospital to exclude all solicitors from its cafeteria even though the area was available to employees, medical staff, patients, and patients’ visitors. First, the hospital uniformly applied its ban on solicitation to all outside entities. Further, allowing employees’ and patients’ families to eat in the cafeteria, as opposed to permitting outside entities to use the cafeteria to obtain money or memberships, was not considered a form of solicitation.⁷⁶

67 The rights to self-organize; to form, join, or assist labor organizations; to bargain collectively through chosen representatives; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, including the right to discuss wages, hours, benefits, and other terms and conditions of employment.

68 *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

69 *Babcock & Wilcox*, 351 U.S. at 112-114.

70 *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

71 876 F.2d 661 (8th Cir. 1989).

72 *Id.* at 664.

73 *Id.*

74 *Id.*

75 916 F.2d 932 (4th Cir. 1990).

76 *Id.* at 937.

In *Oakwood Hospital v. NLRB*,⁷⁷ the Sixth Circuit upheld a hospital policy that prohibited solicitation by nonemployees on hospital property even though visitors were permitted to eat in the public cafeteria. While acknowledging a union's right to organize, the court found that a "right to communicate with the employer's workforce does not necessarily imply the existence of a right to trespass on the employer's property."⁷⁸ The Sixth Circuit cited *Lechmere* in asserting there was "no room for doubt" under the NLRA that a hospital could prohibit a union organizer from using the cafeteria for organizing activities.⁷⁹ The court also relied on *Baptist Medical Systems* and *Southern Maryland Hospital Center* to conclude that inviting the public to use its property does not surrender the right to control the uses in that area.⁸⁰

While a hospital may have a right to restrict union access to its premises, it is important to remember that it may not exercise that right while allowing other nonemployee organizations unrestricted access. As the Supreme Court noted, an employer generally cannot prohibit union access to its premises if it allows other nonemployee organizations to solicit on its premises. However, there are two important exceptions to this general rule.⁸¹ First, an employer's decision to permit solicitation by outside organizations does not violate the rule if the solicitations consist only of a few isolated "beneficent acts" that are narrow exceptions to the employer's otherwise absolute policy against third-party solicitations.⁸² In contrast, where the permitted solicitations occurred on a regular basis and most were commercial instead of charitable, the hospital did not qualify for the exception and could not deny union access for purposes of soliciting employee support.⁸³

Second, it is permissible to allow solicitations that relate to the employer's business functions and purposes without violating the nondiscrimination rule.⁸⁴ Blood drives, pharmaceutical and medical textbook displays, and fundraising sales are all integral parts of a hospital's necessary functions.⁸⁵ Permissible solicitations have also included those intimately related to fringe benefits the hospital offers employees (e.g., tax-sheltered annuity plans, health insurance plans, etc.), as well as the sale of medical textbooks of interest to physicians and other health professionals, which were considered part of the hospital's practice of educational enhancement.⁸⁶ These solicitations were considered to be integrally related to the hospital's necessary business functions.⁸⁷

On the other hand, the following solicitations were *not* permitted under the exception because they were neither part of the fringe benefits package offered by the hospital nor related to the enhancement of healthcare: solicitations from a credit union; distributions and referrals regarding family care resources from a child and family services organization; offers of insurance that were not part of the hospital's regular benefit plan; and solicitations for flowers, jewelry, and scrub uniforms from vendors where a percentage of gross receipts was donated to an employee association that sponsored recreational events and purchased gifts for staff on significant occasions.⁸⁸

In summary, employers generally can prohibit nonemployee access to their facilities. In hospital settings, the courts recognize that nonemployee solicitations can be particularly disruptive. Indeed, there is significant precedent supporting such prohibitions, some of which provide specific examples of permissible restrictions. Healthcare employers should take care not to discriminatorily allow some solicitations while restricting union access. Failure to do so may result in unfair labor practice charges and a Board order that the employer allow the union (nonemployees) access to the employer's premises.

77 983 F.2d 698 (6th Cir. 1993).

78 *Id.* at 701.

79 *Id.* at 701-703.

80 *Oakwood Hospital*, 983 F.2d at 702.

81 *Lucile Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 586-587 (D.C. Cir. 1996), enforcing 318 NLRB 433 (1985).

82 *Id.*

83 *Id.* at 589.

84 *Id.* at 586-587.

85 *Id.* at 588.

86 *Lucile Salter Packard Children's Hosp. at Stanford*, 318 NLRB 433 (1985), enforced, 97 F.3d 583 (D.C. Cir. 1996).

87 *Id.* at 589.

88 *Id.* at 588-591.

2. Electronic Access after Purple Communications

In December 2014, the NLRB issued its landmark ruling in *Purple Communications Inc. and Communications Workers of America, AFL-CIO*.⁸⁹ In that decision, the Board rewrote its rules regarding employees' use of an employer's electronic communication systems—specifically email—to open those internal systems to employees to discuss terms and conditions of employment during non-working time, including for purposes of union organizing. Under the prior rule as set forth in *Register Guard*,⁹⁰ which was overruled by *Purple Communications*, an employer could limit the use of its internal, corporate email system by banning all non-business email communications, including those protected by Section 7, because corporate email systems were the employer's property. The *Purple Communications* Board called *Register Guard* “clearly incorrect” and instead found that employees have a presumptive right to use the internal, corporate email systems for non-business purposes—such as communications about union organizing, wages, and working conditions—during “nonworking time.”⁹¹ The *Purple Communications* Board found that *Register Guard* placed too much weight on employers' property interests and not enough on employees' “core Section 7 right to communicate in the workplace about their terms and conditions of employment.”⁹²

In *Purple Communications*, the company's electronic communications policy stated that its systems and equipment “should be used for business purposes only.”⁹³ The policy also prohibited employees from using the equipment to “engag[e] in activities on behalf of organizations or persons with no professional or business affiliation with the Company” and from “sending uninvited email of a personal nature.”⁹⁴ The Board again departed from *Register Guard*, disagreeing that email could be analogized to other employer-owned equipment like bulletin boards, copiers, and phones because of the “flexibility and capacity” of email to make non-work use less costly and disruptive than the non-work use of the other property.⁹⁵ The Board also defined email as the new “natural gathering place” for employees to congregate, the “predominant means of employee-to-employee communication,” and the modern equivalent of the proverbial water cooler where face-to-face solicitations have long been permitted.⁹⁶ The Board declined to analogize email to the distribution of literature or solicitation because emails, depending on the context, may constitute such activity or may simply be communications (protected or not).⁹⁷ The Board also declined to characterize email systems as work or non-work areas for purposes of such distribution.⁹⁸ As such, restrictions on the use of this communication tool would inherently interfere with employees' Section 7 rights to communicate with each other about terms and conditions of employment.

Under *Purple Communications*, certain accepted communication policies have become unlawful. Policies that ban all nonbusiness usage of the corporate email system are presumed unlawful. In order to make such a ban permissible, the employer must demonstrate “special circumstances” that “make the ban necessary to maintain production and discipline.”⁹⁹ The Board opined that it would be a “rare case where special circumstances justify a total ban on nonwork email use by employees.”¹⁰⁰ To do so, the employer would be required to make a particularized showing that demonstrates “the connection between the interest it asserts and the restriction. The mere assertion of an interest that could theoretically support a restriction will not suffice.”¹⁰¹

Similarly, employer policies that prohibit using corporate email for solicitation may be unlawful depending on the restriction. Thus, a policy prohibiting solicitation for types of groups, including membership organizations (e.g., unions), would be unlawful because it would be construed to bar employees from using the corporate email for union organizing—an activity permitted under *Purple Communications*.

89 361 NLRB No. 126 (Dec. 11, 2014).

90 351 NLRB 1110 (2007).

91 *Purple Communications*, 361 NLRB No. 126 at 2.

92 *Id.* at 18.

93 *Id.* at 9.

94 *Id.*

95 *Id.* at 37.

96 *Id.* at 31-33.

97 *Id.* at 54-55.

98 *Id.* at 55.

99 *Id.* at 4.

100 *Id.* at 61.

101 *Id.* at 63.

Such was the outcome in a National Labor Relations Board decision in which a three-member panel determined that a group of Pennsylvania hospitals maintained a non-solicitation policy that violated Section 8(a)(1) of the NLRA.¹⁰² Applying the principles in *Purple Communications*, the three-judge Board panel reversed an administrative law judge's finding that the hospitals' non-solicitation policy was valid, and held instead that the policy was unlawful on its face. The ALJ had previously determined that the policy was lawful under *Register Guard*. Because *Purple Communications* has retroactive application, the Board reconsidered the policy's legality under the new standard, and found that the employees had a "presumptive right to use the Respondents' email system to engage in Section 7-protected communications during nonworking time."¹⁰³

The language at issue in the solicitation policy read as follows:

No staff member may distribute any form of literature that is not related to UPMC business or staff duties at any time in any work, patient care, or treatment areas. Additionally, staff members may not use UPMC electronic messaging systems to engage in solicitation (see also Policy HS-IO147 Electronic Mail and Messaging).

....

All situations of unauthorized solicitation or distribution must be immediately reported to a supervisor or department director and the Human Resources Department and may subject the staff member to corrective action up to and including discharge.¹⁰⁴

The Board took particular issue with the second provision requiring employees to immediately report instances of unauthorized solicitation, as the policy "defines 'unauthorized solicitation' to include solicitation protected by Section 7."¹⁰⁵ Therefore, the rule "reasonably tends to chill employees in the exercise of their Section 7 rights."¹⁰⁶

The hospital had argued that special circumstances related to patient safety justified the standard. Specifically, the hospital cited studies finding a correlation between employee distraction and patient safety, and identifying computers and other electronic communication devices as sources of distraction. The Board, however, deemed these reasons insufficient:

We do not doubt that using a hospital's email system during working time may be distracting, and that when nurses and others responsible for patient care are distracted, errors may result that may affect patient safety. But those concerns, however legitimate, do not justify a policy that prohibits the use of UPMC electronic messaging systems for only one type of communication, namely solicitation. Nothing in the studies cited by the Respondents demonstrates that patient-safety interests would not be similarly affected by employee email use that the Respondents have already authorized.¹⁰⁷

However, even after *Purple Communications*, employers have certain rights and protections. Employers are not required to open their corporate email system to unions or non-employees for Section 7 activities—the decision only provides access to employees.¹⁰⁸ Employers also are not required to provide employees access to the internal, corporate email system if the employees do not require access for their jobs. Only employees who already have access and/or need access to carry out their responsibilities have expanded email access under *Purple Communications*.¹⁰⁹ Moreover, employers maintain their rights to monitor internal, corporate email activity for legitimate business reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that would give rise to employer liability, so long as they do not change their monitoring practices in response to Section 7 activity.¹¹⁰ For example, if the employer's customary monitoring uncovers Section 7 activity, then there is no violation of the NLRA.

102 *UPMC*, 362 NLRB No. 191 (Aug. 27, 2015).

103 362 NLRB No. 191, slip op. at 3.

104 *Id.* slip op. at 2.

105 *Id.* slip op. at 5.

106 *Id.*

107 *Id.* slip op. at 4.

108 *Id.* at 64.

109 *Id.*

110 *Id.* at 67-68.

However, if the employer uncovers such activity and then increases monitoring that particular employee's email account in response to the Section 7 activity, such changes in the monitoring practice are unlawful. An employer can also continue to inform employees that it monitors computer and email activity "for legitimate management reasons and that employees may have no expectation of privacy in their use of the employer's email system."¹¹¹

Additionally, employers retain the right to establish uniform and consistently enforced controls over email systems in order to maintain production and discipline. The Board provided an example: "prohibiting large attachments or audio/video segments, if the employer can demonstrate that they would interfere with the email system's efficient functioning."¹¹² Furthermore, *Purple Communications* does not provide unlimited use of the internal, corporate email systems. Employees can only use the internal, corporate email for Section 7 activity during "nonworking time."¹¹³

Going forward, although not explicit in *Purple Communications*, the holding will likely extend to other electronic communication, such as text messages, internal/corporate social media, and messenger chats.

B. "Quickie" Elections

In a much-heralded change to its election procedures, the NLRB published its final rule on so-called "quickie" elections on December 15, 2014, with an effective date of April 14, 2015.¹¹⁴ The final rule shortens the time period between a union's filing of a representation petition and the holding of the election, provides employers with less time to present their arguments to employees regarding union representation, and requires employers to provide additional information about employees during the election process. Prior to the new rule, the median length of time from petition to election was 38 days; 94.3% of elections were held within 56 days. Under the new rule, "quickie" elections could be held just 13 days after the filing of a petition.

Among other changes to the election process, the rule establishes that at the pre-election hearing, the union must respond on the record to each issue raised in the Statement of Position before the introduction of further evidence.¹¹⁵ A party is precluded from raising any issue, presenting evidence relating to any issue, cross-examining any witness concerning any issue, and presenting an argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response.¹¹⁶ Additionally, if an employer contends that the proposed unit is not appropriate, but fails to specify the classifications, locations, or other employee groupings that must be added or excluded, the employer is precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting an argument concerning the appropriateness of the unit.¹¹⁷

Bargaining unit appropriateness has long been an issue in healthcare settings. In a seminal case, *Specialty Healthcare*,¹¹⁸ the NLRB adopted a new standard for determining the appropriateness of a bargaining unit, and held that a group of certified nursing assistants at a nursing home constituted a proper standalone unit apart from an existing group of unionized employees. In this case, the Board overturned its 1991 decision in *Park Manor Care Center*,¹¹⁹ and adopted a new standard for determining appropriate bargaining units. Under the revised standard, which the Sixth Circuit ultimately upheld,¹²⁰ so long as a union's petitioned-for unit consists of a clearly identifiable group of employees, the Board will presume the unit is appropriate. If an employer believes additional employees warrant inclusion in the unit, it must prove that the employees in the larger unit share an "overwhelming" community of interest with those in the petitioned-for unit.

The concern for most employers, including those in the healthcare industry, is the proliferation of so-called "micro" bargaining units, which are easier for unions to organize, but administratively difficult for employers to manage.

¹¹¹ *Id.* at 68.

¹¹² *Id.* at 64.

¹¹³ *Id.* at 67.

¹¹⁴ 79 Fed. Reg. 74,307-74,490 (Dec. 15, 2014).

¹¹⁵ 29 CFR § 102.64.

¹¹⁶ 29 CFR § 102.66.

¹¹⁷ 29 CFR § 102.66(d).

¹¹⁸ 357 NLRB No. 83 (2011).

¹¹⁹ 305 NLRB 872 (1991).

¹²⁰ *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

Compounding this issue is the Board's long-standing Health Care Rule,¹²¹ which establishes a procedure for organizing and collective bargaining in certain sectors of the healthcare industry. Specifically, this rule sets forth eight appropriate units for acute care hospitals:¹²² (1) All registered nurses; (2) All physicians; (3) All professionals except for registered nurses and physicians; (4) All technical employees; (5) All skilled maintenance employees; (6) All business office clerical employees; (7) All guards; and (8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.¹²³ The rule notes, however, that "[w]here extraordinary circumstances exist, the Board shall determine appropriate units by adjudication," and "[w]here there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed...the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit..."¹²⁴

Healthcare entities have often tried to challenge the appropriateness of a bargaining unit as running contrary to the Health Care Rule.¹²⁵ More often than not, however, the Board and courts have taken a permissive approach in determining unit appropriateness.

In fact, the healthcare industry in general has been fertile ground for unionization in recent years. According to the latest Bureau of Labor Statistics (BLS) figures, in 2015, approximately 1.2 million healthcare practitioner and technical occupations were represented by unions; approximately 314,000 individuals in the healthcare support occupations were represented by unions; more than 2.1 million in the education and health services field were so represented; and over 1.4 million in the healthcare and social assistance industry were represented by unions.¹²⁶ Notably, while overall union membership remained constant from 2014-2015, membership for most of the above healthcare industry categories rose.

The new representation election rule is expected to increase these numbers. According to early data on the election rule, from March 13, 2015 to April 13, 2015—the day before the expedited election rule took effect—there were 212 petitions for election filed with the NLRB.¹²⁷ From April 14, 2015 to May 14, 2015—the first month in which the new election rule was in play—there were 280 filings, or a 32% increase.¹²⁸ The median time from petition to election for all representation elections held after April 14 was just 23 days.¹²⁹ Also, while the percentage of elections conducted pursuant to stipulated election agreements typically hovers around 80 to 85%, only 63% of the elections held pursuant to petitions filed after April 14 were stipulated elections.¹³⁰ This may mean that election disputes are increasing, which results in fewer election agreements under the new rule.

Healthcare entities have seen their fair share of election petitions following the implementation of the new NLRB rule. During the roughly three-month period following the effective date of the election rule (April 14, 2015 – July 10, 2015), 589 election petitions were filed.¹³¹ Of these petitions, 225 were filed with 36 healthcare entities.

121 29 C.F.R. § 130.30.

122 Acute care hospital is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital. 29 C.F.R. § 130.30(f)(2).

123 29 C.F.R. § 130.30(a)(1)-(8).

124 29 C.F.R. § 130.30(b), (c).

125 See, e.g., *an Miguel Hospital Corp. v. National Labor Relations Board*, 697 F.3d 1181 (D.C. Cir. 2012) (D.C. Circuit rejected a New Mexico hospital's contention that a "wall-to-wall" bargaining unit comprised of both professional and non-professional employees was an inappropriate unit for collective bargaining and in violation of the Health Care Rule); *Rush University Medical Center and Local 743 International Brotherhood of Teamsters*, 362 NLRB No. 163 (Aug. 7, 2015) (In a refusal to bargain case, the hospital employer admitted the refusal, but contested the validity of the election certification on the grounds that it runs contrary to the Health Care Rule. The Board rejected this argument on the grounds that it was raised and rejected in the representation proceeding.).

126 Bureau of Labor Statistics, *Union Membership (Annual) News Release* (Jan. 28, 2016), Table 3. Union affiliation of employed wage and salary workers by occupation and industry, 2014-2015 annual averages.

127 "Election Petitions Surge After NLRB Union Rule Takes Effect," Law360.com (May 28, 2015).

128 *Id.*

129 *Id.*

130 *Id.*

131 Littler tracks election petitions based on information posted on the NLRB's website.

With the new accelerated election procedure, employers must be prepared in advance for any possibility of union organizing. There will not be sufficient time after a union files a petition to prepare a union avoidance campaign under the new streamlined procedure. To combat these temporal limitations on avoidance campaigns, employers should consider taking certain actions to prepare in advance.

Initially, employers should consider providing their management with training on the importance of positive employee relations and the potential impact of unionization. Positive relations should include discussing the supervisor's role relative to employees, how to effectively communicate with employees, and how to counsel and discipline employees. The benefits of training can also address union issues including facts about unionization in the country, local area, and industry; identifying causes of a negative work environment that may lead to unionization; identifying signs of union organizing; explaining how unions organize; teaching what supervisors can and cannot say under the Act regarding unions; and identifying common scenarios management may face during organization.

In addition to training, employers may conduct an attorney-client privileged union vulnerability audit. This audit will help identify potential issues in the workplace that could lead to union support and assess manager or supervisor effectiveness—both in terms of maintaining positive employee relations and communicating the employer's message to the workforce.

Employers should also proactively identify its designated supervisors and lead employees who will be excluded from organizing under Section 2(11) of the Act. This step allows an employer to identify who can attend management meetings and subsequently communicate the employer's message to its workforce in response to organizing efforts. Early identification also allows the employer to begin training supervisors regarding their roles in responding to organizing campaigns.

In addition to identifying supervisors, employers should also consider analyzing potential bargaining units among the workforce. The employer should focus on the scope (*i.e.*, locations) and composition (*i.e.*, job classifications) of potential bargaining units. Determining scope involves evaluating whether certain locations are so integrated that they should be included in a petitioned-for unit. Composition involves which classifications share a community of interest warranting inclusion in, or exclusion from, a petitioned-for unit. If needed, the employer can use this analysis to restructure or reorganize and strengthen its position regarding appropriate bargaining units in advance of a petition.

Employers should also collect relevant data regarding their employees to make it easier to assess the appropriateness of a petitioned-for unit, prepare a Statement of Position, present its case at a pre-election hearing, or prepare an *Excelsior* list. This information should include: employee names, addresses, work locations, job classifications, personal email addresses, home and cell phone numbers, primary language spoken, relatives in the workforce, disciplinary history, date of hire, date and amount of last pay increase, and any personal favors extended to the employee.

Finally, employers can also prepare a campaign calendar or a campaign-in-a-box to expedite decision-making if a petition is filed. During the campaign, employers should hold small group meetings with employees and contact them (by mail, payroll stuffers, email, social media, posters, flyers, buttons, etc.) to discuss the organizing campaign and address why employees do not need a union. Employers may prepare two calendars—one for a 23-day quickie-election and one for a 13-day quickie-election. To streamline the employer's ability to create the materials as the need arises, the campaign-in-a-box should include templates or drafts of training for supervisors, speeches, materials to share with employees, sample media statements, etc.

C. NLRB Attacks on Work Rules and Policies under Section 7 of the NLRA

In recent years, the NLRB has scrutinized employer handbooks, policies and rules for the purpose of restricting perceived employer infringements on employees' Section 7 rights, searching for any ambiguities that it characterizes as chilling those rights. The result has been a number of Board decisions and reports from the NLRB General Counsel that have shaped an expansive framework significantly restricting an employer's ability to control employee conduct in the workplace. In general, the NLRB welcomes policies that provide sufficient details and context to clearly identify precisely what the policy allows and/or prohibits while striking down general and vague policies that can be reasonably interpreted to restrict some form of protected Section 7 communication or activity.

1. Confidentiality

One type of policy the Board has examined involves confidentiality rules. While employers may prohibit disclosing “confidential” information given their legitimate interest in maintaining the privacy of certain business information, the prohibition cannot reference information regarding employees or anything that would reasonably be considered a term or condition of employment.¹³² The Board will find such a policy lawful if employees would not reasonably understand the prohibition as restricting their Section 7 protected activities. Policies that include overbroad references to “employee information” without defining the context in which that information cannot be discussed are likely unlawful.

Following these general guidelines, the NLRB General Counsel issued an advice memorandum on March 18, 2015, that identified examples of unlawful and lawful confidentiality policies.¹³³ Following are some examples of what it considers unlawful policies:

- Policy prohibiting disclosure of “proprietary or confidential information” about the employer or “other associates (if...obtained in violation of law or lawful Company policy)” was unlawfully overbroad because a reasonable employee would not know how the employer determines what constitutes a “lawful Company policy.”
- A rule instructing employees to “never publish or disclose [the Employer’s] or another’s confidential or other proprietary information” is unlawful, without clarification, because it would be interpreted to include other employees’ wages and terms and conditions of employment, although the employer may ban disclosure of its own confidential information.
- Prohibitions from “disclosing ... details about the [Employer,]” and sharing overheard conversations with coworkers, the public, or anyone outside the immediate work group are unlawful even though they do not reference terms and conditions of employment because they are so broad and do not clarify (expressly or contextually) that the rules do not restrict Section 7 communications.
- Instructions to “discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information” are also unlawful because the broad restrictions do not permit protected Section 7 communications.
- A general instruction that “if something is not public information, you must not share it” is unlawful because it would ban all non-public information, which includes employee wages, benefits, and other terms and conditions of employment.

On the other hand, the General Counsel found the following narrowly tailored confidentiality policies lawful:

- “No unauthorized disclosure of ‘business secrets’ or other confidential information.”
- “Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination.”
- “Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.”
- The General Counsel considered these prohibitions lawful because (1) they do not reference information regarding employees or terms and conditions of employment, (2) they do not define “confidential” in an overbroad manner, and (3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications.¹³⁴

2. Offensive Language, Gossiping, Non-Disparagement

A number of Board decisions have addressed policies that generally prohibit “disparaging,” “negative,” or “offensive” comments by employees. A policy that stated “employees will not make negative comments about fellow team members [including managers]; and employees will not engage in negativity or gossip” while also requiring employees to behave in a “positive and professional manner” was found unlawful in *Hills and Dales General Hospital*.¹³⁵ The Board determined the employer violated the NLRA because the policy was overbroad and ambiguous.

¹³² *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999).

¹³³ General Counsel Memorandum GC 15-04 (Mar. 18, 2015).

¹³⁴ Memorandum GC 15-04 at 6.

¹³⁵ 360 NLRB No. 70 (Apr. 1, 2014).

Policies will be deemed overly broad and unlawful if they fail to define the narrow application or context of the rule. The policies must be specific enough that they do not include restrictions on vigorous debate or intemperate comments that may involve Section 7-protected subjects. For example, while an employer has a legitimate and substantial interest in maintaining a harassment-free workplace, the anti-harassment rule must be specific enough to identify the type of harassing behavior it prohibits as opposed to generally prohibiting “offensive” comments or “heated” discussions. Without specifically narrowing the scope of the prohibition, these rules could prohibit employees from discussing or complaining about a supervisor, which is protected under Section 7.

Similarly, the Board found a policy that prohibited “displaying a negative attitude that is disruptive to other staff or has a negative impact on guests” unlawful in *Copper River of Boiling Springs, LLC*.¹³⁶ On the topic of gossip, the Board in *Laurus Technical Institute*¹³⁷ found a policy that prohibited “gossip about the company, an employee, or customer” was ambiguous and overbroad and, therefore, unlawful. Gossip was defined as “negative or untrue or disparaging comments,” “repeating information that could injure a person,” or “repeating a rumor about another person.” Similar to the analysis above, such overbroad prohibitions include discussions about the company and supervisors, which is protected under Section 7. Discussing rumors about the company could also implicate wages, hours, and other terms and conditions of employment that are clearly protected topics under Section 7.

3. Conduct Toward the Company and Supervisors

Employees have a Section 7 right to criticize or protest an employer’s labor policies or treatment of employees. Rules that can reasonably be read to prohibit protected concerted activity in the form of criticism have been found to be unlawfully overbroad. For example, the Board has deemed a rule that prohibits employees from engaging in “disrespectful,” “negative,” “inappropriate,” or “rude” conduct towards the employer or management, absent sufficient clarification or context, to be unlawful.¹³⁸ Also, employee criticism does not necessarily lose protection simply because it is false or defamatory, so the Board has held that a rule banning false statements is unlawfully overbroad unless it specifies that only maliciously false statements are prohibited.¹³⁹ On the other hand, a rule requiring employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, is generally lawful because employers have a legitimate business interest in having employees act professionally and courteously with coworkers, customers, employer business partners, and third parties. Rules prohibiting conduct constituting insubordination do not generally limit protected activities.¹⁴⁰

In the General Counsel’s March 18 Memorandum, he stated that rules that instruct employees to “be respectful” and/or “not make fun of, denigrate, or defame” the company, other employees, customers, partners, and competitors, franchisees, suppliers, etc. are unlawful because they ban protected criticism or protests regarding supervisors, management, or the company.¹⁴¹ Similarly, rules that prohibit “defamatory, libelous, slanderous or discriminatory comments about” the company, customers, competitors, employees, or management were unlawful.¹⁴² Furthermore, although employers can ban “insubordination,” if a rule bans insubordination coupled with *other conduct that does not rise to the level of insubordination*, an employee would reasonably read the rule to prohibit protected concerted activity, according to the General Counsel.¹⁴³ Such general or inclusive restrictions regarding conduct towards a supervisor could be protected under Section 7 if the conduct addresses or is related to wages, hours, and terms and conditions of employment. Examples of these unlawful rules include “disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative” and “chronic resistance to proper work-related orders or discipline, even though not overt insubordination [will result in discipline].”¹⁴⁴ Finally, the General Counsel found general rules directing employees to “refrain from any action that would harm persons or property

136 360 NLRB No. 60 (2014).

137 360 NLRB No. 133 (2014).

138 See *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014).

139 *Id.* at 4.

140 See *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (Feb. 28, 2014).

141 Memorandum GC 15-04 at 7.

142 *Id.*

143 Memorandum GC 15-04 at 7-8.

144 Memorandum GC 15-04 at 8.

or cause damage to the Company's business or reputation" or "never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself" unlawfully overbroad as they may be reasonably read to prohibit employees from criticizing the employer in public.¹⁴⁵

Policies instructing employees to be respectful of customers, competitors, and others that do not mention the company or its management, are not reasonably read to prohibit Section 7 criticism of the company and are lawful.¹⁴⁶ Thus, the General Counsel considered the following rules lawful:

- No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.
- "Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."

4. Conduct Toward Employees

Generally, employees' Section 7 rights include arguing and debating with each other about unions, management, and terms and conditions of employment. The discussions do not lose protection even if they include "intemperate, abusive and inaccurate statements."¹⁴⁷ Therefore, when an employer bans "negative" or "inappropriate" discussions among employees without clarification, employees reasonably read those rules to prohibit discussions and interactions that are protected.¹⁴⁸

In *Triple Play*, a non-union sports bar fired two employees for disloyalty and performance issues after participating in a former employee's social media activity regarding the employer. The former employee complained on Facebook about the employer's tax withholding from her paychecks and miscalculation of taxes. One current employee "liked" the former employee's status on Facebook while another made derogatory comments about their manager. The employer argued that the comments were public, disloyal, and defamatory. Nonetheless, the Board ordered reinstatement because the employees were engaged in protected, concerted activity including discussing work-related issues. The Facebook "like" constituted "participation in the discussion that was sufficiently meaningful as to rise to the level of concerted activity."¹⁴⁹

Triple Play also highlights the Board's focus on social media policies and communications. Generally, the Board has found social media policies overbroad and unlawful for the following reasons: (1) failing to specify the types of information employees were prohibited from sharing; (2) failing to distinguish between information employees could not post and protected speech; (3) failing to provide examples of content an employer would find "appropriate," "professional," "respectful," or "unfavorable."¹⁵⁰ It is also worth noting that social media policies commonly may include policies governing confidentiality, use of trademarks and logos, use of photographs and videos, non-disparagement and general bans on "negative" or "inappropriate" actions or communications, and many other policies that the Board is reviewing.

5. Conduct Toward the Third Parties

Employees have the right under Section 7 to communicate with the media, government agencies, and other third parties about wages, benefits, and terms and conditions of employment. Rules that restrict such communications are unlawfully overbroad.¹⁵¹ However, employers may lawfully control the person who makes official statements on its behalf. Thus, the employer must be careful to ensure that the rule is not reasonably read to ban employees from speaking to the media or other third parties on their own or other employees' behalf.

145 *Id.*

146 *Id.*

147 *Linn v. United Plant Guards*, 383 U.S. 53 (1966).

148 See *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 7 (Aug. 22, 2014); *Hills and Dales General Hospital*, 360 NLRB No. 70, slip op. at 1 (Apr. 1, 2014).

149 An employee's solicitation of support from co-workers can also qualify as concerted activity even if no one agrees or joins the cause. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (Aug. 11, 2014); c.f. *JT's Porch Saloon & Eatery, Ltd.*, No. 13-CA-46689 (Advice Memorandum), 2011 NLRB GCM LEXIS 24 (July 7, 2011) (advising that an employee's Facebook posts were not protected concerted activity growing out of group activity and were instead an individual grievance where coworkers did not discuss them either before or after the posts were written and no coworkers responded to the posts).

150 *Durham School Services*, 360 NLRB No. 85 (2014).

151 *Trump Marina Associates*, 354 NLRB 1027, 1027 n.2 (2009), *incorporated by reference*, 355 NLRB 585 (2010), *enforced mem.*, 435 . App'x 1 (D.C. Cir. 2011).

6. Company Logos, Copyrights, and Trademarks

Although copyright holders have a clear interest in protecting their intellectual property, rules cannot prohibit employees' fair protected use of that property.¹⁵² An employer's name and logo are usually protected by intellectual property laws, but employees can use the name and logo on picket signs, leaflets, and other protect material. Proprietary interests are not implicated by non-commercial use of a name, logo, or other trademark to identify an employer in the course of Section 7 activity.

7. Photography and Recording

Similar to the rules regarding logos, copyrights, and trademarks, employees have a Section 7 right to photograph and make recordings to further their protected concerted activity.¹⁵³ Although employers have legitimate reasons for prohibiting certain photographs and recordings, a rule that completely bans photography or recordings, or the use or possession of personal cameras or recording devices is unlawfully broad and would reasonably be read to restrict the Section 7 rights to take pictures or recordings on non-work time.¹⁵⁴

An example of a limited photography ban that was deemed permissible was discussed in *Flagstaff Medical Center Inc.*¹⁵⁵ In this case, the NLRB upheld a hospital's ban on taking photographs, finding that such a policy designed to protect the significant privacy interests of its patients could not reasonably be interpreted as extending to employees' protected concerted activity. However, employees taking photographs or making recordings to document health and safety violations and unfair labor practices—even in a patient setting—are protected under Section 7. Moreover, a rule limiting an employee's use of personal recording devices to time "on duty" has been unlawful because the employee would understand "on duty" to include breaks and meals as opposed to actual work time.

8. Restricting Employees from Leaving Work

The right to go on strike is fundamental under Section 7. Thus, rules that regulate when employees can leave work are unlawful if reasonably read to forbid protected strike actions and walkouts.¹⁵⁶ However, if a rule makes no mention of "strikes," "walkouts," "disruptions," or similar phrases, employees will reasonably understand the rule to apply to employees leaving their posts for reasons unrelated to protected concerted activity and the rule will be found lawful.¹⁵⁷

9. No-Solicitation Policies and Distribution Rules

While it is widely understood that employees do not have a Section 7 right to solicit or distribute non-work related material during work time, policies prohibiting such activity need to be well-drafted to avoid inadvertent violations of the NLRA. In a 2014 Board decision,¹⁵⁸ the Board found that an employer's no-solicitation policy that prohibited "solicitation and/or distribution of non-work related materials ... during work time or in work areas" was unlawful. The policy was ambiguous and overbroad because employees reasonably would understand it "to prohibit solicitation, in work areas, by employees **not** on working time."

152 See *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-1020 (1991), *enforced mem.*, 953 F.2d 638 (4th Cir. 1992).

153 See *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (Feb. 14, 2011), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012).

154 See, e.g., *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015) (NLRB held employer's policy that generally banned all audio and video recordings in the workplace without the consent of a supervisor or all parties to the conversation unlawfully interfered with employees' Section 7 rights).

155 Certain proprietary interests, such as patient confidentiality, are protected from photography. *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (Aug. 26, 2011), *enforced in relevant part*, 715 F.3d 928 (D.C. Cir. 2013).

156 See *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 2 (Sept. 24, 2014).

157 See *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011).

158 *Mercedes-Benz*, 361 NLRB No. 120 (2014).

D. Tips for Employers

The overarching takeaway from the Board's focus on employer policies (and the above discussion is simply a small sample) is that policies need to be narrowly tailored to address the behavior or actions they seek to regulate or prohibit. Following are some tips for employers to help achieve that goal:

- Establish policies with specific rules that are easily understood;
- Understand what the employer is trying to restrict and draft the language accordingly;
- Avoid subjective terms and standards that require employees to decipher what is prohibited;
- Use examples and limiting language to provide context and explain what specifically is being addressed in the policy rather than issuing a vague, blanket statement;
- Consider whether employees will read the policy to prohibit discussion of wages, performance evaluations, workplace safety, discipline, or other protected terms and conditions of employment; and
- If a policy addresses matters that are described in more detail elsewhere, make a specific reference to the more detailed policy.¹⁵⁹

Another way to protect the employer's rules is to use a disclaimer or "savings clause." There are a few caveats to remember if using a savings clause to insulate a policy or rule from attack under the NLRA. First, the policy "should adequately address the broad panoply of rights protected by Section 7."¹⁶⁰ In other words, it is advisable that the savings clause states that it does not restrict the employees' statutory Section 7 rights in any way including the right to engage in certain activities (such as discussing wages, benefits, and other terms and conditions of employment; the right to select a bargaining representative; etc.). Second, the savings clause should be located in close proximity to the rules it purports to inform.¹⁶¹ A general savings clause on page three of a 70-page handbook will not be read into each rule in the handbook. However, inclusion of the savings clause at the end of a particular rule will reasonably be read with that rule.¹⁶² Similarly, an explicit reference to the savings clause will inform employees that the clause is part of the rule.¹⁶³

The developments discussed in this section are just some of the key labor-management issues healthcare employers are facing. As unions attempt to make inroads in the healthcare sector, industry employers are advised to stay abreast of additional NLRB developments.

159 As discussed above, a broader policy addressing social media activity may encompass numerous other policies.

160 *First Transit, Inc.*, 360 NLRB No. 72 (2014).

161 *Id.*

162 *Id.*

163 *Id.*

III. BUSINESS RESTRUCTURING

The continuing trend towards consolidation in the healthcare industry is apparent even to the casual observer. Every day we read or learn about large medical centers acquiring smaller ones, and large and small medical providers acquiring practice groups, clinics, labs and other providers.

This movement has been well documented. Based on data from the American Hospital Association, it has been reported that over 60% of hospitals are now part of larger healthcare systems, and “[f]rom 2007 to 2012, 432 hospital merger and acquisition deals were announced, involving 835 hospitals.”¹⁶⁴ Medical Group Management Association survey data suggests that hospital ownership of physician practices has increased from 24% in 2004 to 54% in 2012.¹⁶⁵ Several factors are cited as contributing to this development, including declining reimbursements, the Affordable Care Act requirements, and institutions seeking administrative savings and economies of scale.¹⁶⁶ There is no sign this trend is abating.

Business restructuring—mergers, acquisitions, consolidations, joint ventures, relocations, and resulting layoffs—present unique labor and employment law challenges for all parties, whether their relationship is one of equal partners on the same footing, or that of acquirer and acquired. All such transactions present employment law risks, which may affect the value—or even the viability—of the transaction. When one employer replaces another, the new employer may inherit labor relations, wage and hour, ERISA and equal opportunity liabilities of the predecessor. And even an acquisition that results in no measurable loss of employment may technically trigger lengthy advance notice obligations under federal and state WARN Acts.¹⁶⁷

A. WARN Act

WARN, the Worker Adjustment Retraining and Notification Act, applies to all employers with 100 or more full-time employees. The law requires employers to give 60 days’ advance notice to employees or their bargaining agents, and to state and local government officials, prior to implementing a “plant closing” or “mass layoff.” At first glance, such obligations might seem to be a concern primarily to those terminating or selling a facility or operation. But we shall see that it is of equal concern to all parties to a transaction. Further, while simple in concept, the WARN Act can be difficult to apply. Definitions of key terms are often ambiguous and counter-intuitive, and court decisions are inconsistent.¹⁶⁸

In broad terms, a “plant closing” occurs when an employer shuts down a single site of employment, or an “operating unit” within the single site, and 50 or more full-time employees lose their jobs in a 30- (or 90-) day period. A “mass layoff” occurs when there is a reduction-in-force at a single site that results in job losses for at least 500 full-time employees or for 50 or more full-time employees who also comprise more than 33% of the employees at the site. We refer to full-time employees because “part-time employees” do not count in determining WARN thresholds, although they are entitled to notice if WARN is triggered. But a “part-time” employee is not what one might ordinarily think: It is an employee who has (a) worked an average of fewer than 20 hours per week, or (b) been employed for fewer than 6 of the 12 months preceding the WARN notice date.

WARN issues occur whenever a new employer emerges from a business restructuring transaction. If the succeeding or surviving employer does *not* continue to employ all the employees of the old employer, then the notice requirement may of course be triggered, and the question will be who must provide notice. WARN answers this question, in part, by creating a legal fiction that if a sale of all or part of a business occurs, unless they have been terminated by the seller, the

164 David Cutler and Fiona Scott Morton, *Hospitals, Market Share, and Consolidation*, 310 J. Am. Med. Assoc. 1964 at 1965, (Nov. 13, 2013). See also, Jason Lineen, Hospital Consolidation: “Safety in Numbers” Strategy Prevails in Preparation for a Value-Based Marketplace, 59 J. Healthcare Mgt. 315 (2014).

165 Cutler and Morton, *supra* note 164; Lineen, *supra* note 164.

166 *Id.* See also Alexandra E. Page, *Consolidation Trends in Health Systems, Hospitals and Payers*, American Academy of Orthopedic Surgeons (AAOS) (April 2015), available at <http://www.aaos.org/news/aaosnow/apr15/advocacy6.asp>.; See also, Ellen Jean Hirst, Hospital Mergers Continued to Create Larger Systems in 2014, *Chicago Tribune* (Feb. 20, 2015).

167 A thorough examination of all the employment law issues inherent in a restructuring transaction is beyond the scope of this white paper. For a more comprehensive discussion, including matters pertaining to asset purchase agreements and due diligence, please refer to Chapter 17 of *The National Employer*; Littler’s three-volume treatise on U.S. employment law, published annually.

168 “[W]e found that certain definitions and requirement of WARN are difficult to apply when employers and employees assess the applicability of WARN to their circumstances...In addition, the courts have applied the statute’s provisions in varying ways, resulting in decisions that do not always clarify employer responsibilities and employee rights under the law.” *The Worker Adjustment and Retraining Notification Act: Revising the Act and Educational Materials Could Clarify Employer Responsibilities and Employee Rights*, at 4, U.S. General Accounting Office Report to Congressional Requesters (Sept. 2003). See also, 20 CFR § 639.1(e): “In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations.”

employees of the seller automatically become employees of the buyer for WARN purposes. Up to and include the date of sale, the seller is responsible for providing notice, and after the date of sale, the buyer is responsible for giving notice.¹⁶⁹ Thus, a buyer who does not intend to take all the employees of the seller (because it wants fewer employees or because it wants to screen employees rather than automatically take everyone) must ensure that the seller has given any required notice to employees. This is usually accomplished through the purchase agreement.

What happens, however, if no one is to be laid off, but there is also no “sale” of all or part of a business? For example, what happens when two hospitals merge and form a brand new entity, or one company or institution assumes management of another and becomes the employer of the employees, without a transfer of any assets? In this instance there is a technical termination of employment although no one has lost a job, and it is unclear whether WARN notice is required. The legislative history and the Preamble to the federal WARN Act regulations support an argument that such technical terminations do trigger WARN, and there is case law suggesting as much.¹⁷⁰ However, some courts have held that WARN was not triggered in such circumstances, either by analogy to WARN’s sale of assets provision,¹⁷¹ or by determining that there was no “employment loss” under WARN because of the continued employment.¹⁷² While a thorough discussion of this issue is beyond the scope of this paper, it is a question both parties to a transaction should discuss with counsel before proceeding, as WARN Act liabilities can be considerable.

WARN issues are further complicated by “mini-WARN” laws in 16 states, with varying requirements that often differ from federal law. In some states, terminating as few as 25 employees may trigger WARN; in some, the state law applies to much smaller companies. Moreover, in some states, notice 90 days in advance, rather than 60, may be required. And some state WARN laws have structural or definitional differences from federal law.

B. Successor Liability

Aside from anticipating WARN notice issues, the parties to a transaction should be mindful of potential employment law liabilities. Transactions typically (although not always) take one of two forms: a stock deal, in which ownership of the company changes, or an assets deal, in which ownership of the property of the company changes. In a stock deal, the preexisting company typically continues as an ongoing entity, and any preexisting problems or employment law liabilities continue. Asset deals offer more flexibility concerning employment and other contracts including union agreements and relationships. And in an asset deal, while the seller’s employment liabilities are more likely to stay with the seller, that is not a certainty. The general rule that where one company sells or transfers its assets to another the acquiring company is not liable for the debts and liabilities of the transferor, does not apply in the employment law context. Where there is “substantial continuity” between the predecessor and successor employers, the successor will likely be held responsible for the predecessor’s obligations and liabilities.

The U.S. Supreme Court first recognized successor liability in labor law in *John Wiley & Sons, Inc. v. Livingston*,¹⁷³ ruling that the defendant, formed as a result of a merger, was bound to arbitrate with the union under a collective bargaining agreement with one of the pre-merger corporations. The Court concluded there was “substantial continuity in the identity of the business enterprise, as evidenced, among other things, by the “wholesale transfer of employees.” *Wiley* was distinguished in two significant later cases. In *NLRB v. Burns Int’l Security Services*,¹⁷⁴ the Court held that a successor corporation was bound to recognize and bargain with the union that represented the predecessor’s employees but was not bound by the substantive agreement itself, where there was no merger or sale of assets, and the successor had not agreed to be bound by the CBA, and expressed concern that a contrary result would “inhibit the free transfer of capital” and inhibit new employers from making substantial changes in operations.¹⁷⁵ In *Howard Johnson Co., v. Detroit*

169 29 U.S.C § 2101(b)(1).

170 See Comments by Sen. Hatch at 134 Cong. Rec. 16026, 16104-05 (1988); 54 Fed. Reg. 16,042, 16,048 (Apr. 20, 1989) (discussion of 29 C.F.R. Sec. 639.3(f)) (emphasis added); See, also, e.g., *Kalwaytis v. Preferred Meal Systems, Inc.*, 78 F.3d 117, 120 (3d Cir. 1996); *IATSE v. Compact Video Services, Inc.*, 50 F.3d 1464 (9th Cir. 1995).

171 See, e.g., *Headrick v. Rockwell International Corp.*, 24 F.3d 1272, 1281-82 (10th Cir. 1995); *International Oil, Chemical & Atomic Workers v. Uno-Ven Company*, 170 F.3d 779 (7th Cir. 1999).

172 See *SEIU v. Prime Healthcare Services, Inc.*, 2010 U.S. Dist. LEXIS 72036 (E.D. Cal. 2010) (case successfully defended by Littler, finding no employment loss when hospital management changed and new manager made offers of employment, even though no sale of business occurred; trial judge stated he disagreed with the outcome but felt bound by Ninth Circuit precedent), *aff’d on procedural grounds*, 456 Fed. App. 691 (9th Cir. 2011); *Baker v. Washington Group International, Inc.*, 2008 U.S. Dist. LEXIS 20343 (M.D. Pa. 2008) (finding no employment loss when employees of contractor providing services to IBM, whose contract with IBM was not renewed, were immediately re-hired by new contractor that took over the IBM contract work).

173 376 U.S. 543 (1964).

174 406 U.S. 272 (1972).

175 *Id.* at 288.

Local Joint Exec. Board,¹⁷⁶ the Court held that the alleged successor was not bound to arbitrate under the collective bargaining agreement signed by its predecessors because there was no substantial continuity of identity in the workforce hired by the successor with that of the predecessors.¹⁷⁷

*Golden State Bottling v. NLRB*¹⁷⁸ involved an NLRB order reinstating with back pay a Golden State employee whose discharge was found to be an unfair labor practice. Finding that All American had acquired Golden State's assets, had continued Golden State's business "without interruption or substantial change in operations, employee complement or supervisory personnel," and had knowledge of the NLRB order, the Court affirmed the Ninth Circuit ruling enforcing the order against All American as a successor.¹⁷⁹

These four labor cases set the stage for successor liability in other contexts. In the leading case of *EEOC v. MacMillan Bloedel Containers, Inc.*,¹⁸⁰ the Sixth Circuit extended successor liability from the labor law context to Title VII. The appellate court laid out nine factors to be considered in determining whether liability should be imposed on a successor: (1) whether the successor company had prior notice of the charge or lawsuit; (2) the ability of the predecessor to provide relief; (3) whether the new employer uses the same facilities; (4) whether there has been substantial continuity in business operations; (5) whether the new employer uses the same or substantially the same workforce; (6) whether the new employer uses the same or substantially same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the new employer uses the same machinery, equipment and methods of production; and (9) whether the new employer produces the same product.

Courts have since applied identical or nearly identical tests in considering a successor's liability for Age Discrimination in Employment Act (ADEA), Americans with Disability Act (ADA), and the Employee Retirement Income Security Act (ERISA). In *Steinbach v. Hubbard*,¹⁸¹ the Ninth Circuit adopted the same basic standard for overtime liability under the Fair Labor Standards Act. The Seventh Circuit has observed that "when liability is based on a violation of a federal statute relating to labor relations or employment, a federal common law standard of successor liability is applied that is more favorable to plaintiffs than most state-law standards to which the court might otherwise look."¹⁸²

In *Teed v. Thomas & Betts Power Solutions, LLC*,¹⁸³ a purchaser was held liable for overtime violations of a company whose assets it had bought in a receivership auction, despite a disclaimer of liability in the contract of sale. But rather than apply the common nine-factor test, the court wrote more broadly that "successor liability is appropriate in suits to enforce federal labor or employment laws—even when the successor disclaimed liability when it acquired the assets in question—unless there are good reasons to withhold such liability."¹⁸⁴

The Family and Medical Leave Act (FMLA) is a special case: by federal regulation, the factors used under Title VII are applied to determine if an employer is a "successor in interest." "However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration."¹⁸⁵ An FMLA successor has three major responsibilities: to count periods of employment and hours worked for the predecessor in determining employee eligibility for FMLA leave; to

176 417 U.S. 249 (1974).

177 There are many other significant aspects to the bargaining obligations of an employer that may be restructuring: For example, "Under current Board law, as articulated long ago in *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enforced, 529 F.2d 516 (4th Cir. 1975), a perfectly clear successor is one that either actively or, by tacit inference, misleads its predecessor's employees to believe they will all be retained without change to their employment terms, or that fails "to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." A perfectly clear successor forfeits its right to set initial employment terms, and must keep in place the employment terms of its predecessor (*i.e.*, those set forth in its labor agreement) until it bargains to an agreement or impasse with the union." David Kadela and Brendan Fitzgerald, *Buyer Beware - Continuing its Controversial Changes, NLRB Increases the Price Tag of a Successor's Unlawful Failure to Hire Its Predecessor's Employees*, Littler Insight (Oct. 8, 2014). The Board's General Counsel is seeking to have the Board overrule *Spruce Up* and adopt a policy whereby any successor that commits to offer positions to its predecessor's workforce would be a "perfectly clear" successor that must bargain before changing terms and conditions of the predecessor's unionized workforce. There are also issues of "accretion" and defining appropriate bargaining units which must be carefully considered by the parties.

178 414 U.S. 168 (1973).

179 See, also, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), holding that "the determination of whether a majority of the successor's employees were employees of the predecessor [and therefore may have a duty to bargain as a successor employer, under *Burns*] must only be made after the successor employer has hired a 'substantial and representative complement' of its intended labor force."

180 503 F.2d 1086 (6th Cir. 1974).

181 51 F.3d 843 (9th Cir. 1995).

182 *Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763, 764-65 (7th Cir. 2013) (citing cases under the National Labor Relations Act, Labor Management Relations Act, Title VII, ADEA, 42 U.S.C. § 1981, ERISA, and FMLA).

183 711 F.3d 763, 764 (7th Cir. 2013).

184 *Id.* at 766.

185 29 C.F.R. §825.107.

provide leave to eligible employees who gave appropriate notice to the predecessor; and to continue leave begun while an employee was employed by the predecessor, “including maintenance of group health insurance and job restoration at the conclusion of the leave.”¹⁸⁶

C. Withdrawal Liability

Many unionized healthcare organizations participate in multiemployer defined benefit pension plans. Under the Multiemployer Pension Plan Amendments Act of 1980, employers that cease to have an obligation to contribute into such a plan experience a “withdrawal.” If the plan has unfunded vested liability allocable to the employer, the plan assesses a withdrawal liability against the employer intended to make up the employer’s portion of that unfunded vested liability. Assessments can easily run to six or seven figures. Various types of restructuring activities can result in the assessment of withdrawal liability.¹⁸⁷

An employer that sells all or substantially all of its assets in a bona fide arms-length sale may avoid liability where the buyer has an obligation to contribute to the plan on a basis (in amounts) substantially similar to the seller’s contributions, the sales contract provides for secondary liability of the seller if the buyer withdraws from the plan within five years from the sale, and the buyer posts security for timely contributions and payment of the withdrawal liability, for a five year period, in an amount or as required by the law.¹⁸⁸

Presumably, in the absence of satisfying these requirements, withdrawal liability is assessed against the seller even if the successor makes all required contributions. However, at least one court has utilized the *successorship doctrine* to impose withdrawal liability on the buyer.¹⁸⁹

D. Evaluating, Avoiding, and Pricing Liabilities: Due Diligence

In our experience, healthcare institutions often do not have the time, opportunity, or resources to perform the type of extensive “due diligence” analysis of employment law vulnerabilities that, for instance, an investment company might undertake before acquiring a company for its portfolio. Due diligence is akin to conducting a legal audit. Problems that are identified may affect the price of the deal (or, in extreme cases, whether the deal should even be consummated), and the surviving entity or entities may use the information discovered to fix legal and operational issues going forward, and thereby cap potential exposures. Often, a change in control provides the perfect opportunity to correct problems without “raising a red flag”: The new employer simply does things differently.

Due diligence efforts typically focus on Equal Employment Opportunity Commission (“EEOC”) charges and lawsuits; demand letters; litigation holds; compliance agreements and settlements; Office of Federal Contract Compliance Programs (“OFCCP”) correspondence and audits; unfair labor practice charges, union organization activity, strike activity, arbitration awards, and analysis of collective bargaining agreements; Occupational Safety and Health Administration (“OSHA”) citations, logs and records; workers’ compensation claims; contractual obligations (including severance or parachutes and fixed-term agreements) for executives; on-boarding processes including background checks and wage theft forms; I-9 compliance; employee handbooks and policies; retirement plan coverage, funding, and documentation; wage/hour problems such as workers misclassified as independent contractors, misclassification of employees as exempt, meal and rest period violations; adequacy of recordkeeping of all kinds; severance and vacation obligations; and various other human resources issues.

Identifying potential vulnerabilities or liabilities is only the first step. The next is what to do about them. Purchasers should remember that indemnification agreements may provide only limited protection and are only as good and viable as the institution providing them. Moreover, even escrows and set-asides often have a duration far shorter than the statute of limitations on an employment law claim. This is one reason potential employment law liabilities often get reflected in the purchase price.

186 *Id.*

187 ERISA also has rules under which a partial cessation of the employer’s obligation to contribute can trigger liability.

188 ERISA § 4204, 29 U.S.C. § 1384. Under the law, the purchaser assumes the contribution history of the seller only for the plan year of sale and four prior years, which may mean that the purchaser’s liability is less than the seller’s.

189 See *Einhorn v. M.L. Ruberton Construction Co.*, 632 F.3d 89 (3d Cir. 2011).

E. Protecting Talent and Intellectual Property

One of the great challenges of a healthcare industry transaction is to protect the talent and intellectual property that may have been acquired at great cost. Where not illegal, there may be restrictive covenant agreements with the prior employer, but are they assignable from one employer to the next, by their terms? And if so, are they assignable under state law? And even if they are, would they be enforceable, if assigned, or would they now be unreasonable as to scope or geographic effect? Do they need to be rewritten?

If new agreements are necessary, can we make signing a new agreement a condition of employment with the new employer? Often, regardless of the law, timing considerations may preclude that. In that case, the new employer must determine whether continuing employment is sufficient consideration for the restrictions, or whether additional consideration is necessary. Where restrictive covenants might ordinarily be prohibited (e.g., California), perhaps a “sale of business” exception applies (e.g., the acquisition of a clinic or lab, a practice or practice group), so that the acquiring entity can protect itself against the potential loss of personnel.

If inventions, research, and intellectual property are a concern, then the succeeding employer will want to make similar inquiries regarding agreements assigning intellectual property to the employer. *Are* there such agreements in place, and if so, can they be assigned to the new employer, or will new agreements be necessary? And if new agreements are needed, will there be adequate consideration?

F. Other Issues and Conclusion

In a paper of this scope it is impossible to identify, let alone discuss, all the employment law and human resources issues that can arise when two business entities combine. How do we reconcile inconsistent pay scales? Are job descriptions the same? How do we handle the no-show relative on the medical practice payroll? Does the NLRB’s approval of “mini bargaining units” in *Specialty Healthcare*¹⁹⁰ somehow change the rules applying to accretions to bargaining units?

There are many employee benefits issues: What are the obligations to former employees who have COBRA coverage? What about retirement plans: Do we merge them, maintain them as separate plans, spin them off, and what about timing? Will the transaction trigger severance obligations under a plan or under individual employment agreements? Will the new employer assume such agreements? Can the seller transfer vacation balances to the new employer, or must they be paid out?

The list goes on. What remains clear is that business restructuring raises a thicket of challenges for human resources personnel. But careful due diligence and planning can minimize the risks and optimize the opportunities for healthcare institutions undergoing profound change as a result of increasing consolidation.

190 357 NLRB No. 83 (Aug. 26, 2011).

IV. ANTITRUST EMPLOYMENT ISSUES IN THE HEALTHCARE INDUSTRY

Healthcare employers must give due consideration to the potential impact of antitrust law on their operations. Generally, such laws are designed to simultaneously promote and protect competition and are predicated upon the free-market premise that entities should be prohibited from unduly restraining competition by agreement or otherwise. The motivating rationale is that such restraints result in an adverse economic and societal impact, as the beneficiaries of the non-competition are no longer as influenced by traditional market forces (e.g., consumers) and, consequently, are disincentivized to maintain competitive rates and services or to strive to pursue innovations necessary to compete in the marketplace.

A. Background

Three federal statutes primarily proscribe certain non-competitive activities: (1) the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (“Sherman Act”), (2) the Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (“Clayton Act”); and (3) the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (“FTC Act”).¹⁹¹

The Sherman Act generally proscribes contracting or conspiring to contract to restrain competition. The more common examples of such prohibited activities include price fixing (e.g., agreeing to establish certain prices for services), market allocation agreements (e.g., competitors agreeing to provide services only in certain areas or markets), and bid rigging (e.g., competitors agreeing to arrange for one to obtain a successful bid, typically with the understanding that the “losing” competitor will submit the “winning” bid for a subsequent project). The Sherman Act contains criminal penalties for certain violations.

Similarly, the Clayton Act, among other things, prohibits certain price discrimination (e.g., establishing low prices of services for a favored customer, permitting such customer to undersell a competitor) and exclusive dealings (e.g., entity with concentrated market power utilizing exclusive contracts to prevent competition). It also prohibits mergers or acquisitions that are likely to substantially lessen competition.

The FTC Act prohibits unfair methods of competition in interstate commerce. This Act also created the Fair Trade Commission (“FTC”) to police such violations.

B. Antitrust Litigation Threats

A variety of potential antitrust issues arise in the healthcare employment context. For example:

- Hospital systems’ purchasing of medical groups or other healthcare entities can create potential issues, as the new employees (or the affiliate’s new employees) who are acquired can result in a high concentration of market power for the hospital system.
- Independent hospital systems that share certain wage or salary information (or otherwise “fix” wages and salaries of their employees) can create antitrust exposure, as the non-competitive result can lead to a suppression of wages to below market rates.
- Independent hospital systems establishing non-solicitation or “non-poaching” agreements (e.g., agreements to refuse to hire or solicit applicants from a competing hospital) can cause antitrust exposure, as such horizontal restraints can create non-competitive results as applicants or renegotiating employees lose bargaining power.

The FTC continues to prioritize combatting anticompetitive conduct and mergers in the healthcare industry.

C. Mergers & Acquisitions

By far, the greatest antitrust litigation concern facing the healthcare industry arises in challenges to proposed, or completed, mergers and acquisitions. Scrutiny of mergers and acquisitions is repeatedly emphasized as a priority for the FTC. On May 15, 2015, Chairwoman Edith Ramirez testified before the U.S. House of Representatives’ Judiciary Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, addressing the FTC’s rationale and commitment to scrutinizing these potential non-competition enforcement actions: “[t]he high cost of healthcare is a serious concern for most Americans. Health consolidation can threaten to undermine efforts to control these costs, and it is critical for the

¹⁹¹ A variety of parallel state laws also exist that are outside the scope of this paper. Employers should also be mindful of any state antitrust laws that are applicable to their operations.

FTC to preserve and promote competition in health care markets.” As such, “[t]he FTC devotes significant resources to preventing mergers that threaten to raise prices or undermine cost-containment efforts in a variety of healthcare markets, including in both health care provider and pharmaceutical markets.”

The merging of hospital systems or other healthcare entities invariably increases the merging organization’s labor pool, but the pool, in and of itself, is not cause for antitrust concern. Rather, it is the new pool’s relation to other entities’ pools in the local market that drives the question as to whether the merged entities have caused an anticompetitive impact.

The FTC has achieved considerable success over the past decade in proactively preventing mergers and achieving divestiture post-merger. On May 4, 2015, the U.S. Supreme Court denied ProMedica System, Inc.’s petition for *certiorari*,¹⁹² upholding the Sixth Circuit’s decision to order divestiture in *ProMedica Health System, Inc. v. Federal Trade Commission*.¹⁹² In August of 2010, ProMedica merged with St. Luke’s Hospital, a direct competitor in Lucas County, Ohio. Shortly thereafter, the FTC challenged the merger under Section 7 of the Clayton Act. After the FTC ordered divestiture, ProMedica petitioned the Sixth Circuit for review. In analyzing the result of the merger, the Sixth Circuit noted that ProMedica, through its merger, obtained over 50% of the market share for primary and secondary services, and over 80% of the market share for obstetrical services. The Sixth Circuit held the data presented “strongly suggest that [the] merger would enhance ProMedica’s market power even more, to levels rarely tolerated in antitrust law” and affirmed the FTC’s ruling. Significantly, in analyzing ProMedica’s defenses, the Sixth Circuit held ProMedica’s argument that St. Luke’s was not a meaningful competitor due to its financial status was akin to a “Hail-Mary pass of presumptively doomed mergers—in this case thrown from ProMedica’s own end zone.”

This case is significant for several reasons: (1) it was the first federal appellate review of an FTC order against a hospital merger in approximately 15 years; (2) it will act as a guidepost for others considering merger proposals in which there may be presumptively dangerous market share percentages as a result in the impacted market; and (3) the court’s continued reluctance to lend credence to merging entities’ defense that one was a “failing or flailing” entity and thus did not create anticompetitive effects.

Another recent decision, *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health System*,¹⁹³ addressed the antitrust impact of a hospital system acquiring a physician group. In that case, a group of private hospitals in Idaho, along with the FTC and the State of Idaho, brought a complaint in the federal district court of Idaho, seeking to enjoin a merger between St. Luke’s Health Systems, Ltd. (St. Luke’s), a not-for-profit health system operating an emergency clinic in Nampa, Idaho, and Saltzer Medical Group, P.A. (“Saltzer”), the largest independent multi-specialty group in Idaho. The plaintiff argued, among other things, that the merger, which consisted of a five-year professional service agreement between the Saltzer physicians and St. Luke’s, would result in a Clayton Act violation. According to the plaintiff, the merger would result in a healthcare entity holding approximately 80% of the market share of primary care physicians (“PCP”) in Nampa. The district court found that despite the likely potential of “improve[d] patient outcomes,” the post-merger entity would have a “huge market share,” which “create[d] a substantial risk of anticompetitive price increases” in the Nampa adult PCP market.

On appeal, the Ninth Circuit agreed with the lower court, finding that the plaintiffs proved the merger would probably lead to anticompetitive effects in the market. The Ninth Circuit specifically found St. Luke’s post-merger Nampa PCP market share would be exceedingly high (and was unchallenged by St. Luke’s) and would likely result in St. Luke’s utilizing its post-merger power to negotiate higher reimbursement rates for PCP services. Additionally, the Ninth Circuit rejected St. Luke’s efficiencies defense that the merger would benefit patients by creating a team of employed physicians with access to St. Luke’s electronic medical records system. The Ninth Circuit, again, agreed with the lower court, finding that such efficiencies would not have a positive effect on competition and were not exclusive to mergers, as certain data analytical tools were available to independent physicians. Accordingly, the Ninth Circuit affirmed the divestiture of the two entities.

This case is significant because: (1) it has broad implications in the healthcare industry as the trend toward consolidation increases with many hospitals seeking to purchase physician groups; (2) an antitrust defense based upon the efficiencies of the merger should articulate concrete and merger-specific examples (*i.e.*, whether the efficiencies are obtainable only through a merger); and (3) good intentions of improving patient care will not automatically negate the potential antitrust impact.

¹⁹² 749 F.3d 559 (2014).

¹⁹³ 778 F.3d 775 (9th Cir. 2015).

As the trend toward hospital consolidation continues and an increasing number of physicians are becoming employees of hospitals and health systems, it is becoming even more necessary for entities to closely scrutinize their potential antitrust exposure in their consolidation efforts.

D. “Wage-Fixing” and “Non-Poaching” Agreements

Other important employment-related antitrust litigation threats involve “wage-fixing” between independent entities and the existence of other anticompetitive agreements such as “non-poaching” agreements. These types of agreements (commonly described as “horizontal restraints”) can prompt antitrust concern when such agreements either restrain trade or have an anticompetitive impact in the market affected.

The basis for such claims is derived from Section 1 of the Sherman Act, which states “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...is declared to be illegal.” The Sixth Circuit has stated: “[T]o establish a claim under Section 1, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination produced adverse, anti-competitive effects within the relevant product and geographic markets, that the objects of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured of that conspiracy.”¹⁹⁴

The healthcare industry has faced a litany of class action lawsuits over the past decade, most frequently dealing with allegations that various local hospitals in a market colluded to fix nurses’ wages.¹⁹⁵ Healthcare employers must take caution not to inadvertently increase litigation risk by improperly sharing or trading wage information with other competitors.

The U.S. Department of Justice and the FTC have issued joint guidance permitting certain wage sharing antitrust “safety zones” if healthcare employers desire to participate in wage surveys, so long as they are participating in the survey in conformity with the guidance. The guidance provides that “absent extraordinary circumstances,” neither federal agency will challenge a healthcare employer’s participation in the written survey related to wages so long as (1) the survey is managed by a third party (e.g., healthcare consultant); (2) the information provided by the participants is based upon data more than three months old; and (3) there are at least five providers reporting data upon which the statistics are based, with no individual provider’s data representing more than 25% of the data, and the information is sufficiently aggregated as to not allow the participants to identify a particular provider’s data. Outside of such surveys, wage sharing even through informal means (e.g., email communication with industry competitor counterparts), can substantially increase antitrust exposure.

Similar to “wage fixing,” a mutual agreement to refuse to hire another competitor’s employees can also create significant antitrust exposure. Such bare non-poaching or non-hire agreements, outside of any type of procompetitive agreement, are *per se* illegal (e.g., “I won’t hire your employees, if you don’t hire mine”). These types of claims are also typically brought as class actions against employers. For instance, a federal district court in California rejected a settlement agreement between approximately 64,000 class members with multiple major tech companies for approximately \$325 million, finding that the amount was insufficient to adequately compensate the class members.¹⁹⁶

Healthcare, similar to the technology industry, is filled with highly skilled employees with interchangeable skill sets and are vulnerable to non-poaching agreements among competitors due to the increased likelihood of recruiting from competitors. A radiologist specializing in cardiothoracic imaging recently filed a class action lawsuit against Duke University and Duke University Health System (“Duke”). The complaint alleged that senior officials conspired with University of North Carolina and its Health Care System (“UNC”) “to eliminate or reduce competition among them for skilled medical labor, including medical facility faculty” by entering into non-hire agreements with each other.¹⁹⁷ The plaintiff alleged she desired to apply for a position with UNC but was eventually rejected by UNC’s Chief of

194 *Expert Masonry, Inc. v. Boone County, Ky.*, 440 F.3d 336, 342 (6th Cir. 2006).

195 *See, e.g., Cason-Merenda v. Detroit Medical Center*, 862 F. Supp.2d 603 (E.D. Mich. 2012). In this case, a class of nurses alleged that eight Detroit-area hospitals engaged in a wage-fixing antitrust conspiracy. The plaintiffs claimed the hospitals exchanged wage information, which resulted in similar pay structures and thus a lack of competition. On August 31, 2015, the plaintiffs and the last remaining hospital involved in the lawsuit agreed to settle the matter for \$42 million. *Cason-Merenda v. VHS of Michigan, Inc.*, No. 2:06-cv-15601 (E.D. Mich.) (Plaintiffs’ Motion for Preliminary Approval of Settlement, filed Sept. 11, 2015). On January 29, 2015, a Michigan federal court approved a \$14 million attorneys’ fees award for attorneys representing the nurses in this case. *Cason-Merenda v. VHS of Michigan, Inc., d/b/a Detroit Medical Center*, No. 2:06-cv-15601-GER-DA (E.D. Mich.) (Order Granting Plaintiffs’ Counsel’s Application for Award of Attorney’s Fees, Reimbursement of Litigation Expenses, and Payment of Incentive Awards filed Jan. 29, 2015).

196 *See In re High-Tech Employee Antitrust Litigation*, 11-cv-0250, 2014 U.S. Dist. LEXIS 110064 (N.D. Cal. Aug. 8, 2014).

197 *Seaman v. Duke Univ.*, Case No. 15-cv-462 (M.D.N.C. filed June 9, 2015).

Cardiothoracic Imaging in an email that explained “lateral moves of faculty between Duke and UNC are not permitted” pursuant to an agreement between the entities. The plaintiff seeks to certify a class of all Duke and UNC faculty members, physicians, nurses, or other skilled medical employees from January 1, 2012 to the present. There can be little doubt that these allegations will be thoroughly contested but certainly serve to highlight the types of allegations that can be lodged against healthcare entities.

E. Practical Tips

Employers in the healthcare industry must be aware of, and diligent in ensuring compliance with, applicable antitrust laws. Healthcare systems must be cognizant of their potential market share in a proposed merger or acquisition.

Employers should review their practices with respect to exchanging information as well as their policies to ensure they are not impermissibly aggregating wage and benefit data from industry competitors. If compensation surveys are conducted, ensure the data methods are within the designated FTC “safety zones.”

Employers should rely upon carefully drafted non-compete agreements with employees, to the extent allowable under state law, rather than non-poaching agreements with competitors.

Finally, training employees as well as executives on antitrust risks is critical, as business arrangements with competitors could be deemed unlawful antitrust agreements.

V. WHISTLEBLOWING AND FALSE CLAIMS ACT

Whistleblowing and retaliation claims continue to rise nationwide as a result of judicial and legislative expansion of rights and remedies, increased government enforcement, and mobilization of activist groups.¹⁹⁸ This increase has particular bearing on healthcare organizations for two reasons. First, the lion's share of funds the federal government recoups under the False Claims Act ("FCA")¹⁹⁹ is recovered through reports of fraud against the U.S. Department of Health and Human Services. These whistleblower claims led to no less than \$29 billion of the \$44 billion the government regained under the FCA over a 27-year period.²⁰⁰ Second, recent U.S. Supreme Court precedent establishes conclusively that contractors of publicly traded entities are covered by the Sarbanes-Oxley Act ("SOX") non-retaliation provisions, thereby covering the great majority of privately held healthcare providers under SOX for the first time since the statute's inception.²⁰¹

A. Judicial and Legislative Expansion of Whistleblower Rights and Remedies Affecting Healthcare Organizations

As will be explained more fully, on May 20, 2009, President Barack Obama executed the Fraud Enforcement and Recovery Act of 2009 ("FERA"),²⁰² which made the most sweeping pro-whistleblower revisions to the federal FCA since 1986.²⁰³ The Dodd-Frank Wall Street Reform and Consumer Protection Act also amended the FCA by expanding the definition of protected whistleblower conduct and clarified that the statute of limitations for actions brought under the FCA is three years.²⁰⁴

The Patient Protection and Affordable Care Act ("ACA" or "Affordable Care Act"),²⁰⁵ too, made important amendments to the FCA aimed at fueling whistleblower claims. These changes include narrowing the definition of "publicly disclosed" information for purposes of the public disclosure bar²⁰⁶ to bringing actions and expanding the scope of the "original source" exception to the bar. In addition, the Affordable Care Act amendments to the FCA provide the government with the authority to oppose the application of the public disclosure bar.

Beginning in 2006 with its decision in *Burlington Northern & Santa Fe Railway Co. v. White*,²⁰⁷ the U.S. Supreme Court dramatically tipped the scales in favor of employees in retaliation suits, encouraging increased litigation. In *Burlington Northern*, the Court not only adopted the broadest (and in many ways, most unworkable) standard for analyzing what constitutes an adverse action, it also held that the adverse action does not even have to be employment-related. The Court's 2009 decision in *Crawford v. Metropolitan Government of Nashville & Davidson County*²⁰⁸ significantly expanded the definition of actionable "opposition" activity. In 2011, the Court also helped open the floodgates when it ruled that third parties may bring suits for retaliation.²⁰⁹

Reacting to the rapid rise of retaliation claims, the Supreme Court has appeared to place at least a subtle brake on the runaway train of retaliation claims with its 2013 decision in *University of Texas Southwestern Medical Center v. Nassar*.²¹⁰ In *Nassar*, the Court was asked to determine whether Title VII retaliation claims are subject to a "but-for" causation standard (that is, whether the harm would not have occurred in the absence of the defendant's conduct),

198 See Gregory C. Keating, *Whistleblowing & Retaliation: A Guide for Human Resources Professionals & Counsel*, Littler Mendelson, 5th ed., 2013.

199 31 U.S.C. §§ 3729-3733 (also called the "Lincoln Law").

200 U.S. Dep't of Justice, *Fraud Statistics Overview, October 1, 1987 to September 30, 2014* (Nov. 20, 2014), available at www.taf.org/DOJ-FCA-Statistics-2014.pdf.

201 *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014).

202 Pub. L. No. 111-2, 123 Stat. 1617 (2009).

203 Jacqueline Bell, *Changes To FCA Increase Contractor Liability*, Law360 (May 21, 2009).

204 Dodd-Frank Act, Pub. L. No. 111-203, § 1079A(b).

205 Pub. L. No. 111-148 (Mar. 23, 2010). The ACA also amended the FCA to provide that a violation of the Anti-Kickback Statute causes all related "claims" for payment to the government to be false under the FCA.

206 As explained later in this section, the "public disclosure" bar is the FCA's general prohibition against a private party bringing a *qui tam* action to recover falsely or fraudulently obtained federal payments where the case is based upon publicly disclosed allegations or transactions, unless the action is brought by the U.S. Attorney General or the person bringing the action is the "original source" of the information.

207 548 U.S. 53 (2006).

208 555 U.S. 271 (2009).

209 *Thompson v. North Am. Stainless, L.P.*, 131 S. Ct. 863 (2011). *Burlington*, *Crawford* and *Thompson* are perhaps the most dramatic forays into the realm of retaliation by the Supreme Court. However, the Court also issued two other decisions that, likewise, continued the expansion of rights for those contemplating a retaliation claim. See *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (ADEA); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008).

210 133 S. Ct. 2517 (June 24, 2013).

similar to that applied to Age Discrimination in Employment Act (“ADEA”) retaliation claims,²¹¹ or the more liberal “motivating factor” standard used for Title VII discrimination claims. Justice Kennedy, writing for the 5-4 majority, expressly noted concerns over the rapid rise of retaliation claims to justify the stricter “but-for” causation standard that will require a plaintiff to prove “that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”²¹² The Court also pointed out the concern that an employee facing demotion or termination “might be tempted to make an unfounded charge of...discrimination” as a means to prevent the “undesired change in employment circumstance.”²¹³ While the more exacting causation standard may enable employers to defeat more claims at the summary judgment stage, it is probably not enough to stem the continued rise of retaliation claims.

The continued increase in whistleblowing claims has, in turn, been aided by decisions from the Administrative Review Board (“ARB” or “Board”), the U.S. Department of Labor’s tribunal for adjudicating most whistleblower disputes. In 2011, the Board decided three cases that dramatically expanded whistleblower protections under SOX. In *Sylvester v. Parexel International, L.L.C.*,²¹⁴ the ARB held that to state a viable claim under SOX, an employee need only “reasonably believe” that an alleged SOX violation occurred or was likely to occur, not that it had *actually* occurred. The Board further held a complainant no longer needs to allege shareholder fraud to engage in protected activity. In a second case, *Vannoy v. Celanese Corp.*,²¹⁵ the Board went so far as to state that the theft of confidential personal and corporate information may be protected activity, depending on the circumstances surrounding the theft. Finally, in *Menendez v. Halliburton Inc.*,²¹⁶ the ARB expanded what constitutes an adverse employment action under SOX by holding that an employee had suffered an adverse action when the company disclosed his complaint to the company’s CFO, general counsel and others within the company.

In *Lawson v. FMR LLC*,²¹⁷ the Supreme Court massively expanded the scope of the anti-retaliation provision of SOX, from 4,500 publicly held companies to millions of private companies that are “contractors,” “subcontractors” or “agents” of a publicly held company. In so holding, the Court sided with the ARB over the First Circuit, which had previously ruled that an “employee” referred only to an employee of a publicly held company, not employees of private businesses that contracted with publicly-traded companies.

B. Increased Enforcement and Activism

As a result of increased public attention and new laws protecting against retaliation, government agencies are increasing enforcement efforts.

In fiscal year 2012, ending September 30, 2012, the U.S. Department of Justice reported that it recovered nearly \$5 billion in civil settlements and judgments in FCA cases (*i.e.*, involving fraud against the government)—the largest annual recovery of civil fraud claims in the history of the DOJ.²¹⁸ The DOJ attributed its success, in part, to its “aggressively investigating allegations of waste.” A record \$3.3 billion was recovered in cases that involved a whistleblower, and individual whistleblowers received a total of \$439 million in awards in fiscal year 2012.²¹⁹

The SEC has stepped up its enforcement efforts as well. Following the implementation of the Dodd-Frank Act in July 2010, the SEC established the Office of the Whistleblower—dedicated to overseeing the intake and tracking of whistleblower tips, as well as overseeing the review process for eligible whistleblowers. The SEC then added over 800 new positions to carry out its expanded responsibilities. Moreover, it has simplified and streamlined its internal hiring process to quickly fill any vacancies and has increased training to focus on enforcement.²²⁰ By August 2011, the Office of the Whistleblower had launched a new website, making it easier than ever before for whistleblowers to submit tips.²²¹

211 *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

212 *Nassar*, 133 S. Ct. at 2533.

213 *Id.* at 2532.

214 ARB Case No. 07-123 (May 25, 2011).

215 ARB Case No. 09-118 (Sept. 28, 2011).

216 *Menendez v. Halliburton, Inc.*, ARB Case No. 09-002, 24 (Sept. 13, 2011).

217 134 S. Ct. 1158 (2014).

218 Press Release, U.S. Dep’t of Justice, *Justice Department Recovers Nearly \$5 Billion in False Claims Cases in Fiscal Year 2012*, Dec. 4, 2012, available at <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html>. Of that amount, \$3 billion was from health care fraud recoveries—the result of the sustained efforts of the Health Care Fraud Prevention and Enforcement Action Team (HEAT), an interagency task force formed in 2009. *Id.*

219 *Id.*

220 Mary L. Shapiro, SEC, Testimony on Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act by the U.S. Securities and Exchange Commission before the U.S. Senate Committee on Banking, Housing and Urban Affairs (Sept. 30, 2010), available at <http://www.sec.gov/news/testimony/2010/ts093010mls.htm>.

221 See U.S. Securities and Exchange Commission Office of the Whistleblower website, available at <http://www.sec.gov/whistleblower>.

At the same time, organizations have begun to proliferate that exist solely to assist individuals in bringing whistleblowing and retaliation lawsuits. For example, the Corporate Whistle Blower Center targets individuals within the healthcare industry and discourages potential whistleblowers from going to the government, news media, whistleblower law firms, or even to the responsible organization's internal reporting channels—instead urging whistleblowers to report directly to them.²²²

C. Application of the False Claims Act in the Healthcare Setting

The FCA allows private individuals, including employees, to file claims against organizations that have allegedly committed fraud on the federal government. Unlike some of the statutes that provide whistleblower protection, the FCA offers generous financial incentives to individuals who pursue a case on behalf of the government, entitling them to a portion of the government's recovery.²²³ It also contains stringent whistleblower protections for employees who make such claims.²²⁴

In 2014, the federal government recovered nearly \$5.7 billion arising from FCA settlements and judgments.²²⁵ Over \$2 billion of that amount stemmed from claims against federal healthcare programs. Whistleblowers recovered more than \$435 million as their share of the proceeds, up \$100 million from the previous year.²²⁶

The year 2014 is the second consecutive year *qui tam* whistleblowers filed more than 700 lawsuits. A growing number of relators were employed by or affiliated with a competitor of the defendant. Seven hundred and eighty-two new civil healthcare fraud investigations were opened in 2014. *Qui tam* activity is expected to rise.²²⁷

The plaintiffs' bar, lured by the staggering shares to be enjoyed by FCA relators, is becoming increasingly adept at navigating the unique and complex procedures of *qui tam* actions. So must employers—particularly healthcare employers dealing with Medicare and Medicaid billing—educate themselves in this area and engage in active compliance efforts to combat this developing vulnerability.

1. History of the Statute

Initially enacted by President Lincoln to confront fraudulent government contractors during the Civil War, the federal FCA has become an increasingly popular vehicle for employees who allege that their employer has committed fraud on the government.²²⁸ The FCA was first amended in 1986 in an effort to increase the detection and prosecution of false claims submitted to the federal government while discouraging meritless claims.

In May 2009, Congress again amended the FCA when it passed the Fraud Enforcement and Recovery Act. In an effort to encourage reporting and curb potentially increased fraud activity, the FERA significantly expanded the protections for whistleblowers who expose fraud in federal contracting.²²⁹ Among its provisions, the FERA removed the "specific intent" requirement created by the U.S. Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*²³⁰ and replaced it with a less demanding requirement that a false statement be "material" to a false claim.²³¹ In *Allison*, the Court held that plaintiffs in a FCA case must show that the defendant company specifically intended to defraud the government.²³² As a result of this change, many companies that have little or no experience doing business with the government must now comply with the FCA.²³³ Further, the elimination of the "specific intent" requirement expands the definition of fraud beyond affirmative acts. For example, a company's failure to act, such as not returning an overpayment check, may constitute fraud under the FERA's amendments to the FCA.²³⁴

In July 2010, Congress again amended the FCA when it passed the Dodd-Frank Act, expanding the definition of protected whistleblower conduct under the FCA to protect employees from so-called associational discrimination, and

222 Mey Ly, *America's Watchdog Sniffing for Whistleblowers*, Littler ASAP (June 4, 2013).

223 Marci Alboher Nusbaum, *Blowing the Whistle: Not for the Fainthearted*, *N.Y. Times*, Feb. 10, 2002, at 3:10.

224 See 31 U.S.C. § 3730(h).

225 U.S. Dep't of Justice, *Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014* (Nov. 20, 2014), available at <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>.

226 *Id.*

227 *Id.*

228 The False Claims Act, as amended, is codified at 31 U.S.C. §§ 3729–3733.

229 See Press Release, *National Whistleblower's Center, President Signs Major Whistleblower Anti-Fraud Law* (May 20, 2009).

230 128 S. Ct. 2123 (2008).

231 Pub. L. No. 111-2, § 4 (a), 123 Stat. 1617, 1621 (2009); Ryan G. Hassanein, *Revamping the False Claims Act*, *Law360* (Aug. 5, 2009).

232 *Allison*, 128 S. Ct. at 2130.

233 *Id.*

234 *Id.*

clarifying that the statute of limitations for actions brought under the FCA is three years (previously, the U.S. Supreme Court had found a 90-day statute of limitations).²³⁵

The cases discussed below highlight the need for healthcare employers to understand their obligations under federal and state laws. This awareness, coupled with a commitment to compliance, may help to reduce risk of exposure to similar retaliation claims.

2. Prohibited Acts and Penalties

The FCA prohibits fraud upon the government by imposing civil penalties on any person who, inter alia: (1) knowingly presents a false or fraudulent claim for payment or approval to the federal government; (2) knowingly makes or uses a false record or statement in order to get a false or fraudulent claim paid by the government; or (3) conspires to defraud the government by getting a false or fraudulent claim allowed or paid.²³⁶ Violators may be liable to the government for a civil penalty of \$5,000 to \$10,000 for each claim, as well as treble damages and the cost of prosecution (including attorneys' fees).²³⁷

3. Qui Tam Actions

The FCA contains a unique enforcement mechanism, referred to as a *qui tam* action, which allows a private citizen (or "relator") to file civil actions on behalf of the government to recover money paid by the government to a wrongdoer based on false or fraudulent claims, and provides such individuals a substantial portion of the government's recovery.²³⁸ The individual need not have been personally harmed by the wrongdoer's conduct.

To file a *qui tam* action under the FCA, an individual must first file a disclosure statement with the DOJ providing sufficient information for the government to determine whether to join the lawsuit or allow the individual to proceed alone.²³⁹ The individual may also file a complaint in the name of the federal government in a federal district court. This keeps the complaint under seal for at least 60 days to allow the government to conduct its investigation and determine whether it wishes to join the lawsuit, move to dismiss the action, or attempt to settle the action.²⁴⁰

The FCA generally prohibits private parties from bringing *qui tam* actions to recover falsely or fraudulently obtained federal payments where the case is based upon publicly disclosed allegations or transactions, unless the action is brought by the U.S. Attorney General or the person bringing the action is the "original source" of the information.²⁴¹ This is referred to as the "public disclosure" bar. In March 2010, the Affordable Care Act amended the FCA to make it easier for individuals to argue they are an "original source," permitting an individual to proceed with a *qui tam* action if he or she either voluntarily disclosed information to the government prior to a public disclosure or has knowledge that is independent of, and materially adds to, the publicly disclosed allegations or transactions, provided the individual voluntarily gave this information to the government before filing a *qui tam* action.²⁴²

4. Relators' Recovery in Qui Tam Action

Regardless of whether the federal government joins the action, if the *qui tam* claim succeeds, the individual who brought the action is entitled to a substantial portion of the government's recovery. Although the 1986 amendments reduced the overall percentage of recovery to which *qui tam* plaintiffs are entitled, the amounts are still impressive. If the government intervenes in the action, the *qui tam* plaintiff is entitled to 15% to 25% of the action, plus reasonable expenses and attorneys' fees.²⁴³ If the government does not intervene, the *qui tam* plaintiff may recover 25% to 30% of the action, plus reasonable expenses and attorneys' fees.²⁴⁴

235 *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*. 545 U.S. 409 (2005).

236 31 U.S.C. § 3729(a).

237 *Id.*

238 31 U.S.C. § 3730.

239 31 U.S.C. § 3730(b).

240 *Id.*

241 31 U.S.C. § 3730(e)(4)(A).

242 31 U.S.C. § 3730(e)(4)(A).

243 29 U.S.C. § 3730(d)(1).

244 *Id.* § 3730(d)(2).

In the healthcare context, many *qui tam* relators have recovered sizeable sums based on their reporting of, among other things, Medicare and Medicaid fraud, including the following:

- \$38 million paid in October 2014 by healthcare services firm and its subsidiary to resolve claims that it allegedly improperly billed Medicare and Medicaid for purportedly worthless nursing services, and medically unnecessary physical, speech, and occupational rehabilitation services. One whistleblower will receive more than \$1.8 million and the other will receive \$250,000.
- \$350 million to be paid by a dialysis service provider to resolve allegations that it paid kickbacks for patient referrals.
- In October 2014, one of the nation's largest hospital systems agreed to pay \$37 million to resolve claims that it charged the government for costlier inpatient services when the patients could have been billed on an outpatient basis; the *qui tam* whistleblower, a former employee of the hospital system, will receive over \$6 million.
- \$25 million plus interest to be paid by home health agency to settle claims that it allegedly exaggerated the severity of patients' conditions to increase billings and billed for medically unnecessary services to patients who were not homebound; \$3.9 million will be paid to the whistleblower.
- In August 2014, an acute care hospital operator agreed to pay a total of \$98.15 million to settle multiple lawsuits alleging: (1) it knowingly billed government healthcare programs for more expensive inpatient services when it should have billed those services as outpatient or observation services; and (2) one of the company's affiliated hospitals improperly billed the Medicare program for certain inpatient procedures and for services rendered to patients referred.
- In July 2014, a hospital system, two hospital-affiliated clinics, and a physicians' group agreed to pay \$24.5 million to settle claims they agreed to pay the physicians' group a percentage of Medicare payments for tests and procedures referred by the group's physicians. The whistleblower, a former employee of the physicians' group, was to receive \$4.41 million.
- \$35 million to resolve allegations that a nonprofit healthcare network's hospitals submitted false bills to Medicare and other federal and state healthcare programs, including \$5.95 million to the whistleblower.
- \$5.7 million paid by chemotherapy clinic to settle allegations that it defrauded Medicare, Medicaid, and private insurers by allegedly reusing syringes, billing payers for reimbursement of higher quantities of drugs than actually purchased, and drawing multiple patients' chemotherapy drugs from the same bag thereby denying patients the full dosage they should have received. The former owner pled guilty in a related criminal case and was sentenced to 20 years in prison and \$8.4 million in criminal fines. The three whistleblowers will share \$500,000 in settlement proceeds.
- In July 2012, a dialysis clinic operator agreed to pay \$55 million to settle a *qui tam* lawsuit alleging the company fraudulently billed the federal government for free supplies of a drug. The United States declined to intervene in the suit. The whistleblower who initiated this action was not an employee of the dialysis clinic operator, but rather an employee of the company that made the drug.
- \$102 million to be split between five whistleblowers as their share of a settlement in which a large pharmaceutical company agreed to pay \$2.3 billion to settle criminal charges and *qui tam* litigation regarding alleged illegal marketing of an anti-inflammatory drug for off-label uses.
- \$1.4 billion in criminal and civil fines, penalties, and damages arising from allegations that a global pharmaceutical company defrauded Medicare, Medicaid, and other government-funded healthcare programs in connection with its marketing practices for an antipsychotic drug. The *qui tam* complaints were filed on behalf of two former employees. The company allegedly formed a sales unit to market the drug to elderly care facilities for non-indicated uses (such as anxiety, insomnia, and dementia) but clinical studies had shown the drug to increase mortality in elderly patients by two-fold.
- Recovery of nearly \$1 million out of a \$9.9 million settlement with retail drug store chain for a government-sanctioned investigator working undercover as a pharmacist and one additional pharmacist who allegedly uncovered evidence of overcharging Medicare.
- Between \$50.1 million and \$83.6 million, or between 15% and 25% of the total recovery of over \$334 million, to an employee of a health-program management company following a healthcare fraud trial in 2006.
- \$51 million to be split between five employees as their share of a settlement under the federal FCA in which Europe's largest biotechnology company agreed to pay \$704 million to settle criminal and civil charges over the promotion of its AIDS drug.

- “Tens of millions of dollars” to an employee who assisted the government in recovering \$1.7 billion from his employer, a large private healthcare facilities operator, for Medicare fraud.
- Over \$500,000 to an employee who filed a *qui tam* action against his employer for overcharging Medicare and other federal health programs.
- In total, *qui tam* plaintiffs have recovered over \$4.7 billion under the FCA since its inception.²⁴⁵ Nearly \$3.6 billion of those recoveries involved matters in which the Department of Health and Human Services was the primary agency impacted.²⁴⁶

5. Non-Retaliation Provisions under the FCA

Section 1079B of the Dodd Frank Act amended the FCA, allowing private citizens to file civil *qui tam* actions, and providing whistleblower protections to employees.²⁴⁷ Under this provision, employees are protected from so-called associational discrimination. Furthermore, protected activity includes a broad range of actions that could potentially advance a *qui tam* action or constitute an attempt to stop an FCA violation.²⁴⁸

An employee who believes he or she has been retaliated against for engaging in conduct protected by the FCA may file an action in federal district court.²⁴⁹ To state a claim of retaliation under the FCA, a relator must show that:

1. the employee engaged in protected activity under the FCA; and
2. the employer retaliated against the employee because of the protected activity.²⁵⁰

In an FCA case, the *McDonnell-Douglas* burden-shifting analysis applies. Thus, a relator must first set forth a *prima facie* case of retaliation. The burden then shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. If the defendant is able to meet this burden, the relator then assumes the burden of proving that the proffered reason for the action is pretextual.²⁵¹

6. FCA’s Whistleblower and Non-Retaliation Provisions’ Impact on Healthcare Employers

Healthcare employers should be aware of several aspects of the FCA whistleblower protection. First, the FCA’s protections are not limited to the employee who actually files a *qui tam* suit; employees who participate in any investigation or testify in related proceedings are also protected. Second, the Act imposes substantial penalties, including two times the amount of back pay to which the employee is entitled and special damages, including attorneys’ fees and costs. Third, these damages are available in addition to any portion of the government’s recovery to which a *qui tam* plaintiff may be entitled.

Thus, the FCA presents to whistleblowers not only the opportunity to receive an astronomical recovery by virtue of his or her share in the government’s recovery, but also retaliation damages well over what could be recovered under Title VII or other federal nondiscrimination statutes. Thus, it is unsurprising that healthcare employers have seen a steady increase in *qui tam* actions.²⁵² Indeed, since 2010, the U.S. government has recovered over \$2 billion every year for the Department of Health and Human Services alone. During the same period, relators have shared in over \$250 million each year in those recoveries.²⁵³

245 U.S. Dep’t of Justice, *Fraud Statistics Overview, October 1, 1987 to September 30, 2014* (Nov. 20, 2014), available at www.taf.org/DOJ-FCA-Statistics-2014.pdf/.

246 *Id.*

247 31 U.S.C. § 3730(h) (“Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.”)

248 15 U.S.C. § 78u-6.

249 *Id.*

250 *United States ex rel. Howard v. USA Envtl., Inc.*, 2009 U.S. Dist. LEXIS 19625, *12 (M.D. Fla. Mar. 12, 2009) (citing *Mack v. Augusta-Richmond County, Ga.*, 365 F. Supp. 2d 1362, 1378 (S.D. Ga. 2005)).

251 *Harrington v. Aggregate Indus. Ne. Region, Inc.*, 668 F.3d 25 (1st Cir. 2012).

252 U.S. Dep’t of Justice, *Fraud Statistics Overview, October 1, 1987 to September 30, 2014* (Nov. 20, 2014), available at www.taf.org/DOJ-FCA-Statistics-2014.pdf/.

253 *Id.*

D. Sarbanes-Oxley's Whistleblowers and Healthcare Organizations

The Sarbanes-Oxley Act was passed in 2002 in response to corporate scandal. Section 806, the statute's civil non-retaliation provision, prohibits retaliation against an employee who reports conduct that the employee "reasonably believes" violates federal laws against mail, bank, wire, or securities fraud, violates securities laws, or constitutes securities fraud on shareholders.²⁵⁴ Additionally, Section 1107 of SOX imposes criminal liability for retaliation against any person who provides truthful information to law enforcement relating to any federal offense, securities-related or otherwise.²⁵⁵

In the early years of SOX, plaintiffs faced often insurmountable hurdles to establishing claims, including a 90-day statute of limitations, the DOL's position that subsidiaries of publicly traded corporations were not covered under the SOX whistleblower provisions,²⁵⁶ a Republican-appointed ARB, and narrow judicial interpretation by the ARB and U.S. courts of appeal.²⁵⁷

In the last 10 years, SOX's whistleblower protections have been broadened and their use has become more accessible, particularly as a result of the Supreme Court's decision in *Lawson v. FMR LLC*,²⁵⁸ which increased exponentially the number of entities covered by SOX by expanding the statute's protections beyond publicly traded companies to the entities with which they contract. Under *Lawson*, thousands, if not millions, of healthcare organizations and other entities that contract with publicly traded companies are now subject to SOX non-retaliation provisions, which utilize burden-shifting and damages measures unlike those available under other federal non-retaliation statutes, such as Title VII.

1. An Overview of the Statutory Scheme

2. SOX Employers

SOX's civil provisions apply to all public companies.²⁵⁹ The Dodd-Frank Act expanded these provisions to cover a public company's subsidiaries or affiliates (regardless whether they are publicly traded) if the financial information of the subsidiary or affiliate is included in the public company's consolidated financial statements.²⁶⁰ It also expanded SOX's whistleblower protections to apply to employees of nationally recognized statistical ratings organizations, including A.M. Best Company, Inc., Moody's Investors Service, Inc., and Standard & Poor's Ratings Service.²⁶¹ SOX also applies to the actions of any officer, employee, contractor, subcontractor or agent of a public company (and, under the Dodd-Frank Act amendment, its subsidiaries and affiliates) and imposes individual liability on such persons.²⁶²

3. Who is a Covered Employee: SOX Anti-Retaliation Provision's Scope and Recent Expansion

SOX's civil whistleblower protections apply to employees of publicly traded companies who engage in protected conduct as discussed below.²⁶³

254 18 U.S.C. § 1514A(a).

255 18 U.S.C. § 1513(e).

256 See, e.g., *Ambrose v. U.S. Foodservice, Inc.*, 2005-SOX-105 (ALJ Apr. 17, 2006).

257 See, e.g., *Platone v. FLYi, Inc.*, ARB No. 04-154 (Sept. 29, 2006), aff'd 548 F.3d 322 (4th Cir. 2008).

258 134 S. Ct. 1158 (2014).

259 18 U.S.C. § 1507; 29 C.F.R. § 1980.101; see also *Fleszar v. American Med. Ass'n*, 2007SOX-30 (Dep't of Labor June 13, 2007), aff'd, ARB Case Nos. 07-091 & 08-061 (Mar. 31, 2009) (dismissing complaint against the AMA, which was not a publicly traded corporation and did not have any registered securities, and noting that the AMA's contractual relationships with publicly traded corporations, standing alone, was insufficient to make the AMA a covered employer).

260 Section 929 of the Dodd-Frank Act (codified at 18 U.S.C. § 1514A).

261 Section 922(b) of the Dodd-Frank Act (codified at 18 U.S.C. § 1514A).

262 18 U.S.C. § 1514A(a).

263 29 C.F.R. § 1980.101.

Protections have also been extended to employees of the subsidiary of a publicly traded company where the officers of the parent company have the authority to affect their employment.²⁶⁴ In 2010, SOX was amended to expressly provide that employees of “any subsidiary or affiliate whose financial information is included in the consolidated financial statements of a [covered] company” are also protected.²⁶⁵

The U.S. Supreme Court recently resolved another issue of SOX coverage in *Lawson v. FMR, LLC*,²⁶⁶ which resulted in an exponential increase in the number of entities covered by the statute, expanding it from 4,500 publicly held companies to millions of private companies that are “contractors,” “subcontractors,” or “agents” of a publicly held company. In the Supreme Court’s first-ever SOX case, the Court rendered a decision giving deference to the ARB’s expansive interpretations of the term “employee.”²⁶⁷ In reaching this conclusion, the Court “boiled down” the anti-retaliation language of SOX, reducing it to say only that “no contractor may discharge an employee” for blowing the whistle. Simplified in that way, the Court concluded that the “employee” referenced had to be the employee of the contractor, not the employee of the publicly traded company. As further support for this conclusion, the Court noted that SOX says one cannot “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee,” and these are all actions that an employer takes against its own employee, not against the employee of another company. SOX also provides for reinstatement, a remedy that a contractor could not grant to another company’s employee.

Under *Lawson*, thousands, if not millions, of privately held healthcare employers that contract with publicly traded companies are now covered by SOX’s anti-retaliation provisions, but have not yet begun the process of setting in place safeguards to manage this risk.

4. Legal Elements of a SOX Whistleblower Claim

a. The Employee’s Burden of Proof

To establish a claim for relief under SOX’s whistleblowing protections an employee must show:

1. the employee engaged in protected activity;
2. the employer knew of the protected activity;
3. the employee suffered an unfavorable (adverse) personnel action; and
4. circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action.²⁶⁸

These elements are based upon the burden of proof that Congress established for the employee whistleblower protections in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).²⁶⁹

264 *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1374 n.7 (N.D. Ga. 2004); *Klopfenstein v. PPC Flow Tech. Holdings, Inc.*, ARB Case No. 04149, 13 (May 31, 2006), *aff’d following remand*, ARB Case Nos. 07-021 & 07-022 (Aug. 31, 2009) (interpreting SOX as requiring the complainant name “at least one respondent who is covered under the Act as an ‘officer, employee, contractor, subcontractor, or agent’ of such a company”), *aff’d on other grounds sub nom.*, *Klopfenstein v. Administrative Review Bd.*, 2010 U.S. App. LEXIS 24243 (5th Cir. Nov. 23, 2010); *Gonzalez v. Colonial Bank*, 2004-SOX-39 (Dep’t of Labor Aug. 17, 2004); *Morefield v. Exelon Servs., Inc.*, 2004SOX2 (Dep’t of Labor Jan. 28, 2004). *Cf. Brady v. Calyon Sec. (USA), Inc.*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) (employee of non-public company that acted as an agent for publicly traded entities in limited financial transactions, was not protected by SOX).

265 18 U.S.C. § 1514A(a).

266 134 S. Ct. 1158 (2014).

267 *See, e.g., Spinner v. David Landau & Assocs., L.L.C.*, ARB Nos. 10-111 and -115, ALJ No. 2010-SOX-29 (May 31, 2012) (citing *Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (Dec. 16, 2011); *Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043 (July 8, 2011); and *Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (Mar. 31, 2011)).

268 29 C.F.R. § 1980.104(b); *see also Welch*, 536 F.3d 269; *Allen*, 514 F.3d 468, 476 (5th Cir. 2008); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1375-76 (N.D. Ga. 2004).

269 49 U.S.C. § 42121; *see also* 18 U.S.C. § 1514A.

i) *Protected Activity*

The employee must first establish that he or she engaged in conduct protected by the Act. Section 806 of SOX protects employees of publicly traded companies who provide information or otherwise assist in the investigation of any conduct that the employee reasonably believes is a violation of federal securities laws, any SEC rule or regulation, or any other provision of federal law concerning shareholder fraud.²⁷⁰ Some federal trial courts and the ARB have held that protected activity of an employee included reports of securities fraud by a third-party client of the employer.²⁷¹

Satisfying the first element requires a showing that the employee had both a subjectively and objectively reasonable belief that the complained-of conduct constituted a violation of one of the six enumerated categories of law.²⁷² It is not, however, necessary to establish that an employee's belief is accurate. A mistaken but reasonable belief that the complained-of conduct constituted a violation of one of the six enumerated categories of law is protected.²⁷³

An employee need not report potentially illegal activity to a government agency to trigger SOX's whistleblower protections; internal protests or complaints alone may be sufficient if they relate to any of the six sources of law in Section 806. An employee engages in protected activity when he or she provides information about potential securities violations or shareholder fraud, or causes such information to be provided to a person with supervisory authority over the employee or with the authority to "investigate, discover or terminate misconduct."²⁷⁴ However, SOX does not protect employees who merely discuss their concerns with coworkers or subordinates, but do not elevate the concerns to anyone with authority to investigate.²⁷⁵

Additionally, an employee's conduct may also be protected if he or she participates in an investigation, even if the employee is not the individual who reports the allegedly fraudulent or illegal activity.²⁷⁶

Early cases describing the elements of a SOX Section 806 claim generally followed the ARB's first major pronouncement on the subject in *Platone v. FLYi, Inc.*²⁷⁷ In this case, the ARB held that the whistleblower's communication must relate "definitely and specifically" to activity that violates one of the six categories of criminal law or rewrites law identified in Section 806.²⁷⁸ In 2011, however, the ARB changed the law of protected activity in a dramatic way in *Sylvester v. Parexel International L.L.C.*²⁷⁹ In *Sylvester*, the ARB held that, contrary to its own precedent in *Platone* and other cases, a SOX complaint need not allege fraud—let alone shareholder fraud—to be protected under Section 806. Thus, practitioners must be aware of these two distinct and contradictory lines of cases that might apply depending on the forum.

270 *Id.*

271 *Sharkey v. J.P. Morgan Chase*, 2010 U.S. Dist. LEXIS 139761, at **1-5,14-20 (S.D.N.Y. Jan. 14, 2010) (dismissing the plaintiff's complaint for failure to state a claim because it alleged that defendant's client engaged in "illegal activities" and did not allege "definitely and specifically" that the client had violated federal securities laws); *Feldman v. Law Enforcement Assocs. Corp.*, 2011 U.S. Dist. LEXIS 24994, at **44-45 (E.D.N.C. Mar. 10, 2011) (same) (citing *Sharkey*); *Funke v. Federal Express Corp.*, ARB Case No. 09-004 (July 8, 2011) (same) (citing *Sharkey* and *Feldman*).

272 *Day v. Staples, Inc.*, 555 F.3d 42, 54 (1st Cir. 2009); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Van Asdale v. International Game Tech.*, 577 F.3d 989, 1000-01 (9th Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009); *Allen v. Administrative Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008).

273 *Id.*; *Van Asdale*, 577 F.3d at 1001, 1002 (employees need only show they reasonably believed fraud occurred or that they were fired for suggesting further inquiry into suspected fraud; "requiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure").

274 18 U.S.C. § 1514A.

275 49 U.S.C. § 42121; 18 U.S.C. § 1514A. See Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L. Rev. 1029, 1065 (2004) (the Act does not protect employees who confer with peers or discuss accounting improprieties internally with subordinates).

276 See, e.g., *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (Dep't of Labor Dec. 9, 2004).

277 ARB Case No. 04-154 (Sept. 29, 2006), *aff'd*, 548 F.3d 322 (4th Cir. 2008) (employee's expression of concerns that do not include any specific revelations about fraudulent activity affecting shareholder interests are not protected), *cert. denied*, 130 S. Ct. 622 (2009).

278 See *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (communication must specifically relate to one of the laws listed in the statute to be protected); *Van Asdale v. International Game Tech.*, 577 F.3d 989, 997 (9th Cir. 2009) (deferring to the ARB's interpretation that communication must definitively and specifically relate to one of the enumerated laws); *Allen v. Administrative Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) (agreeing with the ARB that an "employee's complaint must 'definitively and specifically relate' to one of the six enumerated categories"); *Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006) ("[p]rotected activity must implicate the substantive law protected in Sarbanes-Oxley 'definitively and specifically'" (citations omitted), *aff'd*, 2010 U.S. App. LEXIS 21214 (2d Cir. Oct. 14, 2010) (unpublished); see also *Lewandowski v. Viacom Inc.*, ARB Case No. 08-026 (Oct. 30, 2009) (finding that plaintiff's reports to her employer that her supervisor was leaking confidential material to competitors relating to various media's potential for development into motion pictures, raised issues of breach of corporate standards and disloyalty but did not "'definitively and specifically' relate to the defrauding [defendant's] shareholders;" the "mere possibility" that the alleged disclosure of confidential information to competitors could affect the value of the stock "is too attenuated to state a claim for relief under SOX").

279 ARB Case No. 07-123 (May 25, 2011).

ii) *Employer Knowledge of Protected Activity*

An employee cannot succeed on a SOX claim unless he or she can prove that the employer knew that the employee had reported a potential violation of one of the predicate statutes, or that the employee participated in an investigation of such misconduct.²⁸⁰

The employee need not establish that the employer had actual knowledge of the specific protected activity. Rather, according to OSHA's 2011 Whistleblower Investigations Manual, the employee can satisfy the elements of a prima facie case by showing that "a person involved in the decision...suspected that the complainant engaged in protected activity."²⁸¹ An employee can also show that the decision-maker could have reasonably deduced the employee's involvement in the protected activity.²⁸²

iii) *Adverse Action under SOX*

Although administrative law judges (ALJs), for several years, arguably applied varying standards to determine what constituted an adverse employment action under SOX,²⁸³ it is now relatively well-settled that the DOL's ARB will apply the broader *Burlington Northern*²⁸⁴ standard announced by the U.S. Supreme Court in connection with retaliation claims under Title VII.²⁸⁵ Under that standard, an employee need only establish the employer's action would have dissuaded a reasonable worker from engaging in the protected activity.²⁸⁶ Under the *Burlington Northern* standard, even conduct that is not a concrete job action may qualify as an adverse action.²⁸⁷

Additionally, because SOX explicitly prohibits threats and harassment, employers may face hostile environment charges under SOX where an employee suffers coworker or supervisor harassment after engaging in protected activity. In such situations, courts and administrative law judges will likely apply the same "severe and pervasive" standard used in Title VII hostile environment cases to determine whether the conduct is actionable.²⁸⁸

iv) *Causation: Contributing Factor Standard*

Significantly, an employee need only establish that his or her protected activity was a *contributing factor*, not necessarily a motivating factor, to the adverse employment action.²⁸⁹ The use of "contributing factor" language in SOX represents a major change that relaxes the burden an employee faces to establish that the adverse employment action was caused by his or her protected activity. In 2013, the Tenth Circuit described the contributing factor standard as "broad and forgiving" and stated that it could even be established by temporal proximity alone.²⁹⁰

280 8 U.S.C. § 1514A; 49 U.S.C. § 42121.

281 See U.S. Dep't of Labor, OSHA Whistleblower Investigations Manual, at 3-10 (Sept. 20, 2011), available at <http://www.whistleblowers.gov/> ("For example, one of the respondent's managers need not have specific knowledge that the complainant contacted a regulatory agency if his or her previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant.").

282 *Id.*

283 See *Dolan v. EMC Corp.*, 2004-SOX-1 (Dep't of Labor Mar. 24, 2004) (ALJ dismissed a SOX claim based on a negative performance evaluation, reasoning that "an adverse employment action must have some tangible job consequences"); *Harvey v. Home Depot, Inc.*, 2004-SOX-77 (Dep't of Labor Nov. 24, 2004), *decision adopted*, ARB Case No. 04-114 (June 2, 2006) (ALJ held a corporate officer's refusal to accept delivery of correspondence from a former employee, which allegedly addressed corporate malfeasance, was not an adverse employment action, reasoning that the conduct did not adversely affect the terms and conditions of the complainant's former employment with the company or his ability to obtain subsequent employment). But see *Willis v. Vie Fin. Group, Inc.*, 2004 U.S. Dist. LEXIS 15753, at *17 (E.D. Pa. Aug. 6, 2004) (employee who lost job responsibilities after allegedly engaging in protected activity sufficiently alleged a change in employment conditions within the meaning of the Act); *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (Dep't of Labor Dec. 9, 2003) (ALJ applying Tenth Circuit Title VII case law and concluding that placement of an employee on a lay-off list after he engaged in protected activity constituted an adverse action even though the employer subsequently removed employee's name from the list and he suffered no tangible consequences).

284 *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

285 *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Allen v. Administrative Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008); *Miles v. Wal-Mart Stores, Inc.*, 2008 U.S. Dist. LEXIS 5781, at *10 & n.4 (W.D. Ark. Jan. 25, 2008); *Melton v. Yellow Trans., Inc.*, ARB Case No. 06-052, 10-11 (Sept. 30, 2008).

286 *Id.* But see *Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp. 2d 310, 323-24 n.7 (S.D.N.Y. 2009) (indicating in a footnote that moving employee's desk closer to supervisor, relieving employee of newsletter duty and not allowing employee to attend certain meetings would not have constituted adverse employment action), *aff'd*, 2010 U.S. App. LEXIS 21214 (2d Cir. Oct. 14, 2010) (unpublished).

287 See, e.g., *Menendez v. Halliburton, Inc.*, ARB Case No. 09-002, 24 (Sept. 13, 2011).

288 See *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (Dep't of Labor Dec. 9, 2003).

289 49 U.S.C. § 42121(b)(2)(B)(iii).

290 *Lockheed Martin Corp. v. Administrative Review Bd.*, 2013 U.S. App. LEXIS 11159, at *33 (10th Cir. June 4, 2013).

b. The Employer's Burden: Clear & Convincing Evidence

Once an employee satisfies his or her burden of establishing a *prima facie* case, the burden shifts to the employer. However, the burden under SOX for an employer is significantly greater than the burden in analogous Title VII circumstances. Following the burden of proof set forth under the AIR 21 statute and adopted by SOX, to avoid liability, an employer must establish by "clear and convincing" evidence that it would have taken the same adverse action against a complainant absent his or her protected activity.²⁹¹ This standard departs significantly from the nondiscriminatory reason analysis applied in other federal employment discrimination statutes and creates a much higher burden of proof for employers.²⁹² In short, proactive precautions such as accurate and complete documentation of performance issues are essential to satisfying the difficult "clear and convincing" standard and defeating a disgruntled employee's SOX whistleblower claim.

E. Practical Advice for Healthcare Employees

Given the recent expansion of SOX to non-publicly traded contractors of publicly traded companies, as well as the significant incentives for *qui tam* whistleblowers, healthcare employers should consider a number of preventative measures to reduce risk from whistleblower claims.

1. *Shifting the Culture: Encouraging Internal Reporting through Policy*

Employers should consider notifying employees how they are expected to behave by developing a *code of ethics* or a *code of conduct*. When developing such codes, an employer should tailor them to its particular areas of risk and risk assessment. For example, if Medicare/Medicaid billing is a critical risk area for the employer, then the code should specifically identify the types of issues employees should report to prevent the risk from occurring.

To further encourage internal reporting under the code of ethics or code of conduct, employers could establish a firm policy prohibiting unlawful retaliation against employees who bring issues forward. An anti-retaliation policy could also include reporting under the company's anti-discrimination and harassment policy.

2. *Turning Policy into Action*

No written policy, no matter how strongly worded, provides adequate protection unless it is actually adopted, understood and enforced. Some organizational behavior experts believe that a supervisor's behavior can exert a more powerful influence on an employee's decision-making than the employee's own ethical beliefs or the employer's written policies. In other words, if a supervisor does not know the policy or does not act or behave in accordance with the policy's values, the written policy will be ineffective.

- Thus, employers should consider taking measures to ensure policies' enforcement, including:
- Performing management training concerning responding to reports.
- Conducting employee complaint and non-retaliation awareness training.
- Holding wrongdoers accountable.
- Ensuring confidentiality of reports.
- Conducting independent and thorough investigations.
- Having employees periodically recertify that they are aware of no violations of the code of ethics or code of conduct.

291 49 U.S.C. § 42121; see also *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004) (employer entitled to summary judgment only if it could establish by clear and convincing evidence that it would have terminated plaintiff even if she had not engaged in protected activity); *Kalkunte v. DVI Fin. Servs., Inc.*, ARB Case Nos. 05-139 & 05-140 (Feb. 27, 2009) (although company offered nondiscriminatory reasons for discharging attorney, it failed to prove by clear and convincing evidence it would have discharged her at the same time had she not engaged in protected activity); *Reines v. Venture Bank & Venture Fin. Group*, 2005-SOX-112 (Dep't of Labor Mar. 13, 2007) (dismissing the employee's complaint where the employer established by clear and convincing evidence that it had sufficient nondiscriminatory reasons for its actions); *Platone v. FLYi, Inc.* (formerly Atlantic Coast Airlines Holdings), ARB Case No. 04-154, 16 (Sept. 29, 2006), *aff'd*, 548 F.3d 322 (4th Cir. 2008) ("If [the employee] succeeds in establishing that protected activity was a contributing factor, then the employer may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of her protected activity."), *cert. denied*, 130 S. Ct. 622 (2009).

292 See 18 U.S.C. § 1514A; 49 U.S.C. § 42121.

3. *Developing a Trusted Complaint Procedure*

A trusted complaint procedure helps to ensure that employee reports of unethical conduct, harassment, or retaliation are handled appropriately and efficiently. Steps to consider when implementing an effective reporting mechanism include:

- Establishing a complaint procedure that is clear and easy for employees to use.
- Identifying multiple appropriate persons to receive complaints, and establishing multiple methods for reporting, such as by email, regular mail, or a hotline.
- If a hotline is used, making it available 24 hours a day, seven days a week, to allow employees to make reports at a time and place where they feel comfortable.
- Considering whether an anonymous outsourced reporting system might best meet the company's needs.
- Instructing employees that the company will take all complaints and concerns seriously and that the company does not permit retaliation.
- Advising managers and supervisors to take all complaints seriously and to report them to human resources so that an employee's potentially protected activity may be taken into account if that employee subsequently faces adverse action.
- Ensuring managers understand that employees have a legal right to make a complaint and that their own actions will be highly scrutinized. After receiving a complaint, it is essential for managers to be keenly aware of their own behavior toward the complainant and make sure it does not even appear to be retaliatory.

To help further guard against retaliation or whistleblowing liability, employers could establish effective internal communication regarding employment decisions. For example, before a manager makes a termination decision concerning an employee, the manager should be able to readily determine: (1) whether that employee recently engaged in any protected activity; or (2) whether the employee is in the "zone of interest" (e.g., spouse, boyfriend, etc.) of another employee who engaged in protected activity. All too often decisions are made by individuals who are unaware that the employee at issue has, or is closely connected to, another employee who has, for example, complained about discriminatory practices or engaged in other protected activity. To that end, employers should consider implementing the following measures:

- Examine the company's organizational design and consider implementing a central employee relations function or ombudsman to handle policy management, case resolution and employee training responsibilities. Many or all of these responsibilities may already be handled by the company's human resources department.
- Use the central employee relations function as a screening device before taking adverse action against an employee. Specifically, track employee complaints in a database and consider whether any argument can be made that the employer is taking an adverse action because of the complaints.
- Train managers to consult the central employee relations department *before* taking an adverse action against an employee to determine if that employee has engaged recently in protected activity.
- Monitor compliance with these procedures.
- Track complaints of retaliation and investigation outcomes to determine when an allegation may be simply an employee grudge and when it warrants further action, such as discipline or training.
- Communicate with employees who have made complaints to determine if they believe anyone is retaliating against them and document the substance of those communications.

Once the employer has centralized the reporting functions, the employer will be able to monitor and audit compliance with the reporting and investigation policies and procedures. Having an effective reporting and investigation policy and procedure is an essential internal control that may help to detect and prevent misconduct from occurring. As with any other critical internal control, it should be tested and audited from time to time to make sure the control is working as intended. Below are some examples of practices to consider:

- Work with the internal or external audit group to create a fact scenario and then lodge a fictitious complaint to determine whether the complaint is transcribed accurately and is forwarded to the appropriate parties for investigation.

- Review closed investigations for completeness and thoroughness (*i.e.*, were the files in order with proper documentation? Were the notes made appropriately with no improper opinions included? If witness statements were taken, were they included in the file?).
- Review open investigations to make sure investigations are being conducted in a timely manner.
- Make sure investigation files are being kept securely and confidentially.
- Follow up with employees who have made complaints to determine their level of satisfaction with the process.

VI. NEGLIGENT HIRING AND RETENTION

Negligent hiring and negligent retention claims are recognized in almost every state and are on the rise. Negligent hiring occurs when an employer hires an incompetent or unfit employee whom it knows, or by the exercise of reasonable care should know, was incompetent or unfit, thereby creating an unreasonable risk of harm to others. Negligent retention occurs when an employer becomes aware, or should become aware, of problems with an employee that indicate the employee's incompetence or unfitness to perform his job, but the employer takes no action.

A. Examples of Negligent Hiring and Retention Verdicts and Settlements

Negligent hiring and retention verdicts and settlements involving healthcare personnel show that these claims are becoming increasingly common and very costly. For example, consider the following plaintiff verdicts in healthcare cases:

- A New Jersey jury awarded \$40.6 million in a negligent hiring case against a nursing agency whose employee burglarized a patient's home and murdered his wife.²⁹³
- A Massachusetts jury awarded \$26.5 million in a negligent hiring case against a home healthcare company whose employee murdered a patient and his grandmother.²⁹⁴
- A California jury awarded \$12.5 million in a negligent hiring case against a nursing home whose employee attempted to rape an elderly, mentally infirm female resident.²⁹⁵

Settlement statistics for healthcare employers in negligent hiring cases are just as daunting. While studies indicate that the average settlement in negligent hiring cases is \$1 million, that figure may actually be higher in the healthcare industry. For example, in Pennsylvania, a \$1.8 million settlement was reached between a mental health hospital and the family of a teenager who had sexual relations with his male psychotherapist.²⁹⁶

While the legal standard for negligent hiring and retention cases varies from state to state, a common key factor in such cases is foreseeability; specifically, the foreseeability of the specific harm to a particular victim given the nature of the employer's business and the employee's job duties. For healthcare employers, this generally means examining whether it was foreseeable to the employer that the employee would engage in conduct potentially harmful to a patient's safety or well-being. The following cases help demonstrate the foreseeability element of liability in the healthcare environment and the serious financial consequences that can result when an employer fails to reasonably foresee harmful employee misconduct.

In *Doe v. Fulton-Dekalb Hosp. Auth.*,²⁹⁷ a female patient sued a hospital for several causes of action, including negligent hiring, regarding a male substance abuse counselor who made sexually offensive comments and advances during counseling sessions.

As required by hospital protocol, when the counselor applied for employment the hospital conducted a background check using an outside screening company, performed a drug screen, and contacted some of the applicant's previous employers. The applicant's criminal background check and drug screen produced no evidence of criminal activity or drug use. Additionally, none of the previous employers who were contacted provided negative information about the counselor. Instead, and as expected, past employers who were contacted generally provided only job title, dates of employment and salary information. Given all of these screening protocols and their concern-free results, what was the basis for this case to proceed all the way to the appellate court level? The simple answer is that the employer was accused of failing to contact enough of the applicant's previous employers, including those employers discovered later during litigation that had fired the counselor for similar sexually inappropriate conduct toward female patients. Of course, the hospital did not contact these employers because the applicant did not identify them on his job application. That series of omissions was the catalyst for this lawsuit.

The hospital's job application required a complete work history for the last 10 years and stated in bold font that "[a] resume in lieu of requested information is not acceptable." Despite this clearly stated requirement, the counselor provided

293 *Gurkin v. The Nurse Connection Inc.*, Case No. OCN-L-4017-95 (N.J. Super. Ct. – Ocean County Mar. 21, 2002).

294 *Ward v. Trusted Health Resources, Inc. of Boston*, Case No. 94-4297 H (Mass. Super. Ct. – Suffolk County Feb. 27, 1998).

295 *Sophie Schwartz v. Oakdale Heights Mgmt. Corp.*, Cause No. PC044618 (Cal. Super. Ct. – Los Angeles County Mar. 1, 2010).

296 *Alyssa Thatcher v. Andrew J. Smith M.S.*, Cause No. 2006-C-2692V and *Alyssa Thatcher v. George M. Perovich*, Ed.D, Cause No. 2007-C-1823, Lehigh County Court of Common Pleas, Pennsylvania (settled 1/31/2011 following jury selection but prior to opening arguments).

297 *Doe v. Fulton-Dekalb Hosp. Auth.*, 2007 U.S. Dist. LEXIS 76247 (N.D. Ga., Oct. 5, 2007, Docket No. 05-02277-CV-TWT-1; 628 F.3d 1325 (11th Cir. 2010)).

only a partial employment history and the hospital made no inquiries about the counselor's incomplete work history. Based on these facts, the plaintiff argued that the hospital's failure to obtain a complete work history in accordance with its job application constituted negligent hiring.

The district court dismissed the negligent hiring claim on the basis that the hospital's screening protocols satisfied the state's standard of care for hiring. The plaintiff appealed and the appellate court affirmed the district court's decision, holding that despite the hospital's failure to obtain a complete work history, the hospital had exercised reasonable care in its hiring process. The court came to this conclusion because the outside screening company's background check revealed no criminal activity, the drug screen revealed no evidence of drug use, and no negative information was received from prior employers who were contacted. In short, there was nothing suggesting that the counselor posed a foreseeable risk of inflicting personal harm to patients.

The appellate court's discussion regarding this latter factor is interesting in that the court noted that while one can criticize the number of employers actually contacted, the court was concerned that placing undue emphasis on the responsibility to contact *more* previous employers was unlikely to ensure workplace safety. Employers are generally hesitant to share negative personnel information in response to employment verification inquiries for fear of being sued by their former employees. Consequently, the court concluded that requiring more diligence in this area would likely be a waste of time and "merely send future human resources personnel on fools' errands."

While the hospital ultimately prevailed in this case, it did so at great financial expense. The hospital in this particular case could have been more diligent in ensuring that the counselor fully completed his job application. Had it done so, it might have discovered the counselor's unsavory work history and/or suspicious application discrepancies, presumably rejected him for employment, and avoided defending an expensive, protracted lawsuit.

As the *Doe* case demonstrates, using a qualified, reputable outside screening company to perform background checks and drug screens can be an asset in the hiring process. In appropriate instances, employers should make reasonable efforts to contact, and request a response from, an applicant's previous employers, and document those efforts. Having designated personnel review job applicants for completeness and perform individualized follow-up with the applicants is also helpful.

In another negligent hiring and retention case, *QBE Specialty Ins. Co. v. TLC Safety Consultants, Inc.*,²⁹⁸ a California bus driver for an adult day healthcare center sexually assaulted a mentally disabled female patient whom he was supposed to transport to and from the facility. It was not until the patient brought a civil action against the healthcare center alleging negligent hiring practices that the center discovered the bus driver had previously been charged with felony counts of domestic abuse and had his required endorsements and certificates for transporting disabled individuals revoked, among other problems with his employment background. When the healthcare center hired the bus driver, it relied on the information that had been provided by a safety consultant agency that was supposed to screen the bus driver's background and qualifications. When the bus driver's criminal record and lack of qualifications were exposed, the healthcare center, through its insurer, settled the case with the patient for \$850,000.

The insurer, on behalf of the healthcare center, then brought suit against the third-party safety consultant agency that was allegedly responsible for vetting the bus driver's background and confirming his eligibility and qualifications for the position. The lawsuit alleged that the agency was responsible for conducting an in-depth review of the bus driver's employment background and qualifications. The agency, however, claimed that it was responsible only for ensuring that the bus driver complied with applicable laws proscribed by the Department of Motor Vehicles. At the trial-court level the safety consultant agency moved for summary judgment, claiming the scope of the agreement between the agency and the healthcare center was narrower than the healthcare center alleged. The problem in this case was that the agreement between the two parties was unclear, as it was partially oral. Ultimately, the trial court agreed with the agency's argument that it was not responsible for discussing, in depth, the bus driver's previous employment with his previous employers, but disagreed with the agency's claim that it was not required to notify the healthcare center about the revocation of the bus driver's required certificates.

The employer in the *QBE* case would have benefited by having a more defined written agreement with the safety consultant agency that explicitly outlined the scope of the agency's responsibilities. Such a written agreement could include an indemnity clause protecting the employer in the event of a negligent hiring lawsuit. The *QBE* decision highlights the risks associated with outsourcing recruiting and hiring activities and makes it clear that, if an employer is

298 *QBE Specialty Ins. Co. v. TLC Safety Consultants, Inc.*, 2012 U.S. Dist. LEXIS 104520 (E.D. Cal. July 26, 2012). Underlying case is *Diaz v. Safe Harbor Adult Day Health Care Ctr., Inc.*, Case No. 09CECG00783 (Cal. App. Dep't Super. Ct. - Fresno County Mar. 17, 2009).

going to outsource its hiring “due diligence,” it should pay particular attention to the quality of work performed by the third-party agency, the terms of the contract for those services and the indemnity provisions included. Simply relying on the third-party agency to conduct sufficient due diligence may not absolve an employer from liability for a negligent hiring claim.

Another helpful case for identifying effective risk management tools that minimize negligent hiring and retention claims is *Navarette v. Naperville Psychiatric Ventures*.²⁹⁹ In *Navarette*, an adolescent patient who was a resident in the extended care unit (ECU) of a mental health hospital was sexually assaulted by a mental health counselor. The patient was in the custody of the Department for Children and Family Services (DCFS), which used the ECU for adolescents who were not appropriate for foster care but needed inpatient psychiatric care.

The patient alleged the hospital failed to conduct an appropriate background check as required by the state regulation requirements the DCFS included in its contract with the mental health hospital. The pertinent state regulation mandated that the background check include checking the Illinois Sex Offender Registry and the Child Abuse and Negligent Tracking Systems and submitting the employee’s fingerprints to the Illinois State Police. The background check was a condition of employment.

The hospital contended it had complied with the regulation and that the checks of the Illinois Sex Offender Registry and Child Abuse and Negligent Tracking Systems were negative, indicating there was no record the employee had been convicted of a sex crime. While the Illinois State Police also reported no evidence of criminal convictions in Illinois, the police report indicated there was a fingerprint search conducted but it was dated two and a half years after the employee was hired (not before hiring, as required), and after the alleged sexual assault occurred. Also, there was no record in the employee’s file that his fingerprints had been submitted to the police (either before or after hiring) and the hospital could not identify anyone who had submitted them to the police. Moreover, the evidence showed that the employee had changed his name prior to applying for the mental health counselor position and then provided an incorrect social security number at the time of hire. Indeed, six months after the hospital hired the employee—and well before the alleged sexual assault occurred—the Social Security Administration informed the hospital that the employee’s name did not match the social security number provided, but the hospital failed to act on this information. The patient alleged that had the hospital timely submitted the employee’s fingerprints to the police or followed up on the incorrect social security number, it would have discovered a drug conviction under the employee’s original name.

The patient sued the hospital for negligent hiring, general negligence, negligent retention and negligent supervision. The hospital initially won a motion for summary judgment on the negligent hiring claim, but the ruling was reversed on appeal. The appellate court concluded the conviction for selling drugs was a crime of moral turpitude that was serious enough to render the employee unfit for a position in which he was entrusted with the care of a minor. Furthermore, the employee’s drug conviction made it foreseeable that his hiring posed a patient risk that a reasonable person would have avoided.

In this particular case, the hospital in *Navarette* could have been more vigilant in checking the background of the applicant who was being hired to work in the vicinity of minors, including ensuring his fingerprints were timely collected and submitted to appropriate law enforcement personnel for investigation. The hospital likely would have benefited by maintaining better records to prove that the applicant’s fingerprints had been timely submitted, including keeping a dated copy of the submitted fingerprints in the employee’s file. Additionally, the hospital could have also followed up to determine why the employee’s Social Security number did not match his name. The hospital’s failure to take these proactive steps resulted in an adverse decision and financial liability.

Another case that provides a helpful framework for assessing negligent hiring and retention risk is *Saima Loglisci v. The Stamford Hosp.*,³⁰⁰ involving a female patient who sued a physician’s assistant (PA) and her birthing hospital in connection with the PA’s theft of the patient’s epidural pump while she was preparing to give birth. The PA stole the pump to extract the pain medicine from it to treat his ill dog. The patient alleged a number of claims, including negligent hiring and retention. The hospital moved for summary judgment on the negligence claims, asserting that it was not foreseeable that the PA would steal prescription medication or remove the plaintiff’s epidural pump.

299 *Navarette v. Naperville Psychiatric Ventures*, Trial Court: Circuit Court of Du Page County. No. 05-L-520, Appellate Court: 2011 IL App (2d) 100614-U (Dec. 16, 2011).

300 *Saima Loglisci v. The Stamford Hosp.*, 2011 Conn. Super. LEXIS 387 (Conn. Super. Ct. Feb. 22, 2011).

The court examined the hospital's hiring protocol, which included a background employment check, a criminal records check and a drug screening. These measures failed to reveal any negative employment information. To the contrary, the PA did not have a criminal record and he tested negative for drug use. While the hospital's pre-hiring vetting of the PA did not reveal anything problematic, during the course of his employment numerous hospital employees began to view him with suspicion and distrust and question his competence. One of the hospital's physicians went so far as to state that she never trusted the PA from the time he was hired. Despite these concerns, however, and the fact that epidural pumps had previously been removed from patient rooms, the hospital did nothing to investigate or monitor the PA until after the theft of the plaintiff's pump. Based on these facts, especially the testimony of the physician who had always distrusted the PA, the court denied summary judgment on both the negligent hiring and retention claims, concluding that a jury would need to determine whether it was foreseeable that the PA would commit theft or that any other employee might improperly remove an epidural pump in use.

The moral of the *Saimi* case is that, if a supervisor or manager expresses any hesitation about an applicant's hiring, especially for a patient care position providing ready access to prescription medications, the employer might benefit by engaging in increased due diligence as part of the hiring process, and investigating any post-employment trust or competency concerns as they arise.

The foregoing cases focus on the recruiting and hiring process, and employees whose misdeeds were discovered fairly early in the employment relationship, where the vast majority of vetting errors occur, giving rise to negligent hiring liability. Employers also, however, can make equally grave errors in the supervision and retention aspects of the employment relationship, sometimes with extremely long-term employees. There is one particularly egregious case that demonstrates this fact and provides valuable insight into the steps employers can take to promote vigilance with respect to retaining and properly supervising employees.

In *Doe v. St. Saint Francis Hospital and Medical Center*,³⁰¹ the hospital was sued for negligent supervision by a man who claimed he had been sexually assaulted as a child by one of the hospital's pediatric physicians while participating in the doctor's child growth study. The study was allegedly intended to monitor growth rates of normal children to assist in the treatment of children with abnormally low rates of growth. In reality, however, the physician was a pedophile and child pornographer whose real purpose in establishing the study was to create a situation where he could examine children in isolation in order to sexually exploit them. The physician worked for the hospital for decades and it was only long after his death that the hospital discovered he had sexually exploited hundreds of children during his lengthy employment.³⁰²

The hospital was found liable for negligent supervision and the jury awarded nearly \$3 million in damages to the plaintiff. Why? Because the jury concluded that the hospital should have been on notice of the doctor's misdeeds as they were occurring based on several key facts, including that the hospital: (1) failed to follow its own rules and policies regarding research it authorized, sponsored and hosted; (2) allowed the physician to use hospital funds to purchase erotic publications and expensive photography and filmmaking equipment; and (3) provided him a secluded, private office where he had uncontrolled access to children. In short, the jury, and the court of appeals reviewing the case, concluded that the hospital failed to exercise reasonable supervision over the physician and his child growth study even though hospital administrators knew, or should have known, that the physician was touching, photographing and filming the genitalia of naked children in his office, sometimes for hours, without a chaperone present, in violation of hospital rules, and without any legitimate medical or scientific basis for conducting the study. These factors collectively highlight the importance of diligently monitoring an employee's job performance and ensuring that their activities are being conducted for legitimate business purposes in accordance with the employer's policies and procedures, especially when the employee in question is responsible for, or interacts with, minors and equally vulnerable patients.

B. Background Checks

Fortunately, there are certain steps that healthcare employers can proactively take to potentially help reduce their exposure for negligent hiring, supervision and retention claims like those in the cases just discussed. One technique for managing such risk is conducting thorough background checks. Specifically, healthcare employers, especially those whose employees will be rendering care or assistance to vulnerable, frail or seriously impaired patients or entering patients' private residences, should consider conducting comprehensive criminal background checks on all such applicants. These additional checks—which can be done at a modest cost—can be invaluable when making employment

301 72 A. 3d 929 (2013).

302 Following the physician's death, the owner of his former residence discovered behind a fake wall 50,000-60,000 photographs and more than 100 films containing child pornography. Many of the children filmed had participated in the physician's child growth study.

decisions and defending against negligent hiring, supervision and retention claims. There are, however, legal risks associated with conducting such background checks that present their own unique set of legal challenges and are addressed in the latter half of this section.

From the recruiting and hiring perspective, healthcare employers face significant risks by hiring employees without conducting criminal background checks. As discussed above, an employer's failure to conduct a thorough background screening could subject the employer to tort liability, as well as liability for violating specific state statutes, agency regulations and/or local ordinances that mandate criminal background checks for certain employees. What can healthcare employers do to reduce their potential liability?

While no method is foolproof and each case presents its own set of facts and circumstances, the following are steps healthcare employers can take to help minimize risk:

- Verify an applicant's identity.
- Verify education history, licenses and certifications required for the position.
- Research state and/or federal background check requirements for specific occupations.
- Investigate employment history, including dates of employment, employment gaps, compensation, job titles and responsibilities.
- Search, as appropriate to the job position being filled, the List of Excluded Individuals/Entities (LEIE) maintained by the U.S. Department of Health and Human Services' (HHS) Office of the Inspector General (OIG); federal exclusion lists and state Medicaid lists; the General Services Administration (GSA) System for Award Management (SAM) [formerly Excluded Parties List System (EPLS)]; the National Practitioner Data Bank; or the Fraud and Abuse Control Information System (FACIS) for the applicant's name.
- Perform criminal background checks to determine any risks to other employees, patients and/or third parties.
- Expand core screenings to include sex offender registry checks and drug tests based on the level of the employee's patient interaction and control.

Armed with information about negligent hiring, supervision and negligent retention claims, employers should consider broadening existing pre-employment background checks for healthcare employees to encompass the above-identified subject areas. The more information obtained about an applicant before they are hired, the more confidence an employer can have in that hiring decision and its potential legal consequences.

C. Discrimination and Ex-Offender Laws

Ex-offenders present one of the biggest negligent hiring risks and challenges for employers, especially in the healthcare industry. As discussed above, checking an applicant's criminal history is a logical way for employers to safeguard themselves against the risks posed by hiring ex-offenders. An employer's use of an individual's criminal history when making employment decisions, however, opens the door to liability under anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, as amended, which prohibits discrimination based on race, color, national origin, sex, and other factors. Specifically, an employer's neutral policy of excluding applicants from employment based on certain criminal conduct may disproportionately impact some individuals and can violate Title VII if the policy is not job-related and consistent with business necessity.

The EEOC co-authored guidelines to aid employers in developing background check policies that comply with Title VII and other federal anti-discrimination laws. To minimize the risk of Title VII liability associated with background checks, the EEOC advises employers to treat everyone equally by applying the same standards to everyone. Employers should take special care when basing employment decisions on background issues that may be more common among people who fall into certain protected categories, such as race, color, national origin, or sex. Employers should also be prepared to make exceptions if a background check reveals problems that stem from a disability, to avoid liability under the Americans with Disabilities Act. Employers should preserve any personnel employment records—including application forms—for at least one year after making the records or taking a personnel action, whichever is later. The EEOC extends this requirement to two years for educational institutions and state and local governments.

Some state and local laws and regulations restrict the employment of individuals who have records of certain criminal conduct. These laws and regulations frequently affect healthcare providers because they often prohibit individuals who have been convicted of certain crimes from working in close proximity to vulnerable individuals, such as children, the

elderly, and the mentally infirm. Unlike similar federal laws and regulations, Title VII preempts these state and local laws and regulations if they “purport[] to require or permit the doing of any act which would be an unlawful employment practice” under Title VII. Therefore, the fact that a criminal background check policy aims to ensure compliance with state or local law does not preclude Title VII liability.

By way of example, consider the following: John, who is African American, applies for a position as a nurse at a pediatric hospital in a state that imposes criminal record restrictions on employees who work with children. The hospital performs a background check and discovers that John was convicted of indecent exposure two years ago. Even if this policy were found to have a disparate impact on African American men, the EEOC would likely find the policy permissible because the exclusion is job-related for the position in question and consistent with business necessity because it responds to serious safety risks of employment in a job that involves regular contact with children.

1. “Ban-the-Box” Laws

Public policy interests support encouraging ex-offenders to reenter the workforce. One method of promoting this policy is to restrict employers’ inquiries into, and use of, criminal records for employment purposes. These laws—known as “ban-the-box laws” because they limit employers’ abilities to ask job applicants to check a box on the application if they have been convicted of a crime—have become increasingly popular in recent years. More than 100 localities and 20 states have adopted such laws, many of which extend only to government employers and government contractors.³⁰³ To date, only the District of Columbia, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon and Rhode Island and certain localities have passed laws that apply to private employers.

States and localities have taken different approaches to banning the box. Some, such as Illinois, Massachusetts, and Minnesota, allow employers to investigate an applicant’s criminal background at the interview stage. New Jersey specifies that inquiries cannot occur until after the first interview. Other jurisdictions, such as Hawaii, the District of Columbia, and Rhode Island, require employers to wait until making a conditional offer of employment before inquiring about criminal convictions. Even then, many jurisdictions prohibit employers from making hiring decisions based on criminal history unless the crime bears some relationship to the job in question.

Importantly for healthcare employers, many of these laws contain exceptions that allow employers to comply with government-mandated background check requirements, such as those that apply to providers serving children, the elderly, or the mentally infirm.

2. Immunity and Ex-Offender Laws

Although the ban-the-box laws described above further the important public policy goal of allowing ex-offenders to reenter the workforce, these record restrictions also hamper employers’ abilities to minimize their exposure to negligent hiring claims by making hiring decisions based on applicants’ criminal histories.

Recognizing that employers risk potential tort exposure when they hire ex-offenders, some state legislatures have taken steps to protect employers from negligent hiring and retention claims. Laws in some states make it easier for employers to defend against negligent hiring or retention lawsuits when they hire ex-offenders with certificates of rehabilitation or similar documentation showing their suitability for employment. For example, one Ohio law provides that an employer cannot be held liable for a negligent hiring claim stemming from an ex-offender’s conduct if the ex-offender obtained a certificate of qualification for employment and the employer knew about the certificate when the alleged negligence occurred. Knowledge of the certificate does not render the employer immune to negligent retention claims, if a person with hiring and firing responsibility knew that an employee was dangerous or had been convicted of a subsequent felony and willfully retained the employee despite that knowledge.

Other states have taken different approaches to mitigating the liability risk that employers face when they hire ex-offenders. Some states preclude liability or make it more difficult to introduce ex-offenders’ criminal records as evidence when the employer took certain measures to ensure that the ex-offender did not pose a risk to the public, such as conducting a criminal background check using the state’s criminal records database. Other states look to the reasonableness of the employer’s decision to hire or retain the ex-offender, in light of the ex-offender’s criminal history and other considerations, to determine whether immunity or the exclusion of conviction evidence is appropriate. For example, in the District of Columbia, an employee’s criminal history information cannot be used as evidence in a lawsuit

³⁰³ See Jennifer Mora, *Private-Sector Employers Doing Business with Local Governments may be Subject to Even More Ban-the-Box and Other Laws Restricting Consideration of Criminal Records*, Littler Insight (July 13, 2015).

against his employer if the employer made a reasonable, good-faith decision to hire or retain the employee based on his job duties, how much time had elapsed since the offense(s), the employee's age at the time of the offense(s), the frequency and seriousness of the offense(s), information regarding rehabilitation and good conduct, and the public policy in favor of employing ex-offenders.

Texas and Louisiana place practically no investigatory or reasonableness burden on employers through their immunity statutes. With certain exceptions, their laws preclude civil suits against an employer for negligent hiring based on evidence of an employee's prior conviction unless, for example, the conviction involved a particular sexual or violent offense or the employer knew or should have known about the employee's prior conviction for a crime committed while performing similar job duties.

D. Final Thoughts about Minimizing the Risk of Negligence Claims

Healthcare employers must bear in mind that this area of law is complex and may differ significantly from state-to-state and from municipality-to-municipality. For example, as discussed above, the EEOC, as well as several states and municipalities, restrict pre-employment inquiries about arrests or convictions, and some states and municipalities prohibit employers from refusing to hire employees with criminal convictions in certain instances. While many of these laws do not apply in situations involving mandatory background check requirements, employers should obtain legal advice before implementing or modifying a screening program to ensure that the program and the employer's filtering criteria are legally compliant in the jurisdictions in which it will be administered.

VII. IMMUNITIES AND PRIVILEGES UNDER THE HEALTHCARE QUALITY IMPROVEMENT ACT

In an effort to improve the quality of medical care by encouraging physician participation in professional review committees, Congress enacted the Health Care Quality Improvement Act (“HCQIA”).³⁰⁴ Under the HCQIA, a professional review body is provided immunity from monetary damages when it takes an adverse action against a physician, provided the action meets the statutory definition of “professional review action” and the entity follows certain procedures set forth in the statute.³⁰⁵ This immunity reaches not only the professional review body, but also provides for immunity for hospitals, doctors, and others who participate in professional peer review proceedings or file reports with the National Practitioner’s Data Bank (“NPDB”).³⁰⁶ Importantly, HCQIA immunity does not apply to claims brought under civil rights statutes.³⁰⁷

“Professional review actions” are actions or recommendations of a professional review body that are based on the competence or professional conduct of an individual physician, and that adversely affects, or may adversely affect, the clinical privileges of the physician.³⁰⁸ To secure the immunity offered under the HCQIA, the “professional review action” in question must have been taken:

- (1) in the reasonable belief that the action was in the furtherance of quality healthcare,
- (2) after a reasonable effort to obtain the facts of the matter,
- (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
- (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).³⁰⁹

The statute further establishes a presumption that a professional review action has met these standards, and thus qualifies for immunity, “unless the presumption is rebutted by a preponderance of the evidence.”³¹⁰

In addition, certain professional review actions must be reported to the NPDB. Professional review actions that adversely affect the clinical privileges of a physician for a period longer than 30 days must be reported to the NPDB.³¹¹ Healthcare entities must also report physicians that surrender clinical privileges while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct.³¹² The HCQIA contains a separate immunity provision pertaining to reports made to the NPDB.³¹³ However, a healthcare entity cannot benefit from either of the HCQIA immunity provisions if it fails to satisfy the NPDB reporting requirements.³¹⁴

A. Professional Review Action

The HCQIA defines “professional review action” as an action or recommendation to reduce, restrict, suspend, revoke, deny, or not renew the clinical privileges or membership of a physician in a professional society based on the physician’s competence or professional conduct that adversely affects (or could adversely affect) the health or welfare of a patient.³¹⁵

304 42 U.S.C. §§ 11101-11152.

305 42 U.S.C. § 11111(a)(1). It should be noted that immunity is limited to actions for monetary damages, and does not apply to injunctive or other non-monetary relief. See *Islami v. Covenant Med. Ctr.*, 822 F.Supp. 1361, 1376 (N.D. Iowa 1992).

306 Immunity applies to “any person who participates with or assists the body with respect to the action.” 42 U.S.C. §§ 11111(a)(2), 11133. As discussed later in this chapter, the NPDB is an information clearinghouse that collects certain information related to the professional competence and conduct of physicians and makes such information available to eligible entities and individuals.

307 The immunity provision in the HCQIA does not apply to civil rights claims under federal and state law. 42 U.S.C. § 11111(a). This exception includes discrimination claims brought under Title VII of the Civil Rights Act, 42 U.S.C. § 1981, and state anti-discrimination laws. See *Johnson v. Complete Med. Care*, 334 F. App’x 673, 684 (5th Cir. 2009) (alleging, among other claims, race discrimination under 42 U.S.C. §1981); *Brintley v. St. Mary Mercy Hosp.*, No. 09-cv-14014, 2012 U.S. Dist. LEXIS 163909, at *23 (E.D. Mich. Nov. 16, 2012) (alleging, among other claims, gender and race discrimination under Title VII and the Michigan Elliot-Larsen Civil Rights Act).

308 42 U.S.C. § 11151(9).

309 42 U.S.C. § 11112(a).

310 *Id.*

311 42 U.S.C. § 11133(a)(1)(A).

312 42 U.S.C. § 11133(a)(1)(B).

313 42 U.S.C. § 11137; See *Hooda v. W.C.A. Serv. Corp.*, 2013 U.S. Dist. LEXIS 71809, *12-13 (W.D.N.Y. May 17, 2013) (analyzing separate immunity provisions under HCQIA).

314 42 U.S.C. § 11133(c).

315 *Id.* §11151(9).

The definition also includes formal decisions not to take such actions or make such recommendations.³¹⁶ Actions that do not relate to the competence or professional conduct of a physician, such as actions regarding fees, manner of billing, advertising, or participation in a pre-paid health plan, are not “professional review actions.”³¹⁷ However, “[u]nprofessional behavior on the part of physicians, regardless of its relationship to medical competence, falls within the purview of HCQIA’s definition of professional review action.”³¹⁸

B. Reasonable Belief that the Action was in Furtherance of Quality Healthcare

The requirement that the action was taken “in the reasonable belief that [it] was in the furtherance of quality health care” is met if “the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients.”³¹⁹ In this regard, concern about “quality health care” is “not limited to clinical competence, but includes matters of general behavior and ethical conduct.”³²⁰ Many courts have recognized that disruptive physician behavior poses a threat to patient health and safety.³²¹

To that end, the Sixth Circuit recognized in *Meyers v. Columbia/HCA Healthcare Corporation* that a peer review committee reasonably acted “in furtherance of quality health care” as a matter of law in suspending the privileges of a physician who repeatedly engaged in temper tantrums, coercive conduct, and displayed a chronic inability to work with others, “despite the fact that no patients were actually injured.”³²²

There are instances in which off-duty conduct may result in a professional review action under the HCQIA. “A physician’s competence can be implicated by conduct outside a health care facility if there is a clear nexus between that conduct and the ability to render patient care.”³²³ In *Moore v. Williamsburg Regional Hospital*, a physician brought suit against a hospital that suspended his staff privileges because he was accused of sexually abusing his adopted daughter. In determining whether the hospital was entitled to immunity under the HCQIA, the court addressed whether the suspension, which was based solely on conduct outside the professional context, could be deemed based on “competence or professional conduct that adversely affects (or could adversely affect) the health or welfare of a patient,” and, thus, constitute a “professional review action” under the HCQIA. The court concluded that there was “a clear nexus between the basis for plaintiff’s suspension (evidence of child sexual abuse) and his medical practice (involving children) such that the hospital legitimately feared that plaintiff might harm child patients.” Accordingly, the court found the suspension to be a “professional review action” and within the scope of HCQIA immunity.

Moreover, actual harm to a patient is not required.³²⁴ “It is enough that a physician is disciplined for conduct that could result in harm to a patient.”³²⁵ Courts will generally not substitute their judgment for that of the healthcare entity as to whether a physician’s conduct did or could have an adverse impact on patient health or welfare.³²⁶ Similarly, the HCQIA also does not require that the professional review action result in *actual* improvement in the quality of healthcare.³²⁷ Instead, it merely requires that the action “was undertaken in the reasonable belief that quality health care was being

316 *Id.*

317 *Id.*

318 *Gordon v. Lewiston Hosp.*, No. 1:Civ-99-1100, 2001 U.S. Dist. LEXIS 25644, at *48 (M.D. Pa. May 21, 2001), *aff’d*, 423 F.3d 184 (3d Cir. 2005).

319 *Bryan v. James Holmes Regional Med. Ctr.*, 33 F.3d 1318, 1335 (11th Cir. 1994) (citing H.R. Rep. No. 902, at 10, reprinted in 1986 U.S.C.C.A.N. at 6393).

320 *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 469 (6th Cir. 2003).

321 *See, e.g., Brader v. Allegheny General Hosp.*, 167 F.3d 832, 840-41 (3d Cir. 1999) (reasoning that the hospital acted in the reasonable belief that it was protecting patient safety when it suspended the privileges of a physician who was a “disruptive force” at the hospital and “exercised poor judgment repeatedly in his surgical, teaching, and personal interactions”); *Morgan v. PeaceHEALTH, Inc.*, 14 P.3d 773, 783 (Wash. Ct. App. 2000) (“Undoubtedly, unprofessional conduct may adversely affect the quality of health care. Even unprofessional conduct toward other staff members may detrimentally affect patient care.”).

322 *Brader*, 167 F.3d at 468-69.

323 *See Moore v. Williamsburg Regional Hospital*, 560 F.3d 166, 168 (4th Cir. 2009).

324 *Williamsburg Regional Hospital*, 560 F.3d at 1285.

325 *Id.*

326 *See, e.g., Gordon v. Lewistown Hosp.*, 423 F.3d 184, 204 (3d Cir. 2005) (“Nor will this Court substitute its judgment for that of health care professionals and the governing body of the Hospital as to whether [the physician’s] conduct either did or could have an adverse impact on patient health or welfare.”).

327 *Meyers*, 341 F.3d at 468.

furthered.”³²⁸ The test for reasonableness “is an objective one.”³²⁹ Thus, allegations of personal or professional bias or hostility toward the individual on the part of the reviewers are immaterial if there was an objectively reasonable basis for the professional review action.³³⁰

C. Reasonable Effort to Obtain the Facts

To qualify for immunity, the action must also be taken “after a reasonable effort to obtain the facts of the matter.”³³¹ The proper inquiry under this standard is whether the “totality of the process” leading up to the professional review action “evidenced a reasonable effort to obtain the facts of the matter.”³³² For this reason, courts have generally found there was “a reasonable effort to obtain the facts” when there has been multiple levels of investigation and review.³³³

To meet this standard, however, a healthcare entity cannot merely rely on an asserted fact or a report regarding the physician’s alleged misconduct.³³⁴ In *Smigaj v. Yakima Valley Memorial Hospital Association*, the court denied immunity to a hospital because it did not make a “reasonable effort to obtain the facts” before suspending an obstetrician/gynecologist for alleged poor clinical judgment and disruptive behavior.³³⁵ In that case, the hospital decided to conduct an investigation of the physician’s practice following an issue regarding the appropriate procedures in the delivery of a baby in a high-risk pregnancy. The peer review committee engaged an external reviewer and provided him with records relating to three of the physician’s cases.³³⁶

The peer review committee also requested a written response from the physician regarding the cases and asked her to attend a committee meeting to discuss them.³³⁷ At the meeting, she explained her care and provided the committee with copies of an independent evaluation by an outside physician who concluded that nothing in the management of the cases deserved criticism.³³⁸ Following a subsequent meeting, the committee concluded that the physician exhibited poor clinical judgment in each of the three cases and that these issues, combined with past concerns, constituted an unacceptable risk to patients.³³⁹ As a result, the hospital suspended the physician’s privileges, while proceeding with further review of all of her current and past cases that raised quality concerns.³⁴⁰

Although the physician’s privileges were later reinstated, she filed suit in state court. The court denied the hospital’s assertion of immunity under the HCQIA, concluding that the suspension was not made after a “reasonable effort to obtain the facts,” as required under section 11112(a)(2) of the Act.³⁴¹ According to the court, the peer review committee relied on the external reviewer’s conclusions regarding three of the plaintiff’s cases, but failed to interview the reviewer about two of them and did not receive his reports on the cases until after the suspension was imposed.³⁴² Instead, hospital leadership spoke to the reviewer about two of the cases, and then reported the information to the committee.³⁴³ The court found that the committee’s failure to take steps to obtain the reviewer’s opinions directly and accurately was

328 *Id.*

329 *Poliner v. Tex. Health Sys.*, 537 F.3d 368 (5th Cir. 2008); *Deming v. Jackson-Madison County Gen. Hosp. Dist.*, 553 F. Supp. 2d 914, 925 (W.D. Tenn. 2008); *Reyes v. Wilson Mem’l Hosp.*, 102 F. Supp. 2d 798, 811 (S.D. Ohio 1998) (“[W]hat is relevant, and dispositive, is whether there existed an objectively reasonable basis for the defendant’s actions.”).

330 *Hein-Muniz v. Aiken Reg’l Med. Ctrs.*, 2012 U.S. Dist. LEXIS 153164 (D.S.C. Oct. 25, 2012) (finding immunity despite physician’s claims that some peer review panel members were competitors and therefore acted with bias against her); *Wood v. Archbold Medical Center, Inc.*, 738 F. Supp. 2d 1298 (M.D. Ga. 2010) (claim that action against physician was taken “as part of a continuing effort to drive him out of the relevant markets and control competition” irrelevant).

331 42 U.S.C. § 11112(a).

332 *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 637 (3d Cir. 1996).

333 See, e.g., *Hein-Muniz*, 2012 U.S. Dist. LEXIS 153164, at *13-14 (holding that a hospital made a reasonable effort to obtain the facts because the peer review action included a multi-level review process and an exhaustive fact finding); *Mazen Abu-Hatab v. Blount Mem’l Hosp., Inc.*, 2009 U.S. Dist. LEXIS 28239, at *34-35 (E.D. Tenn. Apr. 2, 2009) (holding that the hospital made a reasonable effort to obtain the facts when it conducted a “thorough and well-documented investigation”).

334 *Smigaj v. Yakima Valley Mem’l Hosp. Assoc.*, 269 P.3d 323, 333 (Wash. 2012).

335 *Id.* at 327-28.

336 *Id.*

337 *Id.*

338 *Id.* at 330.

339 *Id.*

340 *Id.*

341 *Id.* at 333.

342 *Id.* at 333-34.

343 *Id.*

unreasonable.³⁴⁴ Moreover, the committee did not interview any of the hospital's nurses or physicians, or the chair of the department.³⁴⁵ The court concluded that the committee's "failure to obtain timely written reports from [the external reviewer], or to at least interview him by conference call, and [the committee's] failure to interview hospital physicians and nurses, and the chair of the hospital's ob/gyn department, constituted an unreasonable investigation under the circumstances."³⁴⁶

In contrast, the court in *Pal v. Jersey City Medical Center* found the defendant-hospital put forth a "reasonable effort to obtain facts" about an applicant when it called several of the applicant's former supervisors and relied on numerous negative responses when it declined to extend clinical privileges to the applicant.³⁴⁷ The court noted that reviewers who take the initiative to speak with an applicant's former supervisors who are not listed as references are conducting a "diligent and comprehensive investigation" of an applicant's merit.³⁴⁸

D. Adequate Notice and Hearing Procedures

To qualify for immunity, the HCQIA mandates that a healthcare entity take action only after providing the affected physician with "adequate notice and hearing procedures" or "such other procedures as are fair to the physician under the circumstances."³⁴⁹ Generally, healthcare entities have bylaws that provide physicians with a certain amount of due process before an adverse action can be taken regarding the physician's clinical privileges or staff membership. From a practical standpoint, bylaw compliance will generally constitute proof of "such other procedures as are fair to the physician under the circumstances" unless the bylaws themselves are found not to provide adequate protections.³⁵⁰

Although the HCQIA does not explicitly state what procedures must be employed to meet the "adequate notice and hearing" standard, the statute includes a safe harbor provision, in the form of a detailed checklist, that sets forth specific procedures that will meet the standard. These safe harbor procedures are as follows:

Notice of the Proposed Action. The healthcare entity must provide the physician with notice that a professional review action has been proposed to be taken against the physician.³⁵¹ The notice must contain the following information:

- The reasons for the proposed action;³⁵²
- Notice that the physician has the right to request a hearing on the proposed action;³⁵³
- Any time limit (of not less than 30 days) within which to request such a hearing;³⁵⁴
- A summary of the physician's rights (as set forth below) in the hearing.³⁵⁵

Notice of the Hearing. If the physician requests a hearing within the specified time limit, the healthcare entity must provide the physician notice of the following information:

- The place, time, and date of the hearing;³⁵⁶
- A list of witnesses (if any) expected to testify at the hearing on behalf of the professional review body.³⁵⁷
- The date of the hearing must not be less than 30 days after the date of the notice.³⁵⁸

344 *Id.*

345 *Id.* at 334.

346 *Id.*

347 2014 U.S. Dist. LEXIS 151928, *30-31 (D.N.J. Oct. 24, 2014)

348 *Id.*

349 42 U.S.C. § 11112(a).

350 *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 609 (4th Cir. 2009) ("Nothing in the subsection (a)(3) phrase 'such other procedures as are fair...under the circumstances' mandates by-law compliance as the sine qua non for immunity, although from a practical standpoint, by-law compliance may often be proof of such procedures in many cases.")

351 42 U.S.C. § 11112(b)(1)(A)(i).

352 42 U.S.C. § 11112(b)(1)(A)(ii).

353 42 U.S.C. § 11112(b)(1)(B)(i).

354 42 U.S.C. § 11112(b)(1)(B)(ii).

355 42 U.S.C. § 11112(b)(1)(C).

356 42 U.S.C. § 11112(b)(2)(A).

357 42 U.S.C. § 11112(b)(2)(B).

358 42 U.S.C. § 11112(b)(2)(A).

Hearing Procedures. The hearing must be held (as determined by the healthcare entity) before any of the following:

- An arbitrator mutually acceptable to the physician and the healthcare entity;³⁵⁹
- A hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved;³⁶⁰ or
- A panel of individuals who are appointed by the entity and who are not in direct economic competition with the physician involved.³⁶¹
- In addition, the physician must be provided with the following rights during and after the hearing:
 - The right to representation by an attorney or other person of the physician's choice;³⁶²
 - The right to have a record made of the proceedings;³⁶³
 - The right to call, examine, and cross-examine witnesses;³⁶⁴
 - The right to present relevant evidence (as determined by the hearing officer), regardless of its admissibility in a court of law,³⁶⁵
 - The right to submit a written statement at the close of the hearing;³⁶⁶
 - The right, upon completion of the hearing, to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendation;³⁶⁷
 - The right, once a final decision is made, to receive a written decision of the healthcare entity, including a statement of the basis for the decision.³⁶⁸

Although the above procedures satisfy the “notice and hearing” safe harbor requirements of the HCQIA, it is important to note that a healthcare entity’s failure follow these procedures will not automatically result in the forfeiture of immunity. Even if a healthcare entity does not provide a physician with notice and a hearing prior to taking a professional review action, the entity may still be entitled to immunity if it takes the action “after such other procedures as are fair to the physician under the circumstances.”³⁶⁹

For example, in *Fox v. Good Samaritan Hospital*, a physician claimed that a hospital that suspended his privileges for violating a hospital policy regarding alternate call coverage was not entitled to immunity under the HCQIA because he was not provided with a hearing before being suspended.³⁷⁰ The court held that a hearing was not necessary under the “unique circumstances” of the case.³⁷¹ Because the physician did not dispute that he violated the hospital’s policy, there were no disputed facts at issue, and therefore, the court concluded, a “formal hearing geared toward resolving factual disputes” was unnecessary. Rather, the court explained, the physician disagreed with the substance of the policy, and the hospital had offered him an opportunity to challenge the policy in informal hearings before the hospital’s executive committee and board of trustees. The court held that these hearings were “fair to the physician under the circumstances.”³⁷² Accordingly, the court held that the hospital was entitled to immunity.

In other circumstances, courts may look to the elements of constitutional due process to determine what is “fair to the physician.” In *Osuagwu v. Gila Regional Medical Center*, for example, a federal court found a physician was deprived of fundamental constitutional due process rights when he was not given the opportunity to cross examine witnesses who

359 42 U.S.C. § 11112(b)(3)(A)(i).

360 42 U.S.C. § 11112(b)(3)(A)(ii).

361 42 U.S.C. § 11112(b)(3)(A)(iii).

362 42 U.S.C. § 11112(b)(3)(C)(i).

363 42 U.S.C. § 11112(b)(3)(C)(ii). If, however, the physician wants transcripts of the proceeding, he or she must pay any reasonable charges associated with the preparation thereof. *Id.*

364 42 U.S.C. § 11112(b)(3)(C)(iii).

365 42 U.S.C. § 11112(b)(3)(C)(iv).

366 42 U.S.C. § 11112(b)(3)(C)(v).

367 42 U.S.C. § 11112(b)(3)(D).

368 *Id.*

369 42 U.S.C. § 11112(a).

370 467 F. App'x 731, 735 (9th Cir. 2012). *But see, Bode v. L.A. Doctors Hosp. Corp.*, 2014 Cal. App. Unpub. LEXIS 5888 (Cal. App. 2d Dist. Aug. 20, 2014) (Immunity not available due to lack of notice and hearing procedures where anesthesiologist was briefly suspended and her clinical privileges were not renewed “because of issues surrounding the return of controlled substances.”)

371 *Id.*

372 *Id.*

testified against him at a hearing that led to the termination of his privileges.³⁷³ The court also found that the procedure was not “procedurally fair” because “the CMO [Chief Medical Officer]—who held a position of power over all of the physicians who participated in the disciplinary proceedings—served as the accuser, investigator, prosecutor, and one of the judges.”³⁷⁴

E. Reasonable Belief that Action was Warranted by the Facts

To qualify for immunity, the action must also be taken “in the reasonable belief that action was warranted by the facts known after such reasonable effort to obtain facts” and after meeting the aforementioned notice and hearing requirements.³⁷⁵ The courts’ analysis of this standard closely tracks that of § 11112(a)(1) (“reasonable belief that the action was in the furtherance of quality health care”).³⁷⁶ Accordingly, a plaintiff’s showing that the healthcare entity reached an incorrect conclusion is immaterial, unless the entity relied on information or reports that were “so obviously mistaken or inadequate as to make reliance on them unreasonable.”³⁷⁷

Although claims of retaliation would not ordinarily be foreclosed by HCQIA immunity, the peer review process may help to fend off retaliation claims. In *Freilich v. Upper Chesapeake Health Systems, Inc.*, the court found a healthcare entity could assert HCQIA immunity to a physician’s claims, which included a claim of retaliation, after the physician was terminated for unprofessional conduct following peer review procedures that included 12 meetings over the course of two years.³⁷⁸ The physician made a number of complaints that she claimed were intended to improve the entities’ “substandard” quality of care. The court found HCQIA immunity still applied because the physician was unable to establish a link between the “professional review action and its allegedly illegitimate basis.” The court noted “[e]vidence of retaliatory animus is one of many types of evidence that can contribute, in the totality of the circumstances, to a finding that an action did not meet the standards for immunity set forth in the [HCQIA].”³⁷⁹

F. Reporting Requirements Under Federal and State Law

Congress enacted HCQIA to prevent malpractice, improve the quality of healthcare, and ensure that incompetent physicians could not move from state to state without disclosing a physician’s previous damaging or incompetent performance.³⁸⁰ To that end, the HCQIA led to the establishment of the National Practitioner Data Bank, an information clearinghouse that collects certain information related to the professional competence and conduct of physicians and makes such information available to eligible entities and individuals.³⁸¹

The HCQIA sets forth specific circumstances under which entities must report a physician to the NPDB. For instance, insurance companies are required to report medical malpractice payments,³⁸² boards of medical examiners are required to report sanctions imposed against physicians,³⁸³ and healthcare entities are required to report adverse professional review information.³⁸⁴

More specifically, a healthcare entity must report any professional review action in which the physician’s clinical privileges or membership in the entity are reduced, restricted, revoked, denied, or non-renewed for a period longer than 30 days.³⁸⁵ A healthcare entity must also report any instance in which it accepts a physician’s surrender of clinical privileges while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or in return for not conducting such an investigation or proceeding.³⁸⁶ The reports must be made

373 *Osuagwu v. Gila Reg’l Med. Ctr.*, 850 F. Supp. 2d 1216, 1235 (D.N.M. 2012).

374 *Id.* at 1239.

375 42 U.S.C. § 11112(a)(2).

376 See *Poliner*, 537 F.3d at 384; *Meyers*, 341 F.3d at 472; *Brader*, 167 F.3d at 843.

377 *Poliner*, 537 F.3d at 380 (stating that a peer review chairman was entitled to rely on information provided to him by other doctors, and there was “nothing to suggest that the information was facially flawed or otherwise so obviously deficient so as to render Defendants’ reliance ‘unreasonable’”).

378 423 Md. 690, (Md Ct App. 2011).

379 *Id.* at 707.

380 *Murphy v. Goss*, 2015 U.S. Dist. LEXIS 50818, *4 (D. Or. Apr. 16, 2015) (discussing the HCQIA requirements to report peer review actions to the NPDB and state medical boards).

381 45 C.F.R. Part 60.1. See also NPDB Guidebook, available at www.npdb-hipdb.hrsa.gov/resources/NPDB_Guidebook.pdf.

382 42 U.S.C. § 11131.

383 42 U.S.C. § 11132.

384 42 U.S.C. § 11133.

385 42 U.S.C. § 11133(a)(1)(A).

386 42 U.S.C. § 11133(a)(1)(B).

within 15 days from the date the adverse action was taken or clinical privileges were voluntarily surrendered,³⁸⁷ and must contain the following information:

- The name of the physician involved;
- A description of the acts or omissions or other reasons for the action or, if known, the surrender; and
- Such other information respecting the circumstances of the action or surrender as the Secretary of Health and Human Services deems appropriate.³⁸⁸

The healthcare entity must also print a copy of the NPDB report and mail it to the appropriate state licensing board for its use.³⁸⁹

If the U.S. Department of Health and Human Services has reason to believe a healthcare entity has failed to report a physician as required, it may conduct an investigation and, if the investigation shows non-compliance with the reporting requirements, the entity will be given written notice, an opportunity to correct the noncompliance, and an opportunity for a hearing. If it is determined that the healthcare entity has failed to substantially meet its reporting requirements under the HCQIA, the name of the entity will be published in the *Federal Register*, and it will lose HCQIA immunity for a period of three years.³⁹⁰

HCQIA contains two separate immunity provisions: immunity for reports made to the NPDB and professional review action immunity.³⁹¹ Where claims relate only to an allegedly false report to the NPDB, rather than to the validity of a peer review action, only the immunity granted by Section 11137 (the reporting provision) applies. Section 11137(c) provides that no person or entity “shall be held liable in any civil action with respect to any report made under this subchapter...without knowledge of the falsity of the information contained in the report.”³⁹² “[I]mmunity for reporting exists as a matter of law unless there is sufficient evidence for a jury to conclude the report was false and the reporting party knew it was false.”³⁹³ In addition, Section 11137(c) immunity provides immunity from both damages and suits for injunctive relief, while professional review action immunity provides immunity only over actions for monetary damages, and not over actions for injunctive relief.³⁹⁴

In evaluating a report to the NPDB, courts do not evaluate whether the underlying merits of the reported action were properly determined. Instead, “the court’s role is to evaluate whether the report itself accurately reflected the action taken.”³⁹⁵

387 45 C.F.R. Part 60.5(c).

388 42 U.S.C. § 11133(a)(3).

389 See NPDB Guidebook, *supra* note 381, at E-17.

390 42 U.S.C. § 11111.

391 Immunity pertaining to reports made to the NPDB is provided under 42 U.S.C. § 11137, while peer review action immunity is provided under 42 U.S.C. §§ 11111, 11112. See *Murphy v. Goss*, 2015 U.S. Dist. LEXIS 50818 (D. Or. Apr. 16, 2015) (analyzing separate immunity provisions under HCQIA).

392 *Murphy*, 2015 U.S. Dist. LEXIS 50818 (Presumption of immunity could not be overcome where plaintiff alleged information in report was false, but failed to allege the “report was knowingly false.”); *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1333 (10th Cir.1996) (refusing to grant immunity in case where report to NPDB did not accurately reflect the findings of the professional review action, and there was sufficient evidence from which a reasonable jury could have concluded that the report was false and the defendant knew of its falsity).

393 *Ritten v. Lapeer Regional Med. Cntr.*, 611 F. Supp. 2d 696, 733 (E.D. Mich. 2009).

394 See *Sheikh v. Grant Regional Health Ctr.*, 2014 U.S. Dist. LEXIS 69, *8 (W.D. Wis. Jan. 2, 2014) (contrasting Section 11137(c)’s “complete” grant of immunity with Section 11111’s more limited grant of immunity from damages); *Reyes v. Wilson Mem’l Hosp.*, 102 F. Supp. 2d 798, 822 (S.D. Ohio 1998).

395 *Kunajukr v. Lawrence & Mem’l Hosp., Inc.*, 2009 U.S. Dist. LEXIS 129545, 2009 WL 651984, at *23 (D. Conn. Jan. 12, 2009).

Reporting requirements exist under state law as well. Some states have reporting requirements similar to those set forth in the HCQIA.³⁹⁶ Others, however, differ by requiring that reports must be made within a different period of time, either more or less than the 15-day reporting period in the HCQIA, and/or requiring broader reporting than required under the HCQIA.³⁹⁷ In addition, some states impose hefty monetary penalties for failing to comply with reporting requirements.³⁹⁸ Other states require reporting of actions against physicians and non-physician practitioners.³⁹⁹

Because of the complexity involved and the potential penalties for noncompliance, consultation with counsel regarding HCQIA reporting is recommended.

396 See, e.g., CAL. BUS. & PROF. CODE §805(b).

397 See, e.g., OHIO REV. CODE § 4731.224 (requiring reporting, within 60 days, “any action resulting in the revocation, restriction, reduction, or termination of clinical privileges for violations of professional ethics, or for reasons of medical incompetence, medical malpractice, or drug or alcohol abuse,” including, “a summary action, an action that takes effect notwithstanding any appeal rights that may exist, and an action that results in an individual surrendering clinical privileges while under investigation and during proceedings regarding the action being taken or in return for not being investigated or having proceedings held”); GA. CODE ANN. § 31-7-8 (2012) (requiring reporting, within 20 days, of any denial, restriction, or revocation of medical staff privileges for “any reason involving the medical care given [the physician’s] patient”).

398 See e.g., VA. CODE § 54.1-2400.6 (civil penalties up to \$25,000); Kan. Stat. Ann. §§65-4921; 65-4923; 65-28,121; 65-4216 (penalty up to \$1000 per day incident goes unreported).

399 See e.g., WASH. ADMIN. CODE § 246-840-730 (Reporting required for nurses and nurse practitioners); Mo. ANN. STAT. §§ 334.100; 383.130; 383.133 (reporting applies to all “health care professionals”).

VIII. PREVENTING AND RESPONDING TO DISCRIMINATION AND HARASSMENT

Healthcare employers today face a myriad of discrimination and harassment claims⁴⁰⁰ as the Equal Employment Opportunity Commission continues to move forward with its Strategic Enforcement Plan (SEP).⁴⁰¹ The agency's SEP includes an emphasis on combating systemic discrimination and addressing discrimination based upon pregnancy, genetic information, sexual orientation or gender identity, among other areas. It is also important to keep in mind that healthcare employers have a duty to prevent and respond to claims of discrimination and harassment not only based on the conduct of employees, but also in response to the conduct of third parties, including patients.

A. Pregnancy Discrimination and Light Duty: The U.S. Supreme Court's Decision in *Young v. UPS*

On March 25, 2015, the U.S. Supreme Court issued its much-anticipated decision in *Young v. United Parcel Service*,⁴⁰² which was expected to clarify whether employers must provide light duty and other workplace accommodations to pregnant employees in the same manner they provide accommodations to employees who are injured on the job. This issue arises quite a bit in the healthcare setting, as patient care often involves strenuous activity, such as patient lifting. While the majority opinion did not answer this question directly, the Supreme Court provided a framework for pregnant employees challenging workplace accommodation policies and practices under Title VII of the Civil Rights Act (Title VII), as amended by the Pregnancy Discrimination Act (PDA).⁴⁰³

The plaintiff in this case worked as a part-time delivery driver. Although all drivers were required to be able to lift items weighing up to 70 pounds as an essential function of their jobs, the plaintiff's duties generally involved lighter letters and packages. After the plaintiff became pregnant, she asked for a brief leave of absence. Shortly thereafter, she submitted a doctor's note recommending that she not lift more than 20 pounds and accordingly asked for an accommodation to work light duty. The company regularly provided light duty to employees who suffered on-the-job injuries as well as to other categories of employees (such as those who had disabilities under the ADA, and drivers who lost DOT certification and were unable to drive). Young, like other men and women who did not fall into any of these categories, was therefore denied light duty. The company, however, also denied the plaintiff's return to work because the ability to lift more than 20 pounds was an essential job function. Young remained on an unpaid leave of absence for the duration of her pregnancy. The plaintiff sued, claiming that the PDA requires employers to provide pregnant employees with light-duty work if they provide similar work to other employees in other circumstances.

The case ultimately made its way to the Supreme Court, where a majority held that a pregnant employee can establish a prima facie case of disparate treatment by showing, under the familiar *McDonnell Douglas* burden-shifting framework: (1) she belongs to a protected class; (2) she sought an accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others "similar in their ability or inability to work." If these elements are established, an employer has the burden of production to proffer a legitimate, nondiscriminatory reason for denying the accommodation. The Court noted, however, that this reason must be more than an employer's claim that it is more expensive or less convenient to add pregnant women to the categories of those whom the employer accommodates. Once the employer proffers a legitimate, nondiscriminatory reason, the employee must establish that the employer's reason is pretextual.

The Court specifically held that a plaintiff could reach a jury by providing significant evidence that the employer's facially neutral policies impose a "significant burden" on pregnant employees and that the employer's legitimate, nondiscriminatory reasons are not "sufficiently strong" to justify the burden. By way of example, the Court noted that a showing of pretext could be made if the employer accommodated a large percentage of non-pregnant employees, while failing to accommodate a large percentage of pregnant employees.

400 Federal laws prohibit discrimination and harassment on the basis of race, color, national origin, sex, religion, disability, pregnancy, age, genetic status, and veteran status. State and local laws may contain additional protections, including anti-discrimination provisions related to sexual orientation or gender identity. Under federal and state law, it is also unlawful to retaliate against applicants or employees who engage in protected activity related to the enforcement of anti-discrimination and anti-harassment laws.

401 In 2012, the EEOC released its Strategic Plan for 2012-2016, detailing the areas where it would be focusing its attention during the next few years. As part of the Strategic Plan, the EEOC also drafted a Strategic Enforcement Plan, which establishes its enforcement priorities for fiscal years 2013-2016. <http://www.eeoc.gov/eeoc/plan/sep.cfm>

402 *Young v. United Parcel Service*, 575 U.S. ___, 135 S. Ct. 1338 (2015).

403 The Heavy Burden of Light Duty: *Young v. UPS*, Joseph P. Harkins, Alexis C. Knapp, Steven E. Kaplan, <https://www.littler.com/heavy-burden-light-duty-young-v-ups>

In remanding the case to the Fourth Circuit, the Court held that the plaintiff had in fact established a *prima facie* case of discrimination because the company had three separate accommodation policies (on-the-job, ADA, DOT) that, when taken together, demonstrate a genuine dispute as to whether the company provided more favorable treatment to at least some categories of employees under similar circumstances. The Court also noted that these policies, at least arguably, significantly burden pregnant employees.

Since *Young*, the EEOC has updated its Enforcement Guidance, and has expounded upon its views regarding the interplay between Title VII, the PDA, the ADA, FMLA, and other statutes as they relate to pregnancy and pregnancy-related medical conditions.⁴⁰⁴

The EEOC also recently commenced an enforcement action against a licensed nursing center based on the *Young* decision. In that pending case, the EEOC claims the nursing center violated federal law by failing to accommodate a pregnant employee's request for leave and by subsequently firing her for excessive absences because of her pregnancy and her disability.⁴⁰⁵

In light of the Supreme Court's *Young* decision and the EEOC's strategic focus on enforcement actions, light duty policies that exclude accommodation of pregnancy-related restrictions or pregnancy-related disabilities will face stringent scrutiny. These developments, along with the expansion of the ADA (such that it may now include shorter-term complications arising from pregnancy) and the increasing number of states providing ADA-like accommodation protections for pregnant employees,⁴⁰⁶ may require employers to revisit their accommodation policies and practices, and to consider to whom they should extend those policies and practices.

B. Americans with Disabilities Act – Reasonable Accommodation in the Form of Job Reassignment

The EEOC has also continued to aggressively pursue reasonable accommodation claims under the Americans with Disabilities Act. In *Equal Employment Opportunity Commission v. St. Joseph's Hospital, Inc.*,⁴⁰⁷ for example, a Florida district court found that the EEOC established a triable issue of fact as to whether the hospital violated the ADA by failing to consider a disabled nurse who used a cane for two positions for which she applied. This decision serves as a reminder to employers of the need to fully explore reasonable accommodations requested by disabled employees, including reassignment.

In that case, the plaintiff worked in a Behavior Health Unit (BHU) in-patient psychiatric unit, which was for patients who present an imminent danger to themselves or others. The plaintiff had hip replacement surgery, which required her to use a cane upon her return to work. She initially came back to work without incident, but was demoted nearly two years later for performance reasons. In her new position, plaintiff had much more direct interaction with patients in hallways and in their rooms. Plaintiff's physician indicated that she needed to use her cane on a permanent basis to help her with a "gait dysfunction" caused by the hip replacement. Based on the patient population with whom plaintiff worked, however, the hospital determined that the plaintiff could not continue in the position because of safety concerns raised by her need to use a cane in the BHU.

Instead, the hospital allowed plaintiff a month to seek another internal position. Plaintiff applied for seven positions, but was not selected for any of them. In particular, the plaintiff was not considered for one position because she did not have the "psychiatric background" that the hiring manager preferred. Accordingly, the hospital terminated plaintiff's employment.

404 *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, June 25, 2015.
http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

405 EEOC, Press Release, Nursing Center Sued by EEOC for Pregnancy and Disability Discrimination (July 7, 2015). The EEOC issued a press release that noted that this action is part of one of the six national priorities identified by the Commission's Strategic Enforcement Plan is for the Commission to address emerging and developing issues in equal employment law, including issues involving the intersection between the ADA and pregnancy-related limitations.

406 *Young* dealt with the application of the federal PDA to workplace accommodations. However, at least 12 states and the District of Columbia have enacted laws that treat pregnancy like a disability and therefore require employers to provide reasonable accommodations to pregnant employees absent a showing of undue hardship (similar to the ADA). As of the date of this publication, these states include: Alaska, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Louisiana, Maryland, Minnesota, New Jersey, Texas, and West Virginia.

407 *EEOC v. St. Joseph's Hospital, Inc.*, 2015 U.S. Dist. LEXIS 19272 (M.D. Fla. Feb. 18, 2015).

The EEOC filed suit on the plaintiff's behalf. The EEOC alleged that the hospital violated the ADA's reasonable accommodation obligations by failing to allow the plaintiff to maintain her position while using her cane in the BHU, and by failing to reassign her to a vacant position for which she was otherwise qualified.⁴⁰⁸

On summary judgment, the district court agreed with the hospital's decision to remove the plaintiff from the BHU position, holding that the use of the cane in the BHU was not a reasonable accommodation as a matter of law, given the unpredictability of the patients' behavior and its possible use as a weapon, along with the fact that plaintiff was unable to walk even short distances or to help restrain patients.

The district court, however, held that a jury *could* find that the hospital should have reassigned the plaintiff to one of two open available positions for which the plaintiff met minimum qualifications. In its holding, the district court specifically rejected the hospital's position that the plaintiff was not qualified because she did not have the "psychiatric background" sought by the hiring manager. The court held that a hiring manager's *preference* did not equate to an essential function of that position, particularly because that background was not listed as a minimum job qualification on the position description. Because that was the only reason the hiring manager did not consider the plaintiff, a jury could find the hospital unreasonably failed to accommodate the plaintiff by failing to reassign her to that position.

The case proceeded to trial. The jury found that the hospital failed to provide a reasonable accommodation in connection with one particular opening, but also found that the hospital made good-faith efforts to identify and make a reasonable accommodation. In the course of post-trial motions, the district court rejected the EEOC's argument challenging the good-faith defense on the grounds that the ADA mandates reassignment *without competition* as a matter of law. The court noted that the Eleventh Circuit has not held that such a duty exists, and therefore whether reassignment opportunity was competitive is simply one factor in determining whether the accommodation is reasonable.⁴⁰⁹ The court went on to conclude that the evidence at trial supported the jury's finding that the hospital made good-faith efforts to accommodate the plaintiff, and that she was therefore entitled only to equitable relief.

In short, the decisions above underscore the importance of fully exploring all accommodation requests posed by healthcare workers, regardless of whether the condition qualifies as a disability under the ADA or is otherwise a pregnancy-related restriction. Although employers are not required to grant unreasonable accommodation requests, such as where the accommodation creates a risk of harm to patients or employees, employers must at least consider the request, including any request for reassignment, and provide a reasoned basis for any denial.

C. Systemic Discrimination and the Genetic Information Non-Discrimination Act (GINA)

The EEOC in 2013 filed a systemic lawsuit against a skilled nursing and rehabilitation facility in New York.⁴¹⁰ The lawsuit alleged that the facility violated GINA by conducting a post-offer, pre-employment medical exam that included questions about the applicant's family medical history and then requiring employees to repeat this exam annually. The EEOC claimed this conduct violated GINA because this statute makes it illegal to use genetic information—which includes an individual's genetic tests, family medical history, and the genetic tests of his or her family members—in making employment decisions and also restricts employers from requesting genetic information from applicants or employees. The lawsuit further alleged that the facility violated Title VII of the Civil Rights Act and the Americans with Disabilities Act by refusing to hire and/or firing women because they were pregnant or had perceived disabilities.

In 2014, the agency settled the case for \$370,000 and the agency directed employers to "take heed of this settlement because there are real consequences to asking applicants or employee[s] for their family medical history." The litigation is just one example of the EEOC's focus on systematic litigation as part of its SEP.⁴¹¹ It also serves as reminder regarding the limitations on the inquiries that can be made of applicants or employees. The decision has particular significance for healthcare employers as they are more likely to gather health-related information and require employees to undergo medical exams to ensure patient safety.

408 The other position was never filled and later the posting was removed.

409 *EEOC v. St. Joseph's Hospital, Inc.*, No. 8:13-cv-2723, 2015 U.S. Dist. LEXIS 106041 (M.D. Fla., Aug. 12, 2015).

410 *EEOC v. Founders Pavilion, Inc.*, 13-CV-01438 (W.D. N.Y. 2013).

411 The EEOC's Systematic Task Force defines systematic cases as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company or geographic location."

D. Sexual Orientation and Gender Non-Conformity

Another top priority for the EEOC under the agency's SEP is "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions." In July 2015, the EEOC issued a potentially groundbreaking decision finding discrimination based on "sexual orientation" can be brought under Title VII.⁴¹² For the 28 states that lack any explicit state-level protections against discrimination on the basis of sexual orientation, this decision has the potential to have a significant impact, including an increase in litigation. While the full impact of this decision will depend on the deference that federal courts give to it, healthcare employers should review any policies that, inadvertently or intentionally, treat employees differently based on their sexual orientation.

While the EEOC's decision related to sexual orientation is new, federal courts and the EEOC have held for years that **discrimination** because of gender non-conformity or gender stereotyping is sex **discrimination**.⁴¹³ Symbolizing its increased interest in this area, the EEOC has filed at least three sex discrimination lawsuits related to discrimination against transgender employees, including a claim against an eye clinic alleging the clinic fired an employee for failing to conform to gender stereotypes.⁴¹⁴ As the workplace continues to change, healthcare employers should remain mindful of this evolving area of the law and carefully evaluate work place requirements that could involve gender stereotyping (*i.e.*, dress codes).

E. Discrimination and Harassment by Third Party Non-Employees

Today, most healthcare employers are sensitive to issues of workplace discrimination and harassment. However, the focus is usually on the conduct of employees or other medical staff employed as independent contractors. Healthcare employers should keep in mind that their legal duty extends to preventing and responding to unlawful discrimination or harassment by third parties. This brings to the forefront patient preferences and patient conduct. In honoring a patient's "right to choose," healthcare employers must balance patient's rights with employee rights.

1. Racial, Gender or Religious Preferences

Courts have consistently found that an employer's obligation to provide a discrimination-free workplace takes precedence over a patient's racial preferences. In 2010, the Seventh Circuit rejected a nursing home's policy of honoring the racial preferences of its residents when assigning care providers.⁴¹⁵ The plaintiff was an African American nurse assistant given written instruction that a resident in her assigned unit "Prefers No Black CNAs." The court held that catering to the racial preferences of residents is an insufficient justification for otherwise violating Title VII protections against disparate treatment. More recently, in 2013, a nurse filed a charge against a Michigan hospital alleging that for more than a month, no African American nurses could care for a Caucasian baby at the father's request.⁴¹⁶ The matter settled, but is a reminder of the need to evaluate patient preferences against legal protections for employees.

While courts have ruled that employers cannot discriminate based on patient preference relating to race or national origin, gender preference has been open to more interpretation. A healthcare employer can honor a patient's request to not have an opposite-sex caregiver assisting with care without violating anti-discrimination employment laws, but only as to care that involves issues of intimate personal privacy, such as toileting or examination of private areas.⁴¹⁷ There must be a specific patient request related to personal privacy, rather than a blanket policy of exclusion.⁴¹⁸

Regarding religion, research has shown that healthcare providers can improve a patient's healthcare experience by understanding and honoring the patient's religious values and beliefs.⁴¹⁹ Healthcare providers are also required to accommodate employees' sincerely held religious beliefs or practices, which can extend to dress (*i.e.*, a Christian cross

412 *Complainant v. Foxx*, E.E.O.C., Appeal No. 0120133080 (July 16, 2015).

413 See *Doe v. United Consumer Fin. Serv.*, 2001 U.S. Dist. LEXIS 25509, at *8-13 (N.D. Ohio Nov. 9, 2001) (finding that while Title VII does not prohibit discrimination based on an individual's transsexualism, a plaintiff can assert a claim that she was terminated because her appearance and behavior did not meet gender expectations); *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female "tomboyish" plaintiff had been fired for not having the "Midwestern girl look" suggested "her employer found her unsuited for her job...because her appearance did not comport with its preferred feminine stereotype").

414 *EEOC v. Lakeland Eye Clinic, P.A.*, Civ. No. 8:14-cv-2421-T35 AEP (M.D. Fla. filed Sept. 25, 2014).

415 See *Chaney v. Plainfield Health Care Center*, 612 F.3d 908 (7th Cir. 2010).

416 *Battle v. Hurley*, No. 2:2013cv10680 (E.D. Mich. filed Feb. 18, 2013).

417 See discussion in *Spragg v. Shore Care*, 293 N.J. Super. 33, 50-55(1996).

418 *Id.*

419 Puchalski, Christina, M.D., *Ethical Concerns and Boundaries in Spirituality and Health*, AMA Journal of Ethics, Vol. 11, No. 10:804-815 (October 2009), <http://journalofethics.ama-assn.org/2009/10/oped1-0910.html>.

or a Muslim hijab (headscarf)). Patient religious preference has not been found to be a cognizable basis for denying an employee's religious accommodation request or a legitimate basis for reassigning an employee of a different faith. Honoring a patient's preference to reassign a care provider because the care provider is of a different faith than a patient or because the care provider wears a visible symbol of that faith can lead to claims of employment discrimination.

2. Duty to Prevent Harassment

While honoring discriminatory patient preferences can prove problematic, requiring an employee to continue to provide care when a patient is openly discriminating against or harassing an employee can also lead to litigation and adversely impact care.⁴²⁰ In 2012, the EEOC sued a Virginia long-term care facility under Title VII, alleging the employer failed to protect a female receptionist from sexual harassment by a resident, which created a "sexually hostile work environment" for her.⁴²¹ Harassment of employees by patients is often more complicated in healthcare settings, particularly long-term care settings, where inappropriate comments or behavior may be attributable to a patient's deteriorated mental condition, such as dementia or Alzheimer's disease. However, a patient's or resident's mental condition will not shield a healthcare employer from liability. Ultimately, a healthcare employer has a legal duty to investigate and respond to any complaint of harassment made by an employee.

F. Mandatory Flu Vaccinations

Multi-state measles outbreaks, combined with the Ebola scare and regular flu season concerns, have made efforts to prevent the spread of infectious diseases a top priority for healthcare organizations. Healthcare advocates often favor mandatory vaccination programs in healthcare settings as a cornerstone step in this effort.⁴²² While such programs are generally permissible, the EEOC's Technical Assistance Document "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," warns employers of its position that they may not compel all employees to get vaccinated.⁴²³ The EEOC cautions that an employer must provide a "reasonable accommodation" for employees: (1) with a disability or medical condition for which vaccination is contraindicated (such as a severe allergy to eggs or underlying medical condition compromised by a flu vaccine), or (2) who have a "sincerely held religious belief, practice or observance" that prohibits the employee from getting vaccinated.

When considering accommodation requests, healthcare employers should be careful about judging the veracity of beliefs, practices, observances, or conditions, as opposed to objectively assessing a request. This is particularly true when evaluating religious accommodation requests. The EEOC has advised that "because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for a religious accommodation is based on a sincerely-held religious belief."⁴²⁴ In *Chenzira v. Cincinnati Children's Hospital Medical Center*,⁴²⁵ the plaintiff had refused to submit to mandatory vaccination on the ground that her religion, which she claimed was veganism, prohibited her ingesting any animal products. The U.S. District Court for the Southern District of Ohio in Cincinnati declined to dismiss the plaintiff's complaint, holding that sincerely held beliefs in veganism could plausibly be considered religious beliefs protected against religious discrimination, as opposed to a mere dietary preference.

While it is clear that healthcare employers have legitimate business reasons for requiring vaccinations, any mandatory policy should be carefully crafted and applied to allow consideration of accommodation requests. Before denying a request, healthcare employers should be mindful to engage in the interactive process and evaluate whether there are other protective measures that can be applied.

420 A recent study found when nurses feel sexually harassed by a patient, they tend to distance themselves from that patient, providing medical essentials but withholding emotional support.

421 *Equal Employment Opportunity Commission v. Southwest Virginia Community Health System, Inc.*, Civil Action No. 7:12cv424.

422 As part of its Healthy People 2020 campaign — a national health promotion initiative — the Centers for Disease Control aims to achieve a 90% flu vaccination rate among healthcare personnel by 2020.

423 EEOC, *Pandemic Preparedness In The Workplace And The Americans With Disabilities Act*.

424 EEOC Compliance Manual No. 915.003, Section 12: Religious Discrimination (July 22, 2008).

425 Case No. 1:11-cv-00917 (S.D. Ohio Dec. 27, 2012).

G. Summary

In addition to having policies in place to address discrimination and harassment, healthcare employers would benefit by performing ongoing training, and completing thorough investigations in response to any complaint. Building a culturally competent workforce trained to serve a diverse population can also limit a healthcare employer's exposure to employment-related litigation and claims, besides improving health outcomes.

IX. WORKPLACE SAFETY

The federal Occupational Safety and Health Act (“OSH Act”) requires all employers covered by its provisions to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.⁴²⁶ Employers are also required to comply with all applicable occupational safety and health standards. An employer’s duties are governed by federal statutory law and by an extensive set of regulations.⁴²⁷ The discussion below summarizes the general provisions of the OSH Act applicable to most healthcare employers—a full analysis of the complete federal Occupational Safety and Health Administration (“OSHA”) regulations is beyond the scope of this paper. Further, because some states administer federally-approved state plans that are more comprehensive than (or different from) the federal program, the federal law, employers operating in a state with a state OSHA plan are advised to consult counsel to ensure they are in compliance with the applicable state occupational safety and health program(s).

A. OSH Act Coverage

The OSH Act requires every employer to furnish a safe place of employment and to comply with all applicable occupational safety and health standards.⁴²⁸ An employer is defined in the Act as “a person engaged in a business affecting commerce who has employees.”⁴²⁹ The definition of “employer” does not include federal agencies (except for the U.S. House of Representatives and Senate) or any state government employees. In healthcare, some state hospitals and institutions can fall within this jurisdictional exclusion. In some states, however, state government may be subject to state safety and health plan requirements.

The term employee is broadly defined under the Act as an employee of any employer engaged in a business that affects commerce. OSHA maintains that the existence of an employment relationship is based upon economic realities rather than legal definitions. OSHA has interpreted the term employee to include supervisors, partners, corporate officers, former employees, applicants for employment and, in the case of contingent workers, employees of other employers.

B. State-Approved Plans & State Jurisdiction

One of the declared purposes of the OSH Act is to encourage states to assume full responsibility for the administration of their own occupational safety and health laws. As of 2015, 25 states and two territories have achieved state-plan status.⁴³⁰ A few of these state/territory plans apply only to public sector employers, although the vast majority apply to private employers operating in these jurisdictions. Employers in these states and territories must ensure they comply with the appropriate state plan.

C. General Employer Responsibilities Under the OSH Act

The responsibilities and duties imposed upon employers by OSHA are rigorous and far-reaching. These start with a broad statutory provision which includes: (1) the duty to furnish employment, and a place of employment, free from recognized hazards that cause, or are likely to cause, death or serious physical harm, to each employee; and (2) the duty to comply with the occupational safety and health standards promulgated under the Act.⁴³¹

1. *The General Duty Clause*

The first provision is enforceable through issuance of citations known as General Duty Clause violations. Under this provision, employers must take steps to eliminate or minimize employee exposure to all recognized hazards that are likely to cause death or serious physical harm. This means that an employer may still violate the OSH Act even if it complies with all of the thousands of OSHA regulations. An employer must maintain a safe workplace, free of all hazards—even those not specifically covered by OSHA.

426 29 U.S.C. § 654(a)(1).

427 Codified at Code of Federal Regulations title 29, sections 1910.1-309 et seq., 1915.1-100 and 1926.1-1092.

428 29 U.S.C. § 654(a).

429 29 U.S.C. § 652(5).

430 Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington and Wyoming. The following states have approved plans that cover public sector employers only: Connecticut, Illinois, New Jersey, New York and the U.S. Virgin Islands.

431 29 U.S.C. § 654(a). The General Duty Clause also directs employees to comply with occupational safety and health standards, including all rules, regulations, and orders. 29 U.S.C. § 654(b).

To establish a violation of the General Duty Clause, the Secretary of Labor must prove that:

- the employer failed to make its workplace free of a hazard;
- the hazard is recognized by the employer or the employer's industry;
- the hazard has caused or is likely to cause death or serious physical harm to employees; and
- the hazard could have been materially reduced or eliminated by a feasible means of abatement.

In practice, the General Duty Clause, only comes into effect where no specific OSHA Standard governs the work in question. Within healthcare, OSHA most commonly uses the General Duty Clause to attempt enforcement actions with respect to ergonomic and workplace violence issues. These efforts can be quite broad. For example, although OSHA has no direct role in establishing staffing levels for healthcare institutions, they have issued citations to employers where they allege that staffing levels are insufficient to protect employees from patient aggression. OSHA has also enforced communicable illness requirements for tuberculosis, Ebola, and other diseases through the General Duty Clause.

2. Compliance with Safety & Health Standards

As noted, the OSH Act also requires employers to comply with all applicable safety and health standards, many of which are lengthy and quite complex. OSHA standards are divided and separated by the industry sector in which the work is being performed – for healthcare this is almost always General Industry. Healthcare employers may be covered by different standards at different times depending upon the work being performed – e.g., hospital maintenance employees engaged in work that goes beyond maintenance and is considered construction of a new facility or equipment would be covered by the Construction standards for that work.

Each of OSHA's standards covers a specific subject and has its own scope and applicability section. Some standards have wide applicability in many industrial sectors, such as the Hazard Communication Standard. Other standards apply to specific operations that utilize a specific hazardous chemical substance, such as vinyl chloride. Employers must review their worksites to determine which OSHA standards are applicable and what they must do to achieve compliance with those standards. Among the most commonly cited OSHA standards for healthcare are:

- Hazard Communication – 29 CFR 1910.1200
- Personal Protective Equipment – 29 CFR 1910.134
- Electrical requirements including wiring methods, components, and equipment for general use. 29 CFR 1910.202 et seq.
- Medical services and first aid – 29 CFR 1910.151
- Injury and Illness Recordkeeping – 29 CFR 1904.1 et seq.
- Bloodborne Pathogens – 29 CFR 1910.1030
- Exit aisle maintenance, safeguards, and operational features for exit routes. – 29 CFR 1910.37
- Respiratory Protection – 29 CFR 1910.134

OSHA standards are developed through “notice and comment” rulemaking, a process that typically extends for several years. OSHA's national office then develops compliance directives, usually after release of a final standard. These compliance directives often contain important interpretations of the rule. The specific requirements of standards, their interpretation by OSHA and their application to individual employers establish a substantial volume of litigation under the Act.

OSHA maintains a comprehensive website with guidance documents and interpretations. As part of those efforts the agency maintains a page devoted specifically to healthcare facilities and their obligations.⁴³²

D. OSHA Inspections

The Act authorizes an OSHA Compliance Safety and Health Officer (CSHO), upon presenting appropriate credentials to the owner, operator or agent in charge, to enter an employer's premises to inspect and investigate all pertinent conditions, structures, machines, apparatuses, devices, equipment and materials. The inspection must be conducted during regular working hours or at other reasonable times within reasonable limits and in a reasonable manner. The CSHO is also authorized to question any employer, owner, operator, agent or employee during this inspection.⁴³³

⁴³² See <https://www.osha.gov/SLTC/healthcarefacilities/>.

⁴³³ 29 U.S.C. § 657(a); 29 C.F.R. § 1903.3(a).

It is important for healthcare employers to understand that OSHA does not have an unfettered right to conduct inspections. The U.S. Supreme Court in the case of *Marshall v. Barlow*⁴³⁴ held that the Fourth Amendment's protection against unreasonable search and seizure applies to OSHA and thus requires that administrative probable cause exists for any inspection. This probable cause can result from a report of a fatality or significant injury, a referral from another governmental agency or the media, a complaint from an employee, former employee, union or member of the public, or pursuant to a formalized administrative targeting plan.

The probable cause supporting the inspection thus forms the basis for the scope of the inspection. CSHOs have access to any place of employment during regular working hours, and at other reasonable times when necessary for the protection of safety and health, subject to the restrictions discussed below:

- The CSHO must present appropriate credentials to the employer.
- The investigation or inspection must be carried out within reasonable limits and in a reasonable manner.
- Both employers and employees have the right to have representatives accompany the CSHO during the investigation.
- Information that might contain or reveal a trade secret may be protected under United States Code title 29, section 664.80.
- An investigation occasioned by an employee complaint is generally limited to the condition or conditions alleged in the complaint which should be provided to the employer in writing.
- An employer can refuse entry and require a search warrant.

It is extremely important to note that an employer's Fourth Amendment right to protection against unreasonable searches and seizures can be waived if an employer voluntarily agrees to an overbroad inspection. Thus agreeing upon the scope of the inspection and keeping the inspection to that scope are important considerations.

1. Refusing Entry to Employer's Workplace

An employer enforces the scope of an inspection by refusing entry and requiring a search warrant.⁴³⁵ As noted, the exercise of an employer's right to refuse entry has been upheld by the U.S. Supreme Court. This important right should be carefully considered and utilized when necessary to protect an employer's rights, primarily in situations where OSHA is insisting on expanding the scope of the inspection beyond its probable cause. However, refusing entry where OSHA is limiting its inspection to its probable cause, may serve only to delay the inspection and may also result in a particularly aggressive and meticulous OSHA inspection. Employers should consult with their labor counsel when these concerns arise.

2. An Employer's Own Investigation

Employers should not rely solely on OSHA's investigation of any accidents or injuries. In challenging any citation that may issue, it will be helpful to have conducted a thorough internal investigation. Such an investigation may reveal possible defenses to the citation and will highlight to OSHA the employer's commitment to safety. Some states, such as California, require employers to conduct their own accident investigations. Furthermore, such an investigation may assist with regard to any workers' compensation claims and/or personal injury lawsuits. Consideration should be given to whether this inspection should be conducted under the direction of an attorney to extend the attorney work product protections to any information generated.

E. Issuance of Citations and Penalties

If OSHA determines an employee is exposed to a hazardous condition that violates the Act, the agency will issue a citation to the employer. The citation must be in writing and must "describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated."⁴³⁶ The citation will also establish a time for the employer to abate the violation. Failure to correct the hazard within that period may result in the assessment of additional penalties. Citations must be issued within six months following the occurrence of a violation.

434 436 U.S. 307 (1978).

435 29 U.S.C. § 657(a).

436 29 U.S.C. § 658(a).

In conjunction with the issuance of a citation, the Area Director may propose a monetary penalty be assessed against the employer. The citation and proposed penalty will become final unless the employer notifies the Area Director in writing that it intends to contest the citation, the proposed penalty or abatement date. The employer has 15 working days from receipt of the notice of proposed penalty to inform the Area Director of its intention to file an appeal.

The penalty for violations considered serious or other-than-serious is a fine of up to \$7,000 for each violation.⁴³⁷ Willful or repeat violations may be assessed a penalty of up to \$70,000 per violation, but not less than \$5,000 for each willful violation. Failure to correct a violation for which a citation has been issued within the abatement period will result in a fine of up to \$7,000 per day until abatement is accomplished.⁴³⁸

The Bipartisan Budget Act of 2015 requires OSHA to raise its citation penalties for the first time in 25 years. Since 1990, OSHA has been one of only three federal agencies that were specifically exempted from a law that required federal agencies to raise their fines to keep pace with inflation. A section of the budget bill— entitled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015— eliminates this exemption for OSHA.

The law now requires an initial penalty “catch up adjustment,” which must be in place by August 1, 2016. The catch up adjustment is tied to the percentage difference between the October 2015 Consumer Price Index (CPI) and the October 1990 CPI. Based on recent CPI, the increase will likely be in the range of 75% to 80% over current penalty amounts. Although OSHA must go through the rulemaking process to effect the penalty increases, the budget law directs that the increase be issued as an interim final rule. This means that OSHA does not have to issue a proposed rule, which would be subject to a public notice and comment period before finalized. Rather, the rule will become effective immediately upon publication.

F. Settlements & Appeals

Following the issuance of a citation, an employer has a short period prior to filing a formal Notice of Contest (up to 15 working days) during which time an employer may request an informal conference with the Area Director who authorized issuance of the citation. A large percentage of citations are resolved at such sessions, through which the citation itself, its characterization (e.g., “Serious”), the proposed penalty, the specified abatement and/or the time frame for abatement may be adjusted.

Any settlement during this phase must be executed within the 15-day period allowed to file a Notice of Contest. Fourth, once a Notice of Contest has been filed, a citation may still be informally resolved either through the U.S. Department of Labor, Office of Solicitor or by virtue of a settlement conference with the ALJ who will hear the appeal.

G. The Appeal Process

An employer has 15 working days from the day a citation is received to notify the Area Director in writing that it intends to contest the citation, suggested abatement and date, and/or the proposed penalty. The notice of contest must specify whether it is directed to the citation, the proposed penalty, the proposed abatement or all three. If there is any doubt that an employer may wish to file a Notice of Contest, the Notice should be filed. If an employer does not file the Notice of Contest in a timely fashion, the citation, proposed abatement and penalty will become a final determination.

⁴³⁷ 29 U.S.C. § 666(b)-(c). The Area Director has discretion to impose penalties for non-serious violations, but is required to impose penalties when the violation is characterized as serious. 29 U.S.C. § 666(b).

⁴³⁸ 29 U.S.C. § 666(a), (d).

H. Discrimination & Retaliation Under the OSH Act

OSHA protects employees against discharge or other discriminatory treatment for exercising any rights they may have under the OSH Act. Employers are prohibited from taking adverse action against employees who have filed complaints on health or safety matters, or who have participated in OSHA proceedings. Employees are also protected from retaliation for refusing to work under certain hazardous conditions. The pertinent OSHA regulation provides:

If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.⁴³⁹

Employees who refuse to comply with occupational safety and health standards or valid safety rules implemented by the employer in furtherance of the OSH Act are not exercising any rights afforded by the OSH Act. Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations will not ordinarily be regarded as disciplinary action prohibited by the OSH Act. This situation is distinguishable from legitimate refusals to work as discussed above.⁴⁴⁰

I. Applicability of Other Laws

Although the federal OSH Act pre-empts all other laws purporting to regulate the health and safety of employees directly, it is not the only source of safety and health regulation. State and local laws on infection control and vaccinations, workers compensation, and other public facing protections exist and must be complied with.

439 29 C.F.R. § 1977.12(b)(2).

440 29 C.F.R. § 1977.22.

X. OFCCP/FEDERAL CONTRACTOR STATUS

A. The Impact of Federal Contractor Status on Healthcare Organizations

Entities that enter into federal government contracts or subcontracts may be obligated to implement an affirmative action program pursuant to Executive Order 11246 (“EO 11246”),⁴⁴¹ Section 503 of the Rehabilitation Act of 1973 (“Section 503”),⁴⁴² and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“VEVRAA”).⁴⁴³ Before 2010, many of the arrangements commonly entered into by healthcare organizations were not considered to be covered federal contracts and the organizations were not obligated to maintain affirmative action programs. Under President Obama, however, the Office of Federal Contract Compliance Programs (“OFCCP”), which is tasked with enforcing the government’s affirmative action requirements, has been trying to expand the definition of covered federal contracts so as to extend its jurisdiction over more healthcare providers. In particular, the agency has taken the position that providers participating in the TRICARE health care program⁴⁴⁴ are required to comply with all of the agency’s regulations. In addition, the OFCCP has indicated that, in its opinion, participation in Medicare Parts C and D may subject providers to OFCCP’s requirements.⁴⁴⁵

Although OFCCP’s efforts to expand its jurisdiction may be vulnerable to legal challenges, objecting to OFCCP jurisdiction involves costs that many entities are unwilling to incur. Therefore, even though the OFCCP has agreed to place on hold until 2019 its enforcement efforts relative to TRICARE employers⁴⁴⁶ and has not yet been aggressive in seeking to audit providers based on participation in Medicare Parts C and D, it is still important for healthcare entities to consider now whether they are or may become subject to OFCCP’s regulations and what they should do to be ready for an OFCCP audit.⁴⁴⁷

B. The Statutory Schemes Enforced by the OFCCP

1. Executive Order 11246

Executive Order 11246, originally issued by President Johnson in 1965 and amended by several subsequent executive orders, prohibits discrimination by federal contractors and subcontractors on the basis of race, color, religion, sex, sexual orientation, gender identity, and national origin.⁴⁴⁸ It also imposes on federal contractors and subcontractors an affirmative action obligation, under which they must take active measures to ensure equal employment opportunity is provided to applicants for hire, and employees for advancement.⁴⁴⁹ Under the regulations implementing EO 11246, employers with 50 or more employees and a government contract of \$50,000 or more must implement an affirmative action program, including, among other things, a written affirmative action plan (AAP) and detailed records of hiring, training, promotion, and other employment-related activities.⁴⁵⁰

2. Section 503 of the Rehabilitation Act of 1973

Section 503 prohibits discrimination on the basis of disability and also requires federal contractors and subcontractors to take affirmative action to employ and advance in employment qualified persons with disabilities.⁴⁵¹ Required actions under Section 503 include outreach and other action-oriented efforts to try to increase the representation of disabled individuals in the workplace. OFCCP has imposed on all federal contractors a 7% goal for the employment of qualified individuals with disabilities.⁴⁵²

441 Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965), as amended.

442 29 U.S.C. § 793.

443 38 U.S.C. § 4212.

444 The healthcare program of the U.S. Department of Defense Military Health System.

445 OFCCP, Dir. 293, Coverage of Health Care Providers and Insurers (Dec. 16, 2010).

446 OFCCP, Dir. 2014-01, TRICARE Subcontractor Enforcement Activities (May 7, 2014).

447 Providers should also keep in mind that even if they are not subject to the OFCCP’s rules, they may still be subject to other laws regulating the employment practices of government contractors that apply in circumstances involving lower value contracts or else non-contractual arrangements to provide services to or for the government. In this regard there are, for example, executive orders requiring covered contractors to provide certain employees with compensation in excess of the minimum wage established by the Fair Labor Standards Act and paid sick leave. As another example, pursuant to a proposed rule, a contractor that fails to adequately comply with any of a number of federal and state labor and employment laws (including Title VII, the ADEA, and OSHA) may be subject to debarment from further federal work.

448 Exec. Order No. 11246.

449 *Id.*

450 See 41 C.F.R. Part 60-2.

451 29 U.S.C. § 793.

452 41 C.F.R. Part 60-741.

3. Vietnam Era Veterans' Readjustment Assistance Act of 1974

VEVRAA prohibits discrimination against certain veterans and requires affirmative action to increase employment of protected veterans.⁴⁵³ Federal contractors and subcontractors are required under VEVRAA to post most job openings with a state employment delivery system, set hiring benchmarks for veterans, collect data regarding veterans' rates of application, hire, training, and promotion, and update such data annually as part of their AAP.⁴⁵⁴

C. Overview of OFCCP Jurisdiction

1. Federal Contracts Defined

A "federal contract" is any agreement between a department or agency of the federal government and any person for the purchase, sale, or use of goods or services.⁴⁵⁵ A "federal subcontract" is an agreement with a federal contractor either (1) for the furnishing of supplies or services or for the use of real or personal property that is necessary to the performance of any one or more federal contracts; or (2) under which any portion of the federal contractor's obligation under any contracts is performed, undertaken, or assumed.⁴⁵⁶

By contrast, federal grants and other financial assistance are not considered to be "contracts" or "subcontracts" so as to extend OFCCP jurisdiction.⁴⁵⁷ Thus, there are arrangements by which healthcare organizations may receive federal funding without being a covered federal contractor.⁴⁵⁸

2. Determining Whether a Particular Contract is a Covered Federal Contract

The fact that a particular arrangement constitutes a covered federal contract is often, but unfortunately not always, obvious.

For example, it is not hard to recognize that an agreement entered into by a provider with the Federal Bureau of Prisons in an amount over \$50,000 to provide medical care to prisoners would be a covered federal contract.⁴⁵⁹

More complicated situations arise, however, in the context insurance arrangements.

Prior to 1993, it was unclear whether participation in Medicare parts A and B subjected providers to federal affirmative action obligations. In that year, however, the OFCCP issued a directive adopting the position that, because Medicare and Medicaid are programs of federal financial assistance and not contracts, the OFCCP had no jurisdiction over hospitals receiving reimbursement.

The limits of the OFCCP's jurisdiction over providers were further delineated in 2000 by the decision of the Department of Labor's Administrative Review Board (the "ARB") in *OFCCP v. Bridgeport Hospital*.⁴⁶⁰

The facts underlying the *Bridgeport* decision were as follows. Blue Cross had a direct contract with the Office of Personnel Management ("OPM") to cover medical expenses of federal employees in connection with the Federal Employees Health Benefit Program ("FEHBP"). As required by its government contract, Blue Cross reimbursed Bridgeport Hospital for providing medical services to federal employees. The OFCCP then asserted jurisdiction over Bridgeport, claiming the Hospital's arrangements with Blue Cross for reimbursement constituted a covered government subcontract.

Bridgeport objected to this assertion of OFCCP jurisdiction, and the claim was eventually heard by the ARB, which ruled that Bridgeport was not a covered contractor because the medical services that it was providing were not necessary to the performance of the contract between Blue Cross and OPM. The ARB reasoned that Blue Cross had not entered into a contract to provide medical services directly to federal employees under the FEHBP. Therefore, in

453 38 U.S.C. § 4212.

454 41 C.F.R. Part 60-300.

455 29 U.S.C. § 793 (Section 503); 38 U.S.C. § 4212 (VEVRAA); 41 C.F.R. § 60-300.2 (EO 11246).

456 *Id.*

457 See 41 C.F.R. §§ 60-1.3 and 1.4(a) (EO 11246), § 60-300.2 (VEVRAA, § 60-741.2 (Section 503).

458 Note, however, that an entity performing construction work funded by federal financial assistance is subject to the Executive Order and its implementing rules. See 41 C.F.R. § 60-1.4(b) and Part 60-4 (EO 11246).

459 It is sometimes only after the fact that providers discover they have entered into a covered contract. For example, a prisoner may be admitted for emergency care that is unavailable at his or her place of incarceration and treated without anyone involved realizing that the party responsible for payment is a federal entity - the Federal Bureau of Prisons. However, in arranging for and accepting payment for the services, the provider may end up having become a covered federal contractor.

460 1997-OFC-01 (Jan. 21, 2000).

rendering medical services to FEHBP beneficiaries (and accepting reimbursement from Blue Cross), Bridgeport was not providing services necessary to the direct contractor's insurance and reimbursement relationship with the federal government and, therefore, was not a covered subcontractor.

Following this ruling, the OFCCP issued a directive addressing FEHBP-type arrangements.⁴⁶¹ The so-called Bridgeport directive stated that "health care providers having a relationship with FEHBP participants are not covered under OFCCP's programs based solely on that relationship." It also reiterated advice from the Solicitor of Labor that the "OFCCP cannot establish subcontractor coverage of hospitals, pharmacies or other medical care providers based on the existence of prime contracts with Blue Cross or other FEHBP providers."

The Bridgeport directive is very broadly written, and although it arose out of the Blue Cross contract with OPM, the OFCCP's policy pronouncement was not limited to that situation.

The situation in the *Bridgeport* case must be contrasted with the situation that was reviewed in *OFCCP v. UPMC Braddock*,⁴⁶² which arose out of a direct contract that UPMC negotiated with the OPM to put an HMO into operation. In *Braddock*, the court held that participation in an HMO under the FEHBP was necessary to the performance of the prime contract because the HMO, unlike the Blue Cross insurer, contracted with the OPM to provide actual medical services. Thus, hospitals and medical providers that perform medical services as part of an FEHBP HMO are federal subcontractors on the direct contract to provide medical services.⁴⁶³

3. Coverage Generally: Contractors, Subcontractors, and Single Entity Coverage

The Code of Federal Regulations defines a "contractor" as a prime contractor or subcontractor.⁴⁶⁴ Prime contractors include entities holding government contracts valued in excess of \$10,000 for purposes of the nondiscrimination mandate contained in EO 11246 and Section 503.⁴⁶⁵ However, the more onerous affirmative action obligations do not apply unless a contractor has: (1) more than 50 employees; and (2) the contractor holds a single contract of \$50,000 or more.⁴⁶⁶ VEVRAA's affirmative action obligations do not apply unless an employer: (1) has 50 or more employees; and (2) holds government contracts of \$100,000 or more.⁴⁶⁷ For purposes of establishing affirmative action obligations, government contracts cannot be aggregated; rather, the contractor must hold a "single contract" equal to or greater than the jurisdictional amount.⁴⁶⁸

Subcontractors may not hold any contracts directly with the federal government, but nonetheless fall within the jurisdiction of the OFCCP if they have a contract with a prime contractor (or a subcontractor at any tier) for goods or services that are either "necessary" to the performance of the government contract, or that fulfill a part of another entity's agreement with the federal government.⁴⁶⁹ Subcontractors are subject to AAP requirements only if they, too, meet the 50-employee \$50,000 threshold.⁴⁷⁰

When it has been determined that a business or organization has a federal contract, then all parts of that business (*i.e.*, divisions, branches, establishments, and facilities) must comply with the OFCCP's laws, regardless of whether a particular facility holds the federal contract.⁴⁷¹

461 U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Directive No. 262 (Mar. 17, 2003), available at <http://www.dol.gov/ofccp/regs/compliance/directives/dir262.htm>.

462 *OFCCP v. UPMC Braddock*, 2013 U.S. Dist. LEXIS 45953 (D.D.C. Mar. 30, 2013).

463 It is worth noting that the Federal Acquisition Regulation (FAR) that governs the OPM's contracts with health plans, hospitals and medical suppliers expressly exclude hospitals and medical suppliers from the definition of a subcontractor. 48 C.F.R. § 1602.170-14. Moreover, the OFCCP's Bridgeport directive explicitly exempted "health care providers having a relationship with FEHBP participants" and did not distinguish between HMOs and insurance arrangements. Accordingly, it was undisputed that the providers in *Braddock* entered into their contracts with UPMC with a reasonable understanding that they would not be subject to federal affirmative action obligations. Nevertheless, the court held that the contractual language "exempting" *Braddock* from coverage could not be given effect because the applicable regulations did not provide for exemptions for medical service providers and the parties are not "empowered to override the mandatory requirements of two federal statutes and an Executive Order." The court also found that the provider's consent to be bound by the OFCCP's equal opportunity clauses was not necessary as it was bound, as a matter of law, by the obligations imposed by statute and regulation on federal contractors.

464 41 C.F.R. § 60-1.3.

465 41 C.F.R. Parts 60-1, 60-741.

466 *Id.*

467 41 C.F.R. Part 60-300-40.

468 40 C.F.R. Part 60-2.1(b)(1).

469 40 C.F.R. Part 60-1.3.

470 41 C.F.R. Part 60-2.1(b).

471 See *Board of Governors of Univ. of N. Carolina v. DOL*, 917 F.2d 812, 813 (4th Cir. 1990); *Trinity Industries v. Herman*, 173 F.3d 527 (4th Cir. 1999).

In addition, separate legal entities that are related to a government contractor as part of a corporate family (for example as subsidiaries of a common parent) will also fall within OFCCP's jurisdiction if found to be a "single entity" with a government contractor.⁴⁷² "Single entity" status is determined on the basis of a five-factor test assessing: (1) common ownership; (2) common directors and/or officers; (3) *de facto* exercise of control; (4) unity of personnel policies; and (5) dependency of operations.⁴⁷³

4. Non-Discrimination Obligations

Federal equal opportunity obligations require several active measures by federal contractors and subcontractors. First, a subcontractor that has cumulative subcontracts worth \$10,000 or more must comply with certain obligations under EO 11246 and Section 503, including:

- Not harassing or discriminating against applicants or employees on the basis of race, color, religion, sex, national origin, sexual orientation, gender identity, or status as an individual with a disability;
- Inserting a specific flow-down clause, appearing in bold, into each subcontract (including purchase orders);
- Including specific language in all job advertisements informing applicants that the entity is an equal opportunity employer;
- Physically posting the Department of Labor's "Equal Employment Opportunity is the Law" poster at each physical location; and
- Adopting and communicating to applicants and employees specific policy language protecting employee communications regarding compensation;
- If unionized, notifying unions with which the entity has a collective bargaining agreement of its equal employment opportunity and affirmative action obligations.⁴⁷⁴

In addition, a subcontractor that has cumulative subcontracts worth \$100,000 or more must comply with the equal opportunity obligations under VEVRAA which require, in addition to the above obligations, that contractors and subcontractors:

- Not harass or discriminate against applicants or employees on the basis of their status as a protected veteran;
- Insert a specific flow-down clause, appearing in bold, into each subcontract, including purchase orders (can be combined with the clauses required under EO 11246 and Section 503);
- List all job openings with the state employment service delivery system where the opening occurs, unless to be filled internally, at the executive/senior management level, or expected to last three or fewer days.⁴⁷⁵

5. AAP Obligations

In addition to the requirements contained in the equal opportunity clauses of each set of regulations, a federal contractor or subcontractor that holds a single subcontract worth \$50,000 or more and has 50 or more employees must prepare annual affirmative action plans for women, minorities, and individuals with disabilities.⁴⁷⁶ A contractor or subcontractor holding a single contract worth \$100,000 or more and with 50 or more employees must further prepare an annual affirmative action plan for protected veterans.⁴⁷⁷

AAP obligations are extensive and require significant forethought and oversight by contractors and subcontractors. In addition to having to prepare annual affirmative action plans, contractors must, among other things, structure application and hiring processes to satisfy OFCCP recordkeeping requirements, solicit and maintain self-identification information from applicants and employees, prepare and post various notices, review job descriptions to ensure they

472 See *OFCCP v. Manheim Auctions, Inc.*, 2011-OFC-00005, ALJ Order (June 14, 2011).

473 See *Ernst-Theodor Arndt*, 52 Comp. Gen. 145 (1972).

474 41 C.F.R. § 60-1.4 (EO 11246), 41 C.F.R. § 60-741.5 (Section 503).

475 41 C.F.R. § 60-300.5 (VEVRAA).

476 41 C.F.R. Part 60-1 (EO 11246), 41 C.F.R. § 60-741.40, et seq. (Section 503).

477 41 C.F.R. § 60-300.40, et seq. (VEVRAA).

do not improperly screen out qualified individuals with disabilities, provide applicants the opportunity to request accommodations in the application process, notify subcontractors of equal employment opportunity and affirmative action obligations, and engage in outreach to protected classes.⁴⁷⁸

D. OFCCP's Efforts to Expand its Jurisdiction: TRICARE and Medicare Advantage

1. Background

From approximately 2010 until 2014, the OFCCP actively pursued efforts to gain jurisdiction over healthcare providers based solely on providers' participation in TRICARE, the Department of Defense ("DoD") program that pays for the medical benefits of active duty and retired military personnel and their families. In asserting jurisdiction over healthcare providers based on TRICARE, the OFCCP not only took an aggressive position, but actually acted in apparent disregard of congressional intent by continuing to assert jurisdiction over TRICARE participants even after Congress included the following language in the National Defense Authorization Act for 2012:

For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.

By the spring of 2014, the OFCCP's ability to continue to assert jurisdiction based upon TRICARE participation appeared to be in serious jeopardy on two fronts. First, ongoing litigation over the issue was moving from administrative proceedings before the DOL's Administrative Review Board—a forum friendly to the OFCCP—into the federal courts. In addition further legislation was being proposed with bi-partisan support—the Protecting Health Care Providers from Increased Administrative Burdens Act—to end the OFCCP's efforts to expand its jurisdiction over providers.⁴⁷⁹

Thus faced with the possibility of a decisive rejection of its position, the OFCCP issued a directive on May 7, 2014, placing a moratorium on TRICARE-related audits.⁴⁸⁰ Far from a victory for healthcare providers, however, this directive promises years of further uncertainty and litigation. By instituting a moratorium, the OFCCP effectively preserved its ability to claim jurisdiction over healthcare providers into the foreseeable future and postponed final determination as to the validity of its claims of TRICARE jurisdiction.

2. TRICARE and the OFCCP's Argument for Jurisdiction

The DoD has three direct contractors that administer the TRICARE program: (1) Humana Military Healthcare Services; (2) United Healthcare; and (3) Health Net. These three contractors, in turn, enter into contracts with hospitals and other medical providers to provide medical care and supplies to military personnel and their family members covered by TRICARE.⁴⁸¹

Not long after President Obama took office, the OFCCP began to argue that it had jurisdiction over healthcare providers that participate in the TRICARE program based on the theory that they qualify as federal government subcontractors required to comply with the agency's regulations.⁴⁸²

Pursuant to this argument, the OFCCP attempted to conduct an audit of the Florida Hospital of Orlando, a healthcare provider that had agreed to provide care to military members and accept reimbursement through a TRICARE administrator and direct contractor, Humana Military Healthcare Services (HMHS).

When the hospital resisted the OFCCP's efforts to initiate an audit, claiming it was not a covered government contractor, the OFCCP commenced enforcement proceedings and the matter ultimately came before a Department of Labor administrative law judge (ALJ).⁴⁸³

478 41 C.F.R. Part 60-1 (EO 11246), 41 C.F.R. § 60-741.40, et seq. (Section 503), § 60-300.40, et seq. (VEVRAA).

479 Protecting Health Care Providers from Increased Administrative Burdens Act, H.R. 3633, 113th Congress (2014).

480 OFCCP, Dir. 2014-01, TRICARE Subcontractor Enforcement Activities (May 7, 2014).

481 David J. Goldstein, Does OFCCP Have Jurisdiction Over TRICARE Participants? Stay Tuned. The Answer Lies Years In The Future, LITTLER INSIGHT (May 13, 2014).

482 See, e.g., OFCCP, Dir. 293, Coverage of Health Care Providers and Insurers (Dec. 16, 2010).

483 *OFCCP v. Florida Hospital of Orlando*, ALJ Case No. 2009-OFC-00002 (Oct. 18, 2010).

The issues before the ALJ were:

- Whether the hospital's contract with HMHS under the TRICARE program was a federal subcontract, thereby subjecting it to OFCCP jurisdiction, because the hospital's contract (1) was necessary to the performance of HMHS's direct contract with TRICARE, or (2) required the hospital to perform any portion of HMHS's obligation under its direct contract with TRICARE; and
- Whether the DoD's assertion that TRICARE payments were federal financial assistance (not contract payments) trumped the DOL's opinion that the payments were pursuant to a federal contract.⁴⁸⁴

The ALJ concluded that Florida Hospital, through its participation in the TRICARE program, was performing a portion of HMHS's obligations to the DoD under its contract, thus making Florida Hospital a subcontractor under the HMHS-DoD prime contract. The ALJ also concluded that TRICARE payments were not federal financial assistance and therefore were subject to regulatory obligations applicable to federal contracts and subcontracts.⁴⁸⁵ Florida Hospital appealed the ALJ's decision to the DOL's Administrative Review Board (ARB).

3. The National Defense Authorization Act for Fiscal Year 2012 and the First ARB Decision

On December 31, 2011, while *Florida Hospital* was still pending before the ARB, President Obama signed into law the National Defense Authorization Action for Fiscal Year 2012 ("NDAA").⁴⁸⁶ The NDAA included a provision under Section 715 that specifically addressed the OFCCP's jurisdiction over TRICARE providers:

(3) In establishing rates and procedure for reimbursement of providers and other administrative requirements, including those contained in provider network agreements, the Secretary shall, to the extent practicable, maintain adequate networks of providers, including institutional, professional, and pharmacy. *For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.*⁴⁸⁷

Relying on this provision, the ARB ruled in favor of *Florida Hospital* in October 2012.⁴⁸⁸ In response, the OFCCP filed a motion asking the ARB to reconsider its decision and stating in its brief that, notwithstanding the ARB's decision in *Florida Hospital*, the OFCCP "intends to continue to schedule and attempt to review hospitals because they are TRICARE network providers."⁴⁸⁹

In an unusual move, the ARB granted the OFCCP's request for reconsideration and then issued a new opinion on July 22, 2013, holding by a three-to-two vote that the NDAA did not foreclose all of the OFCCP's arguments for jurisdiction. The case was then remanded back to an ALJ for further proceedings.⁴⁹⁰

4. Congressional Oversight

In 2013, continuing concerns in Congress led to the introduction in the House of Representatives, initially with bipartisan support, of the Protecting Health Care Providers from Increased Administrative Burdens Act.⁴⁹¹ This legislation sought to prevent the OFCCP from asserting jurisdiction over healthcare providers based on their federal health program participation. Specifically, this bill provided:

A State, a local government, or other recipient that receives a payment from the Federal Government, directly or indirectly and regardless of reimbursement methodology, related to the delivery of health care services to individuals, whether or not such individuals are or have been employed by the Federal

484 *Id.*

485 *Id.*

486 National Defense Authorization Action for Fiscal Year 2012, H.R. 1540, 112th Congress (2012), Pub. Law. No. 112-81.

487 *Id.* at § 715 (Emphasis added).

488 *OFCCP v. Florida Hospital of Orlando*, ALJ Case No. 2009-OFC-00002 (Oct. 19, 2012).

489 *OFCCP v. Florida Hospital of Orlando*, ALJ Case No. 2009-OFC-00002 (July 22, 2013).

490 *Id.*

491 Protecting Health Care Providers from Increased Administrative Burdens Act, H.R. 3633, 113th Congress (2014).

Government, shall not be treated as a Federal contractor or subcontractor by the Office of Federal Contract Compliance Programs based on the work performed or actions taken by such individuals that resulted in the receipt of such payments.⁴⁹²

5. The OFCCP Forestalls Resolution

On May 7, 2014, the OFCCP issued a directive purporting to establish:

a five-year moratorium on enforcement of the affirmative obligations required of all TRICARE subcontractors. During the moratorium period, OFCCP will engage in outreach and technical assistance to provide greater clarity for the TRICARE subcontractor community about their obligations under the laws administered by OFCCP.⁴⁹³

The directive is described herein as only “purporting” to establish a five-year moratorium because it is not binding on subsequent administrations. Therefore, even assuming the present administration upholds the moratorium, the OFCCP would still be free to attempt to audit providers based on TRICARE participation beginning in January 2017, when the next president is sworn into office. Since an audit involves a review of the contractor’s employment-related activities over the prior year, a provider would have to begin complying with OFCCP’s rules in 2016 in order to be able to respond satisfactorily to an OFCCP audit in 2017.

Moreover, the directive makes it clear that the OFCCP is still maintaining that it has jurisdiction over TRICARE providers. Indeed, the directive indicates that even if the agency will not audit providers during the moratorium, it will still investigate any discrimination complaints that it receives regarding TRICARE providers—something it cannot do unless it has jurisdiction.⁴⁹⁴

6. Further Activity on the Medicare Front

In addition to TRICARE, the OFCCP has also made attempts at expanding its jurisdiction to include providers participating in Medicare Parts C and D. Existing case law and past OFCCP Directives indicate that reimbursement related to Medicare Parts A and B constitute federal financial assistance (“FFA”), and not contractual agreements that confer OFCCP jurisdiction. However, recent developments indicate that the OFCCP views Medicare Parts C and D, like TRICARE, as contractual agreements, and is likely to assert jurisdiction over insurance companies and service providers that participate in these programs.

a. Medicare Parts A and B Distinguished

Case law from the 1980s—that is, prior to the creation of Medicare Parts C and D—held that Medicare reimbursements constitute FFA.⁴⁹⁵ Indeed, the OFCCP itself previously indicated its agreement with this position, noting that “health care institutions that provide services to Medicare and Medicaid beneficiaries [were] recipients of Federal financial assistance and not... contractors.”⁴⁹⁶ It appears established, therefore, that Medicare Parts A and B constitute FFA.

b. Medicare Parts C and D as “Contractual”

More recently, the OFCCP has expressed the position that Medicare Parts C and D potentially involve government contract spending, and not FFA.

⁴⁹² *Id.* at § 2.

⁴⁹³ OFCCP, Dir. 2014-01, TRICARE Subcontractor Enforcement Activities (May 7, 2014).

⁴⁹⁴ *Id.*

⁴⁹⁵ See *United States v. Baylor Univ. Med. Ctr.*, 736 F. 2d 1039, 1043 (5th Cir. 1984) (affirming that, based on Medicare’s legislative history, it constitutes FFA under the Rehabilitation Act); *United States v. University Hosp.*, 575 F. Supp. 607, 612-13 (E.D.N.Y. 1983), *aff’d on other grounds*, 729 F.2d 144 (2d Cir. 1984) (holding that Medicare constitutes FFA for purposes of the Rehabilitation Act); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 n.21 (D.S.C. 1974), *aff’d without opinion*, 529 F.2d 514 (4th Cir. 1975) (finding that Medicare and Medicaid are FFA for Title VI purposes).

⁴⁹⁶ OFCCP, Dir. 189, Health Care Entities That Receive Medicare and/or Medicaid (Dec. 16, 1993).

In a 2010 directive (“Directive 293”), the OFCCP confirmed that Medicare Parts A and B are FFA programs outside of the agency’s reach.⁴⁹⁷ However, it claimed also that “potential covered contracts or subcontracts may include contracts related to Medicare Advantage (Part C) or Part D programs.”⁴⁹⁸ Additionally, the OFCCP stated that it could exercise jurisdiction over Medicare Parts A and B providers if they participated in Parts C and D.⁴⁹⁹

After Directive 293, Congress passed the 2012 National Defense Authorization Act, which included a provision that was understood as intended to deny OFCCP jurisdiction based on an entity’s participation in the TRICARE program.⁵⁰⁰ Subsequently, the OFCCP issued Directive 301, rescinding Directive 293 and stating that the OFCCP “will continue to use a case-by-case approach to make coverage determinations.”⁵⁰¹ Beyond what may be read into the rescission of the directive, OFCCP has not indicated an intention to abandon the argument that Medicare C and D may support jurisdiction.

In July 2013, the OFCCP reached a \$372,739 settlement of a retaliation claim with Tufts Associated Health Plans. The OFCCP’s sole basis for jurisdiction in that case appears to have been Tuft’s participation in Medicare Part D.

Per the OFCCP’s news release:

Tufts Associated Health Plans Inc. offers a full array of health coverage options including Medicare Part D prescription benefits, which it offers under a contract with the Centers for Medicare and Medicaid Services for the operation of a Voluntary Medicare Prescription Drug Plan. The total contract amount for Part D prescriptions benefits for the period from January through May 2012 alone was \$84.5 million.⁵⁰²

This settlement highlights the OFCCP’s continued assertion of jurisdiction over Medicare C and D providers.

7. Medicare Parts C and D Likely Extend OFCCP’s Jurisdiction

Whether participation in Parts C and D subjects the participant to OFCCP’s jurisdiction depends on whether Parts C and D involve contracts or FFA. However, the distinction between a government contract and FFA can be surprisingly obscure.

As noted above, there are a number of cases finding Medicare Part A and B reimbursements to be FFA. As these cases are not explicitly restricted to traditional Medicare, a provider could certainly rely on these cases in arguing that Parts C and D are also FFA and not contractual arrangements supporting OFCCP jurisdiction.

However, the OFCCP would presumably respond that because these cases were decided prior to the existence of Medicare Parts C and D, the courts’ conclusions are, at best, merely instructive and do not compel a conclusion that Parts C and D are FFA.

In addition, the OFCCP is also likely to argue that the private insurance model that underlies Medicare Advantage (Part C) and outpatient prescription care plans (Part D) is more consistent with an interpretation of these programs as contractual. Individuals receive Medicare A and B benefits (often referred to as traditional Medicare) directly from the federal government.⁵⁰³ Medicare Part C, or “Medicare Advantage,”⁵⁰⁴ which was enacted in 1997 and 2003, allows

497 OFCCP, Dir. 293.

498 *Id.*

499 *Id.*

500 H.R. 1540, 112th Congress, Pub. Law. No. 112-81.

501 OFCCP, Dir. 301, Notice of Rescission (Apr. 25, 2012).

502 Press Release, Tufts Associated Health Plans Inc. to Pay More than \$372,000 to 12 Minority Workers to Settle Labor Department Charges of Retaliation (July 17, 2013) (settling allegations that Tufts retaliated against employees whom the OFCCP had determined were victims of discrimination in an earlier investigation).

503 Medicare Part A – the Original Medicare – provides coverage for inpatient hospital care, time in a skilled nursing care facility, certain home health, and hospice care, and a majority of enrollees do not have to pay a monthly fee (premium). Medicare Part B, which requires payment of a monthly premium and imposes deductibles, covers non-hospital medical expenses like doctors’ office visits, blood tests, X-rays and outpatient hospital care.

504 Medicare Advantage plans provide all Medicare Part A and B benefits, and may include additional benefits such as eye exams, hearing aids etc. and lower deductibles.

individuals to receive their Medicare benefits from privately managed healthcare insurers, known as Medicare Advantage Organizations (“MAOs”).⁵⁰⁵ The MAOs may, in turn, contract with providers for services.⁵⁰⁶ Medicare Part D functions, as in the case of Medicare Advantage, through private companies.⁵⁰⁷

While Medicare A and B operate as fee-for-service plans that allow providers to directly bill, and receive reimbursement from, the federal government for services provided, MAOs are paid a set monthly per capita rate based on a formula established by the Centers for Medicare and Medicaid Services (“CMS”), pursuant to authority from the U.S. Secretary of Health and Human Services (“HHS”).⁵⁰⁸ As in the case of private insurance, these MAOs may then contract, and enter into payment arrangements, with third-party providers for services. The Fifth Circuit in *RenCare, Ltd. v. Humana Health Plan of Texas, Inc.*, found the difference between traditional Medicare and Medicare Advantage lies in the method of administration and the degree of financial risk borne by the federal government:

Under Parts A and B, funds from the Federal Supplementary Medical Insurance Trust Fund are paid directly to providers for each qualifying service provided to a beneficiary. The funds may be paid by intermediaries or carriers contracted by CMS to process claims and disburse federal funds. Under Part C, however, CMS pays [MAOs] fixed monthly payments in advance, regardless of the value of the services actually provided to the [Medicare Advantage] beneficiaries. In return, the [MAO] assumes responsibility and full financial risk for providing and arranging healthcare services for [Medicare Advantage] beneficiaries, sometimes contracting health care providers to furnish medical services to those beneficiaries. Such contracts between [MAOs] and providers are subject to very few restrictions, generally, the parties may negotiate their own terms. Thus, under Part C, the government transfers the risk of providing care for [Medicare Advantage] enrollees to the [MAO].⁵⁰⁹

Additionally, the CMS has limited regulatory authority to intervene in payment disputes between MAOs and their providers.⁵¹⁰

Individuals on Medicare are eligible for Part D prescription drug coverage if they are signed up for benefits under Medicare Part A and/or Part B. Part D is, as in the case of Medicare Advantage, administered by private companies.

Thus, a provider that chooses to participate in Medicare Parts C or D should be prepared for the possibility that the OFCCP will use that participation as a basis for asserting jurisdiction. The provider should also understand that, should it object to the OFCCP’s assertion of jurisdiction, the outcome is likely to be years of complicated litigation and an uncertain outcome.

E. Practical Advice for Healthcare Employers

For providers that were unwilling to enter into TRICARE agreements without an assurance that they would not be required to comply with OFCCP’s regulations, nothing has changed as a result of the OFCCP’s moratorium on audits pursuant to purported TRICARE jurisdiction. Such providers should not participate in TRICARE unless they are now willing to either comply with the regulations or accept the risk of litigation.

Providers should also keep in mind that if they were previously selected for an audit based on TRICARE participation, the OFCCP may again seek to audit on that basis in the future. Accordingly, such providers that want to avoid the risk of a future audit might want to use the moratorium as an opportunity to end their TRICARE relationships.

At the same time, however, providers should not assume that they are now free of federal contractor/subcontractor obligations for the next few years. The OFCCP continues to have jurisdiction over providers that have covered contracts with, for example, the Federal Bureau of Prisons to treat federal inmates, HMOs and other networks that are participating in FEHBP, and the Veterans Department. Therefore, providers that do not want to become subject to the government’s affirmative action requirements should continue to review new contracts and relationships in order determine whether they involve covered government contracts. Additionally, there is still the risk that the OFCCP will begin to actively pursue jurisdiction on the basis of Medicare Part C or D. Thus, even organizations that have never participated in TRICARE are still potentially at risk for an OFCCP audit at any time.

⁵⁰⁵ See 42 C.F.R. § 422.300, et seq.

⁵⁰⁶ *Id.*

⁵⁰⁷ See 42 C.F.R. Part 423.

⁵⁰⁸ See 42 C.F.R. § 422.304.

⁵⁰⁹ 395 F.3d 555, 558-559 (5th Cir. 2004) (internal citations omitted).

⁵¹⁰ *N.Y. City Health and Hosps. Corp. v. WellCare of N.Y., Inc.*, 801 F.Supp.2d 126, 139 (S.D.N.Y. 2011).

Providers that participate in TRICARE and do not intend to either end their participation or fight OFCCP jurisdiction may want to consider a number of measures to plan and prepare for audits. TRICARE-based audits could resume in 2019 and could include within their scope periods as early as 2016.

Providers that may be subject to audit pursuant to any of these scenarios should be considering their willingness and ability to comply with the obligations that apply to covered federal contractors.

XI. CONCLUSION

Healthcare employers must navigate a host of legal and regulatory requirements when operating their businesses. The intent of this paper is to raise awareness about some of the more common obstacles they encounter. Armed with information about these labor and employment issues affecting this industry in particular, healthcare employers are in a better position to evaluate and potentially mitigate litigation threats and thorny compliance problems. As is always the case, however, each workplace and situation is unique. Attorneys in Littler's Healthcare Industry Practice Group are available to assist.



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